2018 REAL PROPERTY CASE LAW AND STATUTORY UPDATE

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Advanced Condominium & Planned Development

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JUDGES

Law Offices of Herssein and Herssein v. United Services Automobile Association, Case No. SC17-1848 (Fla. 2018). Judges do not have to automatically recuse themselves from a case if they are “Facebook friends” with counsel for one of the parties.

INTERNET

South Dakota v. Wayfair, Inc., Case No. 17–494 (2018).

Physical presence of an internet seller in a state is not necessary for the state to tax the transaction.

MISREPRESENTATION

Winfield Investments, LLC v. Pascal-Gaston Investments, LLC, Case No. 5D17-1304 (Fla. 5th DCA 2018).
A defendant cannot be held liable for fraudulently misrepresenting that a property is free of mortgages if the existence of the mortgage is obvious to him, i.e., can be ascertained through a search of the public records. Moreover, the Fifth District again certifies the following question to the Florida Supreme Court:

> DID THE COURT IN BUTLER OVERRULE THE DECISIONS IN BESETT, JOHNSON, AND SCHOTTENSTEIN BY HOLDING THAT JUSTIFIABLE RELIANCE IS NOT AN ESSENTIAL ELEMENT OF FRAUDULENT MISREPRESENTATION?

TITLE

C&J Global Investments, Inc. v. JVS Contracting, Inc., Case No. 2D16-4857 (Fla. 2d DCA 2018).

A party may not intervene in a declaratory action regarding the validity of deeds unless it has an interest such that it stands to directly and immediately gain or lose an interest it might have in the property.

DEFICIENCY JUDGMENTS

Dyck-O'Neal, Inc. v. Lanham, Case No. SC17-975 (Fla. 2018).

Resolving a conflict between the district courts of appeal, the Florida Supreme Court rules that reserving jurisdiction in a final judgment of foreclosure to award a deficiency judgment does not prohibit a lender from later seeking a deficiency judgment under Florida Statute section 702.06.

LIS PENDENS

Trigeorgis v. Trigeorgis, Case No. 4D17-0262 (Fla. 4th DCA 2018).
The filing of a "Notice of Interest" (not a lis pendens associated with an action) is not a disparagement of title if the statement contained in the Notice is true or if plaintiff cannot prove that the alleged falsehood induced others to not deal with plaintiff.

National American Home, LLC v. Deutsche Bank National Trust Company, Case No. 4D17-2614 (Fla. 4th DCA 2018). A mortgage foreclosure is founded on a duly recorded instrument and therefore a lis pendens for the foreclosure does not expire one year from recording.

INJUNCTIONS

Greenshields v. Greenshields, Case Nos. 5D18-400 & 5D18-1218 (Fla. 5th DCA 2018).
A court order requiring that certain disputed proceeds from a real estate closing be held in escrow and not disbursed to seller amounts to a temporary injunction, notwithstanding the disbursement of the funds were restricted by an agreement.

XIP Technologies, LLC v. Ascend Global Services, LLC, Case No. 2D17-3718 (Fla. 2d DCA 2018).

A court may not, by temporary injunction, order a party to continue performing a contract when the aggrieved party has an adequate remedy at law for damages, but may issue an injunction to prevent the total destruction of a business as that constitutes an inadequate remedy at law.

ATTORNEY'S FEES AND COSTS

Lovell v. Perez, Case No. 3D18-337 (Fla. 3d DCA 2018).

The following contract provision does not make a Buyer responsible for Seller's attorney's fees when Buyer sues Seller for a declaration that Buyer is not responsible for Seller's fees:

. . . If a real estate agent/broker claims a commission by virtue of showing the subject property to BUYERS or being a “procuring cause” of the purchase then BUYERS will indemnify and holder [sic] SELLERS harmless for all fees and costs, including the fee of SELLERS’ attorney of choice should SELLERS or either of them be joined in any suit or subpoenaed as a witness or otherwise or if SELLERS must set forth SELLERS’ position to such agent/broker by letter or otherwise upon contact by agent/broker.

Bushnell v. Portfolio Recovery Associates, LLC, Case No. 2D17-429 (Fla. 2d DCA 2018).

An action for an account stated is sufficiently "with respect to a [credit card account] contract" such that the prevailing party is entitled to an award of attorney's fees under Florida Statute section 57.105(7).

Ham v. Portfolio Recovery Associates, LLC, Case No. 1D17-3112 (Fla. 1st DCA 2018).
An action for account stated is not "an action to enforce a contract," so a prevailing party is in such a suit not entitled to the reciprocity benefits of Florida Statute section 57.105(7).

Wells Fargo Bank National Association v. Bird, Case No. 5D16-669 (Fla. 5th DCA 2018).
There is no right to contractual prevailing party attorney's fees when the instrument containing the contractual provision is void for lack of a valid signature.

PNC Bank, National Association v. MDTR, LLC, Case No. 5D16-2887 (Fla. 5th DCA 2018).

A party that purchases real property after the *lis pendens* but is not a party to the mortgage is not entitled to prevailing party attorney's fees under the mortgage.

Bank of New York v. Obermeyer, Case No. 3D18-700 (Fla. 3d DCA 2018).
Travel costs are typically not awarded as part of an award of attorney's fees but may be awarded as a sanction.

PROPOSALS FOR SETTLEMENT

Allen v. Nunez, Case No. SC16-1164 (Fla. 2018).
Two codefendants who receive a proposal for settlement in which they are specifically and individually named, possess all the information necessary to determine whether to settle and an attachment which names both codefendants does not make the proposal ambiguous.

HOMESTEAD

DeJesus v. A.M.J.R.K. Corp., Case No. 2D17-2374 (Fla. 2d DCA 2018).

Property owned by a corporation is not entitled to homestead exemption from forced levy, even if the person residing on the property is the president and owner of the corporation.

Webb v. Blue, Case No. 1D17-1510 (Fla. 1st DCA 2018). A decedent survived by heirs (but no spouse or minor children) may pass his homestead to a non-heir by general devise; a specific devise is not required.

FORECLOSURE

The Bank of New York Mellon v. Glenville, Case No. SC17-954 (Fla. 2018).
The 60-day time period for filing a petition for surplus foreclosure sale proceeds commences to run upon the Clerk of the Court filing the Certificate of Disbursements; *Bank of New York Mellon v. Glenville*, 215 So. 3d 1284, 1285 (Fla. 2d DCA 2017), and *Straub v. Wells Fargo Bank, N.A*., 182 So. 3d 878, 881 (Fla. 4th DCA 2016), are disapproved.

McGinnis v. American Home Mortgage Servicing, Inc., Case No. 17-11494 (11th Cir. 2018).
An award of $3,506,000 in damages ($6,000 for economic injury, $500,000 for emotional distress, and $3,000,000 in punitive damages) for a wrongful foreclosure where the jury found intentional conduct, including placing disputed mortgage payments into a suspense account, is not excessive.

Inlet Beach Capital Investments, LLC v. The Enclave at Inlet Beach Owners Association, Inc., Case Nos. 1D16-2282/1D16-2283/1D16-3833 (Fla. 1st DCA 2018). Applying *Debrincat v. Fischer*, 217 So. 3d 68 (Fla. 2017), the First District holds that a party can allege malicious prosecution claims for maintaining a foreclosure suit even though the foreclosure plaintiffs knew there was no valid cause of action.

Seaspray Resort, Ltd, v. UCF I Trust 1, Case No. 4D18-991 (Fla. 4th DCA 2018).
Hotel revenue can be "rents" for the purposes of an Assignment of Rents under Florida Statute section 697.07 and thus may sequestered in the Court Registry; *Orlando Hyatt Associates, Ltd. v. FDIC*, 629 So. 2d 975 (Fla. 5th DCA 1993), is distinguished.

Aquasol Condominium Association, Inc. v. HSBC Bank USA, National Association, Case No. 3D17-352 (Fla. 3d DCA 2018).

A lender need prove only that is the holder or owner of a note, i.e., it does not have to prove it is both owner and holder, in order to have standing.

Schneider v. First American Bank, Case No. 4D17-2239 (Fla. 4th DCA 2018).

A judgment containing both foreclosure and money judgments may permit execution upon the money judgment if the foreclosure sale is stayed but may not authorize both execution and foreclosure sale to proceed simultaneously.

Ocean Bank v. Gato, Case No. 3D18-1608 (Fla. 3d DCA 2018).

A foreclosure sale should not be canceled to permit a defendant time to arrange a short sale because "[a] defendant's claim that they might be able to arrange for payment of the outstanding debt during an extended period of time does not constitute a lawful, cognizable basis for granting relief to one side to the detriment of the other."

Bank of America, N.A. v. Graybush, Case No. 4D17-1256 (Fla. 4th DCA 2018).
A lender suing for foreclosure which alleges an "all subsequent payments" default can collect all payments due on the note, including those outside of the statute of limitations; conflict certified with *Velden v. Nationstar Mortgage, LLC*, 234 So.3d 850 (Fla. 5th DCA 2018).

Grant v. Citizens Bank, N.A., Case No. 5D17-726 (Fla. 5th DCA 2018) (en banc).
The Fifth District recedes from *Velden v. Nationstar Mortgage, LLC*, 234 So. 3d 850 (Fla. 5th DCA 2018), and holds that plaintiffs are not limited to recovering more than five years of damages from date of breach in installment obligation cases.

Fischer v. HSBC Bank USA, Case No. 2D16-5307 (Fla. 2d DCA 2018).

A former Chapter 13 debtor may contest standing in a state foreclosure action even if he promised in his Chapter 13 proceedings to surrender the property to the creditor.

Sayles v. Nationstar Mortgage, LLC, Case No. 4D17-1324 (Fla. 4th DCA 2018).
The Fourth District adopts *In re Failla*, 838 F.3d 1170 (11th Cir. 2016), and distinguishes *Fischer v. HSBC Bank USA, N.A.*, 2018 WL 3320860 at *2 (Fla. 2d DCA July 6, 2018).

Desai v. Bank Of New York Mellon Trust Company, Case No. 4D17-0890 (Fla. 4th DCA 2018).
Defaults subsequent to a previously accelerated but dismissed foreclosure allow action a lender to foreclose all sums due under the note and mort so long as all subsequent defaults are properly pled.

Rodgers v. Deutsche Bank National Trust Company, Case No. 4D18-82 (Fla. 4th DCA 2018).
A foreclosure judgment which contains an error in the legal description can be corrected under Florida Rule of Civil Procedure 1.540(b), while errors caused upon the entry of the final judgment are corrected by 1.540(a).

Madl v. Wells Fargo Bank, N.A., Case No. 5D16-53 (Fla. 5th DCA 2018).
Upon rehearing, the Fifth District clarifies that a lender that fails to prove standing through its promissory note may still have a contractual relationship through the mortgage that allows an award of attorney's fees to a prevailing borrower.

Harris v. The Bank of New York Mellon, Case No. 2D17-2555 (Fla. 2d DCA 2018).
The Second District adopts *Madl v. Wells Fargo Bank, N.A*., 244 So. 3d 1134 (Fla. 5th DCA 2017), and holds that attorney's fees may be awarded to a borrower even when a foreclosing lender fails to establish standing.

Bank of New York Mellon v. Burgiel, Case No. 5D17-1152 (Fla. 5th DCA 2018).
A lender that introduces into evidence at trial the original note and demonstrates the original is the same as the copy attached to the complaint establishes standing to foreclose; a power of attorney is not necessary unless the servicer is seeking to foreclose.

Third Federal Savings & Loan Association of Cleveland v. Koulouvaris, Case No. 2D17-773 (Fla. 2d DCA 2018).
A Home Equity Line of Credit agreement is not a negotiable instrument, and thus must be authenticated before it can be admitted into evidence.

The Estate of Caldwell Jones, Jr. v. Live Well Financial, Inc., Case No. 17-14677 (11th Cir. 2018).
12 U.S.C. § 1715z-20, which states the HUD Secretary "may not insure" a reverse mortgage unless it defers repayment obligations until the borrowing "homeowner" either dies or sells the mortgaged property (and defines "homeowner" to include the borrower's spouse) does not limit a lender's ability to demand repayment immediately following a borrower's death, even if the non-borrowing spouse continues to live in the mortgaged property.

Deutsche Bank National Trust Company v. Noll, Case No. 2D16-5635 (Fla. 2d DCA 2018).
The Clerk of Court does not become the "holder" of a promissory note merely by possession of the note in the court file.

RECEIVERS

Desulme v. Rueda, Case No. 3D17-1652 Fla. 3d DCA 2018). A party must obtain permission from the court appointing the receiver before suing the receiver; the only exception is where the receiver has acted outside his or her authority.

Federal National Mortgage Association v. JKM Services, LLC, as Receiver for Cedar Woods Homes Condominium Association, Inc., Case No. 3D17-370 (Fla. 3d DCA 2018). A lender is entitled to intervene in a proceeding where a receiver is appointed to collect unpaid condominium assessments under Florida Statute section 718.116(6)(c).

ADVERSE POSSESSION

Bank of America, N.A. v. Eastridge, Case No. 5D17-2541 (Fla. 5th DCA 2018).
The 2013 amendments to Florida Statute section 95.18(1) (adverse possession without color of title) merely added a "tacking provision" and did not remove the requirement that claimant (including any "tacked on" predecessors) have adversely occupied the property for seven years in order to prevail on a claim of adverse possession.

EVIDENCE

DeLisle v. Crane Co., Case No. SC16-2182 (Fla. 2018). The Florida Supreme Court rejects the *Daubert* standard and continues its adoption of the *Frye* standard for the admission of scientific evidence.

Trial Practices, Inc. v. Hahn Loeser & Parks, LLP, Case No. SC17-2058 (Fla. 2018).

The Florida Supreme Court rules that "Rule 4-3.4(b) of the Rules Regulating the Florida Bar permits a party to pay a fact witness for the witness's assistance with case and discovery preparation that is directly related to the witness preparing for, attending, or testifying at proceedings."

Jackson v. Household Finance Corp III, Case No. 2D15-2038 (Fla. 2d DCA 2018).
A party may introduce documents into evidence using the Business Records Exception to the Hearsay Rule in three ways: (1) offering testimony of a records custodian, (2) presenting a certification or declaration that each of the elements has been satisfied, or (3) obtaining a stipulation of admissibility. A testifying records custodian need not be the person who created the business records; the witness may be any qualified person with knowledge of each of the elements so long as the witness uses the "magic words" of Florida Statute section 90.803(6); conflict with *Maslak v. Wells Fargo Bank, N.A.*, 190 So. 3d 656 (Fla. 4th DCA 2016), is certified.

HSBC Bank USA v. Buset, Case No. 3D16-1383 (Fla. 3d DCA 2018).
Experts, including those on "securitization" issues, may not testify on legal issues. Additionally, securing a note with a mortgage does not render the note a non-negotiable note under Article 3.

Sacks v. The Bank Of New York Mellon, Case No. 4D17-2122 (Fla. 4th DCA 2018).
The "trustworthiness" requirement of *Bank of N.Y. v. Calloway*, 157 So. 3d 1064 (Fla. 4th DCA 2015), is not satisfied if the evidence (an affidavit in this case) does not reflect the steps taken by the affiant to verify the accuracy of the financial records.

Thorlton v. Nationstar Mortgage, LLC, Case No. 2D17-2328 (Fla. 2d DCA 2018).

A witness testifying as to routine practice of a company sending letters must "be employed by the entity drafting the letter," and also must "have firsthand knowledge of the company's routine practice for mailing letters."

Spencer v. Ditech Financial, LLC, Case No. 2D16-4817 (Fla. 2d DCA 2018).

To establish a routine practice that a letter was mailed, the witness must be employed by the entity drafting the letters and must have firsthand knowledge of the company's routine practice for mailing letters.

Torres v. Deutsche Bank National Trust Company, Case No. 4D17-2727 (Fla. 4th DCA 2018).
The Fourth District re-affirms its position that a "witness must have personal knowledge of the company's general practice in mailing letters" and that mere reliance on the boarding process to prove a letter was mailed in insufficient.

Deutsche Bank Trust Company Americas v. Merced, Case No. 5D16-3486 (Fla. 5th DCA 2018).
Proof of contractual authority to testify is not required for a witness to lay the predicate to testify under the Business Records Exception to the Hearsay Rule because a witness may testify to matters within his or her personal knowledge.

Liukkonen v. Bayview Loan Servicing, LLC, Case No. 4D16-4193 (Fla. 4th DCA 2018).

A modification agreement is not a negotiable instrument like a promissory note, and thus the original need not be introduced into evidence to satisfy the Best Evidence Rule; *Rattigan v. Central Mortgage Co.*, 199 So. 3d 966 (Fla. 4th DCA 2016), is distinguished.

LIENS

Rozanski v. Wells Fargo Bank, N.A., Case No. 2D16-3800 (Fla. 2d DCA 2018).

A lender awarded an equitable lien is not entitled to foreclose the lien unless it can show the equitable lien (or the underlying obligations which gave rise to the equitable lien) is in default.

TAXES

Presley v. United States, No. 17-10182 (11th Cir. 2018). A taxpayer has no expectation of privacy in bank records sought by the I.R.S., even if the records belong to a lawyer and may contain third party (including client) information.

The Florida Bar re: Advisory Opinion – Shore v. Wall, Case No. SC17-1510 (Fla. 2018).

A non-lawyer company is engaged in the unlicensed practice of law when it holds itself out as having special knowledge on how to recover excess proceeds from tax deed sales held by the Clerk of Court under Florida Statutes Chapter 197.

Ashear v. Sklarey, Case No. 3D16-888 (Fla. 3d DCA 2018). A prevailing party in a tax deed contest is not entitled to an award of prevailing party fees and costs unless the claim arose under the current (not prior) version of Florida Statute section 197.602.

CRI-LESLIE, LLC v. Commissioner of Internal Revenue, Case No. 16-17424 (11th Cir. 2018).

A taxpayer that contracts to sell property used in its trade or business is not entitled to treat as capital gain an advance deposit that it rightfully retains when its would-be buyer defaults and cancels the deal.

Magnolia Florida Tax Certificates, LLC v. Florida Department of Revenue, Case No. 1D17-2094 (Fla. 1st DCA 2018).

Charters counties may impose additional tax deed sale bidding requirements on business entities than on individuals, e.g., affidavits requiring the business to name its owners, when such additional requirement is rationally related to a legislatively-perceived need.

BUSINESS ENTITIES

Avant Capital, LLC v. Gomez, Case No. 4D17-1014 (Fla. 4th DCA 2018).
Slight variations in the name of a company in legal instruments, including the omission of the word "Corporation" from an allonge, do not affect the validity of the instruments so long as the identity of the corporation can be established.

Ferk Family, LP v. Frank, Case No. 3D16-448 (Fla. 3d DCA 2018).
The Third District re-affirms *Dinuro Investments, LLC v. Camacho*, 141 So. 3d 731 (Fla. 3d DCA 2014), and holds that a direct (as opposed to derivative) action may be brought by one member of a LLC against another member if "(1) there is a direct harm to the shareholder or members such that the alleged injury does not flow subsequently from an initial harm to the company and (2) there is a special injury to the shareholder or member that is separate and distinct from those sustained by the other shareholders or members," or as in this case, the operating or shareholder's agreement provides for such action.

Florida Research Institute for Equine Nurturing, Development and Safety, Inc. v. Dillon, Case No. 4D17-605 (Fla. 4th DCA 2018).

A Florida not-for-profit corporation may terminate a person's membership without notice and without hearing as the current version of Florida Statute section 617.0607(1) does not require notice and hearing.

STATUTE OF LIMITATIONS

Inlet Marina of Palm Beach, Ltd. v. Sea Diversified, Inc., Case No. 4D17-1406 (Fla. 4th DCA 2018).
The statute of limitations for actions against construction engineers begins to run from the time the defect is or should have been discovered.

Chakra 5, Inc. v. The City of Miami Beach, Case No. 3D16-2569 (Fla. 3d DCA 2018).
Accrual of a landowner's 42 U.S.C. § 1983 claim against a government is determined by federal, not state law, and the statute of limitations begins to run when plaintiffs know or should have known "(1) that they have suffered the injury that forms the basis of their complaint and (2) who has inflicted the injury."

EASEMENTS

Goldman v. Lustig, Case No. 4D16-1933 (Fla. 4th DCA 2018).
A party that has the right to use a dock attached to an adjoining party's land is not entitled to an easement of necessity across the neighbor's land to access the dock; the party seeking to use the dock must build a separate access dock or access the dock from the water.

LONG ARM JURISDICTION

Fincantieri-Cantieri Navali Italiani S.p.A. v. Yuzwa, No. 3D16-1015 (Fla. 3d DCA 2018).

Florida courts do not have long-arm jurisdiction over a lawsuit brought by a Canadian citizen against an Italian shipbuilder for injuries sustained in international waters in the Pacific Ocean on a cruise ship built in Italy which was owned by a Washington corporation when the injuries occurred.

Ware v. Citrix Systems, Inc., Case No. 4D18-1372 (Fla. 4th DCA 2018).

Employees that work remotely and not in Florida may, under certain circumstances, be haled into Florida under the Florida long-arm statute but the *Venetian Salami Co. v. Parthenais, 554 So. 2d 499* (Fla. 1989), test must be satisfied.

ENVIRONMENTAL

Weyerhaeuser Co. v. United States Fish and Wildlife Service, Case No. No. 17–71 (2018).
The designation by the U.S. Fish and Wildlife Service of an area as a "critical habitat" for an endangered species requires that the property be presently "habitable" for the species.

PROCEEDINGS SUPPLEMENTARY

In Re: Amendments to Florida Rule of Civil Procedure, 1.570 and Form 1.914, Case No. SC17-1533 (Fla. 2018). New subdivision (e) is added to Florida Rule of Civil Procedure 1.570 and consistent therewith, new forms 1.914(b) (Notice to Appear) and 1.914(c) (Affidavit of Claimant in Response to Notice to Appear) are added. The new subdivision reads as follows:

> (e) Proceedings Supplementary. Proceedings supplementary to execution and related discovery shall proceed as provided by chapter 56, Florida Statutes. Notices to Appear, as defined by law, and supplemental complaints in proceedings supplementary must be served as provided by the law and rules of procedure for service of process.

DEDICATIONS

Pelican Creek Homeowners, LLC v. Pulverenti, Case No. 5D16-4046 (Fla. 5th DCA 2018).

A common-law dedication of lands does not, in the absence of contrary intent, divest the dedicating party of ownership in the lands while a statutory dedication under Florida Statute section 95.361 does. Moreover, dedicated property that is abandoned on the edge of the plat is an exception to the general rule of "halfway to the street" and gives the abutting property owners title to the full width of the publicly dedicated property.

CONSTRUCTION

Forbes v. Prime General Contractors, Inc., Case No. 2D17-353 (Fla. 2d DCA 2018).

A non-breaching party has the option to treat the breach as a breach of the entire contract, i.e., a total breach, and upon doing so may either treat the contract as void and seek the damages that will restore him to the position he was in prior to entering into the contract, or may instead affirm the contract and seek damages for the "benefit of the bargain." In breached construction contracts, the benefit of the bargain is "either the reasonable cost of completion, or the difference between the value the construction would have had if completed and the value of the construction that has been thus far performed." Likewise, there is no duty to mitigate damages, and the Doctrine of Avoidable Consequences only prevents parties from recovering damages they "could have reasonably avoided."

CB Contractors, LLC v. Allens Steel Products, Inc., Case No. 5D17-1384, 5D17-1606, and 5D17-2129 (Fla. 5th DCA 2018).

The following indemnification provision is in violation of Florida Statute section 726.06 and accordingly the "self-indemnification" is void:

11. Indemnity as to Liabilities. . . .Subcontractor's indemnity obligations hereunder shall apply regardless of whether or not the claims, damages, losses, and expenses or causes of action are caused in part by a party indemnified hereunder and regardless of whether or not the claim relates to a claim under the worker's compensation policy of Subcontractor. . .

Blok Builders, LLC v. Katryniok, Case No. 4D16-1811 (Fla. 4th DCA 2018).
On rehearing, the Fourth District re-affirms that the indemnification requirements of Florida Statute section 725.06 do not apply to projects whose scope of work is exclusively excavation.

Gindel v. Centex Homes, Case No. 4D17-2149 (Fla. 4th DCA 2018).
The sending of the pre-suit notice of construction defects required under Florida Statute section 558.004(1)(a) qualifies as an "action" for purposes of satisfying the time requirements of Florida's Statute of Repose, Florida Statute section 95.11(3)(c).

D.R. Horton, Inc. – Jacksonville v. Heron's Landing Condominium Association of Jacksonville, Inc., Case No. 1d17-1941 (Fla. 1st DCA 2018).

The violation of building codes is sufficient "damages" to sustain a verdict for violation of Florida Statutes section 553.84.

BROKERS

Muchnick v. Goihman, Case No. 3D17-122 (Fla. 3d DCA 2018).
A sales agent, in addition to his or her broker, may be individually liable for misrepresentations made to contracting parties.

COMMUNITY ASSOCIATIONS

Iezzi Family Limited Partnership v. Edgewater Beach Owners Association, Inc., Case No. 1D16-5878 (Fla. 1st DCA 2018).

Members of not-for-profit condominium associations may not avoid pre-suit requirements for derivative actions.

Sterling Breeze Owners' Association, Inc. v. New Sterling Resorts, LLC, Case No. 1D17-1553 (Fla. 1st DCA 2018). A declaration of condominium may exclude some parcels of airspace from the condominium, and upon doing so, the excluded parcels are not subject to the Condominium Act nor to responsibility under the Act.

Central Carillon Beach Condominium Association, Inc. v. Garcia, Case Nos. 3D17-1198 & 3D17-1197 (Fla. 3d DCA 2018).

While associations may object to their ad valorem assessments as a class, each individual taxpayer within the association must be the individual defendant in a suit brought by the property appraiser that objects to a decision of the Valuation Adjustment Board.

Charterhouse Associates, Ltd., Inc. v. Valencia Reserve Homeowners Association, Inc., Case No. 4D17-2640 (Fla. 4th DCA 2018).

A personal trainer invited by a homeowner to train him at the clubhouse owned and maintained by the homeowner's association is an invitee under Florida law and is not a violation of the association restrictive covenants when the covenant permit owner's invitees onto the property; use of the "economic benefit" test to determine the legal status of the invitee on the property is rejected.

Holiday Isle Improvement Association, Inc. v. Destin Parcel 160, LLC, Case No. 1D17-5241 (Fla. 1st DCA 2018). A suit for declaratory relief may constitute an action seeking to enforce community association restrictive covenants, and as a result the prevailing party in such action may be entitled to an award of attorney's fees and costs under Florida Statute section 720.305.

Emerald Estates Community Association v. U.S. Bank National Association, Case No. 4D17-1278 (Fla. 4th DCA 2018).

A lender is not required to pay attorney's fees and costs incurred prior the "safe harbor" amounts.

CSC Serviceworks, Inc. v. Boca Bayou Condominium Association, Inc., Case No. 4D17-0974 (Fla. 4th DCA 2018). An association disconnecting, but not removing, a prior servicer's laundry equipment from a condominium association laundry room does not constitute an unlawful detainer by the association.

First Equitable Realty III, Ltd. v. Grandview Palace Condominium Association, Inc., Case No. 3D17-669 (Fla. 3d DCA 2018).

Interest on outstanding assessments may not be reduced for "equitable considerations."

RESTRICTIVE COVENANTS

ASA College, Inc. v. Dezer Intracoastal Mall, LLC, Case No. 3D16-1381 (Fla. 3d DCA 2018)

A party seeking to enforce a restrictive covenant in a Reciprocal Easement Agreement need not establish irreparable injury to enforce the restriction.

BANKRUPTCY

Cadwell v. Kaufman, Englett & Lynd, PLLC, Case No. 17-10810 (11th Cir. 2018).

An attorney violates Bankruptcy Coe Section 526(a)(4) if he instructs a client to pay his bankruptcy-related legal fees using a credit card.

Dukes v. Suncoast Credit Union (In re Dukes), Case No. 16-16513 (11th Cir. 2018).

Mortgages paid outside a Chapter 13 plan are not "provided for" in the plan under 11 U.S.C. § 1328(a), i.e., the plan must make a provision for or stipulate to the debt in the plan, and a borrower's personal liability under the mortgages is thus not discharged.

CONSUMER PROTECTION

Whynes v. American Security Insurance Company and Wells Fargo Bank, N.A., Case Nos. 4D16-2862 and 4D16-3668 (Fla. 4th DCA 2018).

There is no violation under Florida Statute section 626.9551(1)(d) (solicitations regarding forced-placed insurance must be directed to a borrower) when information (not a solicitation) is transferred to a third party.

EJECTMENT

Mesnikoff v. FQ Backyard Trading, LLC, No. 3D17-2803 (Fla. 3d DCA 2018).
County courts do not have subject matter jurisdiction to hear ejectment claims.

SERVICE OF PROCESS

Queiroz v. Bentley Bay Retail, LLC, Case No. 3D17-1604 (Fla. 3d DCA 2018).

Witnesses and parties in attendance in court outside of the territorial jurisdiction of their residence are immune from service of process while attending court and for a reasonable time before and after going to court and in returning to their homes, except only when there is (1) identity of parties and (2) identity of issues.

LANDLORD TENANT

City of Miami v. Airbnb, Inc., Case No. 3D17-1213 (Fla. 3d DCA 2018).
Florida Statute section 509.032(7)(b) ("A local law, ordinance, or regulation may not prohibit vacation rentals or regulate the duration or frequency of rental of vacation rentals.") invalidates zoning laws prohibiting transient rentals which were not in place as of June 1, 2001.

Custom Marine Sales, Inc. v. Boywic Farms, LTD., Case No. 4D17-2828 (Fla. 4th DCA 2018).
A Florida Statute section 83.232 deposit into court registry is not required when lease payments have not yet begun according to the terms of the lease.

Jahangiri v. 1830 North Bayshore, LLC, Case No. 3D17-529 (Fla. 3d DCA 2018).

The following provision is too indefinite as to how future rent will be determined, and is thus unenforceable:

RENEWAL OPTIONS: Upon six months (sic) notice and provided [lessee] is not in default of any provision of this Lease, LESSOR agrees that [lessee] may renew this Lease for two five-year renewal options, each renewal at the then prevailing market rate for comparable commercial office properties.

MUNICIPAL GOVERNMENT

The City of Palm Beach Gardens v. Oxenvad, Case No. 4D18-1758 (Fla. 4th DCA 2018).
An appeal regarding a municipal annexation must be filed within thirty days of the passage of the annexation ordinance, and an aggrieved party may not wait until the voter referendum on the annexation to appeal.

LAND USE AND ZONING

City of Jacksonville Beach v. BCEL 4, LLC, Case No. 1D18-1280 (Fla. 1st DCA 2018).
Mandamus relief cannot be granted to compel a local government to approve or deny a concept plan for plat application unless the applicant proves the local government's decision is purely ministerial.

Pettway v. City of Jacksonville, Case No. 1D17-2279 (Fla. 1st DCA 2018).
The mailing of the final order of a local administrative agency may, under the rules of the local agency and the municipality, constitute the "filing with the clerk of the lower tribunal" as required for rendition under Florida Rule of Appellate Procedure 9.020(i).

14269 BT LLC v. Village of Wellington, Case No. 4D17-2376 (Fla. 4th DCA 2018).
Florida Statute section 604.50(1) exempts non-residential farm buildings from “any county or municipal code or fee...,” including municipal zoning codes.

Ocean Concrete, Inc. v. Indian River County, Board of County Commissioners, Case No. 4D16-3210 (Fla. 4th DCA 2018).

A determination whether inordinate government regulation violates the anticipated use provision of the Bert Harris Act, Florida Statute section 71.001, must be made without considering the economic viability of the anticipated use.

City of Dunedin v. Pirate's Treasure, Inc., Case No. 2D17-3017 (Fla. 2d DCA 2018).

Local government does not owe a duty to advise an applicant regarding the development code, and thus, cannot be sued for negligent misrepresentation.

Chmielewski v. The City of St. Pete Beach, Case No. 16-16402 (11th Cir. 2018).

A local government's encouragement of the public's use of a private parcel constitutes a compensable taking; a physical invasion is sufficient and exclusive dominion and control is not necessary to support a jury verdict of damages for the taking.

CONTRACTS

Internaves de Mexico S.A. de C.V. v. Andromeda Steamship Corporation, Case No. 17-12164 (11th Cir. 2018).

Contracts, including arbitration agreements are interpreted according to five basic principles: the actual language used is the best evidence of the intent of the parties, a contract should be read to give effect to all of its provisions, a contract's internal conflict resolution method should be employed if provisions conflict with each other, specific provisions generally control over general provisions, and contracts must be interpreted with sensitivity to the reality that parties occasionally err or misprint in the course of contract drafting.

Premier Compounding Pharmacy, Inc. v. Larson, Case No. 4D17-1318 (Fla. 4th DCA 2018).
Contractual provisions which do not go to the essence of the contract are severable, and the remaining portions remain enforceable. Accordingly, the fact that a bond waiver provision is stricken does not affect the attorney's fees provision of the contract.

DePrince v. Starboard Cruise Services, Inc., Case No. 3D16-1149 (Fla. 3d DCA 2018).

On rehearing, the Third District holds that a party seeking rescission of a contract based on a unilateral mistake does not have to prove that she was induced into making the mistake by the other party.

Lowe v. Nissan Of Brandon, Inc., Case No. 2D17-1104 (Fla. 2d DCA 2018).

Documents executed contemporaneously with each other should be interpreted as a whole, including therein arbitration provisions.

McMichael v. Deutsche Bank National Trustee Company, Case No. 4D16-3879 (Fla. 4th DCA 2018).
A party who fails to read a contract before signing it cannot claim “unclean hands” with regard to the provisions contained in the contract.

ARBITRATION

MetroPCS Communications, Inc. v. Porter, No. 3D17-375 (Fla. 3d DCA 2018).
A booklet when purchasing a cellular phone and monthly text messages are sufficient to place a cellular service customer of his agreement to an arbitration provision.

Dye v. Tamko Building Products, Inc., Case No. 17-14052 (11th Cir. 2018).

A shrink-wrap contract on a package of roof shingles purchased and opened by a homeowner's roofer binds a homeowner to the arbitration provisions contained in the shrink-wrap package when " (1) … the manufacturer's packaging … sufficed to convey a valid offer of contract terms, (2) that unwrapping and retaining the shingles was an objectively reasonable means of accepting that offer and (3) … the homeowners' grant of express authority to their roofers to buy and install shingles necessarily included the act of accepting purchase terms on the homeowners' behalf."

City of Miami v. Fraternal Order of Police Lodge #20, Case No. 3D17-729 (Fla. 3d DCA 2018).
A trial court's role in determining arbitrability under the revised Florida Arbitration Code is limited to examining “(1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration was waived."

JPay, Inc. v. Kobel, Case No. 17-13611 (11th Cir. 2018). Whether the parties to a contract agreed to arbitrate the "gateway" issue of arbitrability is presumptively for a court to decide, but the parties may delegate that decision to an arbitrator in their agreement.

National Millwork, Inc. v. ANF Group, Inc., Case No. 4D18-545 (Fla. 4th DCA 2018).

An arbitration agreement may not expand the scope of judicial review beyond that set forth in the Florida Arbitration Code.

DAMAGES

Levy v. Ben-Shmuel, Case No. 3D17-2355 (Fla. 3d DCA 2018).

A party that fails to prove the proper measure of damages at trial is not, upon remand by the appellate court, entitled to a new trial on damages unless the failure was caused by judicial error.

Penton Business Media Holdings, LLC v. Orange County, Florida, Case No. 5D16-3935 (Fla. 5th DCA 2018).
The Doctrine of Avoidable Consequences is not a duty to mitigate, and states that a plaintiff is responsible only for damages it could have avoided using "ordinary and reasonable care."

PLEADINGS

Jackson v. Bank of America, N.A., Case No. 16-16685 (11th Cir. 2018).

Eleventh Circuit precedent holds that a trial court may strike a shotgun pleading and impose sanctions if the deficiencies are not cured by the amended pleading.

Stubbs v. Federal National Mortgage Association, Case No. 2D17-1929 (Fla. 2d DCA 2018).
A Rule 1.540 motion cannot be directed to non-final orders such as a writ of possession.

SOVEREIGN IMMUNITY

Sun 'N Lake of Sebring Improvement District v. Ayala, Case No. 2D17-2440 (Fla. 2d DCA 2018).
The State of Florida has not waived sovereign immunity for claims under the Florida Deceptive and Unfair Trade Practices Act, Florida Statute sections 501.201-.23.

APPEAL

Borowski v. Ferrer, Case No. 1D15-3358 (Fla. 1st DCA 2018).
An appellate court may reverse a final judgment which is internally inconsistent, including reversing a final judgment which removes a fence that causes an obstruction to a neighbor's access easement but places the fence in a new location which causes a new obstruction to the neighbor's access easement.

Guy v. Plaza Home Mortgage, Inc., Case No. 4D17-3335 (Fla. 4th DCA 2018).

A court clerk may not backdate judgments for docketing purposes as doing so improperly affects the date of rendition for appellate purposes.

CRIMES

District of Columbia v. Wesby, No. 15–1485 (2018).
The totality of the circumstances (the condition of the home, condition of partygoers, activities at the party, etc.) may give police officers probable cause to arrest people for unlawful entry at "pop-up" parties where owner has not given permission to use the home.


WANT
Crispy
BACON

STATUTORY UPDATE

EJECTMENT AND UNLAWFUL DETAINER; CUSTOMARY RECREATIONAL USE OF BEACHES, Chapter 2018-94

Forcible Entry and Unlawful Detainer (Chapter 82) is revised and Customary Recreational Use of Beaches (Florida Statute section 163.035) is created

M.R.T.A. COVENANT EXEMPTIONS,
Chapter 2018-55

Condominiums are permitted to use M.R.T.A. to revitalize restrictive covenants and other revisions regarding community associations

CONDOMINIUM REVISIONS,
Chapter 2018-96

Revises association website requirements, revised conflict of interest rules, eliminates repeal of the bulk buyer sunset, and revises recordkeeping requirements

TAX DEEDS,
Chapter 2018-60

Revises the procedure for tax deed sales, including a new section as to how and when to request surplus funds arising from tax deed sales

REBUTTAL PRESUMPTION ARISING FROM BANKRUPTCY PROCEEDINGS, Chapter 2018-15

A decision to “surrender” real property in bankruptcy proceedings is entitled to a rebuttable presumption in state court actions, including foreclosures, that the borrower waived defenses to foreclosures

STATUTES OF LIMITATIONS FOR CONSTRUCTION CONTRACTS,
Chapter 2018-97

Clarifies when a construction contract is “completed” and that punch list items do not extend the statute of limitations once a certificate of occupancy has been issued

Service Areas

Appellate

Banking Counsel

Commercial Litigation

Construction

Creditors' Rights, Financial Restructuring, and Bankruptcy

Intellectual Property

Labor and Employment

Real Estate

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Manny focuses on real estate matters (both transactional and litigation matters), complex business litigation, debtor-creditor law, creditor representation in bankruptcy, and appellate law. He is one of only a handful of lawyers to be triple board certified by The Florida Bar (Real Estate Law, Business Litigation and Appellate Law). Manny's practice focuses on real estate and businesses in numerous industries and of varying sizes, including lenders, and has represented private clients and government agencies such as the Federal Deposit Insurance Corporation (FDIC), the Resolution Trust Corporation (RTC), and the Federal Savings and Loan Insurance Corporation (FSLIC), in addition to numerous borrowers in complex transactions. Manny also provides counsel in corporate mergers and acquisitions; financial and debtor-creditor matters to creditors and lenders (including bankruptcy and complex foreclosure litigation); landlord/tenant disputes; Internet law; and construction and real estate development matters. For more than 20 years, Manny has served as an arbitrator for the American Arbitration Association, has significant FINRA (Financial Industry Regulatory Authority, formerly NASDR) arbitration experience, and is certified as a Florida Supreme Court approved mediator. He also previously served as a Foreclosure Commissioner for the United States Department of Housing and Urban Development (HUD).

Manny is a Fellow of the American College of Real Estate Lawyers, where he serves as Vice-Chair of the College's Bankruptcy and Creditors' Rights Committee. Manny also serves as the Chair of the ABA's Real Property Litigation Committee, and is a member of the Executive Committees of the Real Property, Business Law and A.D.R. Sections of The Florida Bar; Manny serves as Chair of various committees within these Sections. Manny has authored numerous legal publications, including *Florida Real Estate Law* (Thomson-West), the real estate component of West's Florida Practice Series, and publishes the (Florida) Real Property and Business Litigation Report, a highly read weekly compilation of Florida real estate and business cases. The Florida Supreme Court appointed Manny the Chair of its committee on business jury instructions, and he is a regular speaker on topics as diverse as real estate law, business litigation, technology law, and professionalism. Manny is listed in Best Lawyers in America, Florida Trend's "Legal Elite," Thomson Reuters' "Florida SuperLawyers" (including the "Top 100" list) and holds an "AV" Preeminent rating from Martindale-Hubbell. Manny served as a law clerk for the Honorable C. McFerrin Smith of the Seventh Judicial Circuit Court of Florida while in law school and to Judges James T. Downey and Bobbi Gunther of the Florida Fourth District Court of Appeal following law school.