

# 2015 Real Property Case Law Update

Manuel Farach, McGlinchey Stafford

January 2016



## **Manuel Farach**

**Member**

McGlinchey Stafford

Fort Lauderdale

(954) 356-2528

[mfarach@mcglinchey.com](mailto:mfarach@mcglinchey.com)

- Manuel Farach, a Member at McGlinchey Stafford in Fort Lauderdale, is board-certified by The Florida Bar in Real Estate Law and Business Litigation, and practices both transactional and litigation law. He is the author of Florida Real Estate Law, the real estate component of West's Florida Practice Series, and serves as Chair of the Florida Supreme Court Committee on Standard Jury Instructions for Contract Cases. In addition to his numerous speaking engagements, Mr. Farach has served as an Adjunct Professor Real Estate Law at The Florida State University College of Law and of Business Law at the Rinker School of Business at Palm Beach Atlantic University. He serves on the Executive Councils of the Real Property, Business Law and ADR Sections of the Florida Bar. He is listed in The Best Lawyers in America®, Florida Trend's Legal Elite, and Florida Super Lawyers, and has received an AV Peer Review Rating from Martindale-Hubbell. Mr. Farach publishes the Case Law Update, a weekly summary of the past week's real estate and business cases.

# Evidence

A witness may testify to the business records acquired from another business so long as the acquired records are now business records of the acquiring business and the trial court is satisfied of the trustworthiness of the acquired records through additional evidence, clarifying the holding of *WAMCO XXV/11, Ltd. v. Integrated Electronic Environments, Inc.*, 903 So.2d 230 (Fla. 2d DCA 2005).

***Bank of New York v. Calloway***, --- So.3d ----, 2015 WL 71816 (Fla. 4th DCA 2015).

# Consumer Protection

Lender does not violate § 15 U.S.C. § 1691(a)(1) (2012) of the Equal Credit Opportunity Act of 1974 (lenders may not discriminate on the basis of gender or marital status of a credit applicant) by requiring spouse to sign loan instruments when a substantial amount of the assets pledged as security are owned by both spouses.

***Richardson v. Everbank***, --- So.3d ----, 2015 WL 71850 (Fla. 4th DCA 2015).

Representations made by an attorney in court papers are subject to the requirements and protections of the Fair Debt Collection Practices Act.

***Miljkovic v. Shafritz and Dinkin, P.A.***, --- F.3d ----, 2015 WL 3956570 (11th Cir. 2015).



Disparate impact claims are cognizable under the Fair Housing Act, 42 U.S.C.A. §§ 3604(a), 3605(a).

***Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.***, --- S.Ct. ----, 2015 WL 2473449 (2015).

Title insurance agent, law firm and attorney earned their portion of settlement fee, and thus did not violate RESPA as they witnessed the closing, and provider did not violate RESPA by marking up price of government recording charges as the government entity actually provided a service and gave nothing back to provider.

***Clements v. LSI Title Agency, Inc.***, --- F.3d ----, 2015 WL 857964 (11th Cir. 2015).

The Truth In Lending Act only requires that written notice of intent to seek rescission be given within three-year period; the filing of suit within that time is not required.

***Jesinoski v. Countrywide Home Loans, Inc.***, --- S.Ct. ----, 2015 WL 144681 (2015).

A consumer's credit report need not be published to a third party for actual damages to accrue under 15 U.S.C. § 1681 i(a).

***Collins v. Experian Information Solutions, Inc.***, --- F.3d ----,  
2015 WL 55345 (11th Cir. 2015).

# Foreclosures

A third-party purchaser at a foreclosure sale is a stranger to the action, and as a result, cannot move to vacate the final judgment of foreclosure.

***Thriving Investments, LLC v. Chao***, --- So. 3d ----, 2015 WL 9319144 (Fla. 3d DCA 2015).

For purposes of claiming surplus foreclosure proceeds under Florida Statute section 45.031, a foreclosure sale is completed upon the issuance of the certificate of title by the clerk of the court. Thus, a claim for surplus proceeds filed more than sixty days after judicial sale but less than sixty days after issuance of certificate of title is timely.

***Straub v. Wens Fargo Bank, N.A.***, --- So.3d ----, 2015 WL 6738732 (Fla. 4th DCA 2015).

A non-signer's receipt of mortgage funds (or receipt of the benefit of the funds) may supply a missing signature to a mortgage under equitable subrogation principles. However, ratification of an agent's prior mortgage may occur only when the principal has full knowledge of the details surrounding the mortgage.

***Wells Fargo Bank, N.A. v. Clavero***, --- So.3d ----2015 WL 5132447 (Fla. 3d DCA 2015).



Upon entry of the final judgment, a trial court loses jurisdiction to determine the amounts due under the "safe harbor" provisions of Florida Statute section 718.116 (1)(b) unless the final judgment reserved jurisdiction for that specific purpose.

***Grand Central at Kennedy Condominium Ass'n, Inc. v. Space Coast Credit Union***, --- So.3d ----, 2015 WL 4923677 (Fla. 2d DCA 2015).

Dismissal of a mortgage foreclosure suit without prejudice does not continue the running of the statute of limitations; conflict certified with *Deutsche Bank Trust Co. Americas v. Beauvais*, 40 Fla. L. Weekly 01, 2014 WL 7156961 (Fla. 3d DCA Dec. 17, 2014).

***Nationstar Mortg., LLC v. Brown***, --- So.3d ----, 2015 WL 4999017 (Fla. 1st DCA 2015).

Giving only 28 days' notice of default and right to cure (when 30 days is contractually called for) is not a material breach of the right to cure covenant under certain circumstances; *Samaroo v. Wells Fargo Bank, N.A.*, 137 So.3d 1127 (Fla. 5th DCA 2014), is distinguished as not requiring strict compliance with conditions precedent.

***Vasilevskiy v. Wachonia Bank, N.A.***, --- So. 3d. ---, 2015 WL 4577415 (Fla. 5th DCA 2015).

A co-tenant who does not sign the promissory note for a loan but co-signs the mortgage encumbering the entire property (not just the co-tenant's interest) may be foreclosed of his interest upon default by the borrowers even if he signed the mortgage with a "Limited Purpose Execution" notation under his signature.

***CitiMortgage, Inc. v. Turner***, --- So.3d ----, 2015 WL 4623656 (Fla. 1st DCA 2015).

A foreclosure judgment sets the "validity, priority and extent of [the] debt," so introduction into evidence of the final judgment of foreclosure is not necessary when a deficiency judgment is entered in the same action as the foreclosure judgment.

***TD Bank, N.A. v. Graubard***, --- So. 3d ----, 2015 WL 4769264 (Fla. 5th DCA 2015).

A reverse mortgage may not be foreclosed until the death of all borrowers; a wife who does not sign the promissory note (signed only by husband) but signs the mortgage itself is a "borrower" whose homestead may not be foreclosed until her death.

***Smith v. Reverse Mortg. Solutions, Inc.***, --- So.3d ----, 2015 WL 4257632 (Fla. 3d DCA 2015).

A notice of default is not an automatic or self-executing acceleration that starts the running of the statute of limitations if it does not state the debt has been accelerated, does not state the full amount due, and merely states that the debt will be accelerated in the future.

***Snow v. Wells Fargo Bank, N.A.***, --- So.3d ----, 2015 WL 160326 (Fla. 3d DCA 2015).

An equity of redemption may be assigned to a third party.

***Residential Mort. Servicing Corp. v. Winterlakes Property Owners Ass'n***, --- So. 3d ---, 2015 WL 4098868 (Fla. 4th DCA 2015).



A purchaser at a foreclosure sale buys "as is," and cannot raise claims of fraud for failure of the foreclosing party's failure to advise of the property's condition.

***U.S. Bank Nat. Ass'n v. Rios***, --- So.3d ----, 2015 WL 3609892 (Fla. 2d DCA 2015).

In order to be a "holder" of a negotiable instrument, the instrument must be indorsed to the person or indorsed in blank. A non-holder in possession of a negotiable instrument may enforce the instrument, but must prove the "chain of custody" of the instrument.

***Seffar v. Residential Credit Solutions, Inc.***, --- So.3d ----, 2015... WL 1334288 (Fla. 4th DCA 2015).

A short-sale purchaser has a sufficient interest in the real property that he is entitled to intervene in the foreclosure proceedings regarding the property.

***Bymel v. Bank of America, N.A.***, --- So.3d ----, 2015 WL 1044247 (Fla. 3d DCA 2015).

Objections to a foreclosure sale can only be directed to the sale (not the underlying litigation or the judgment itself), and must demonstrate fraud, mistake or other irregularity in the conduct of the sale.

***Salazar v. HSBC Bank, USA, NA***, --- So.3d ----, 2015 WL 543411 (Fla. 3d DCA 2015).

A non-holder in possession under Florida Statute § 673.3011 seeking to enforce a promissory note that has been transferred multiple times must prove the "chain of transfers" of the note.

***Murray v. HSBC Bank USA***, --- So.3d ----, 2015 WL 248651 (Fla. 4th DCA 2015).

A waiver of statute of limitations defense contained in a mortgage is enforceable. The statute of repose for obligations secured by mortgages is 20 years unless the maturity date is ascertainable from the face of the instrument.

***CCM Pathfinder Palm Harbor Management, LLC v. Unknown Heirs of Gendron***, --So.3d ----, 2015 WL 248796 (Fla. 2d DCA 2015).

# Damages

A homeowner is entitled to the reasonable rental value of his home when renovations make the home un-livable.

***Gonzalez v. Barrenechea***, --- So.3d ----, 2015 WL 249254 (Fla. 3d DCA 2015).



# Contracts

Contract provisions that apply the "law of your state" do not permit application of state law that was valid at time of contract but later ruled invalid.

***DIRECTV, Inc. v. Imburgia***, --- U.S.---, 2015 WL 8546242 (2015).

The phrase "liquidated or liquidated" in a durable power of attorney is ambiguous, and requires the trial court make factual findings regarding the intent of the parties.

***Santa Rosa Investors, Inc. v. Wilson***, --- So.3d ----, 2015 WL 4925217 (Fla. 1st DCA 2015).

Contract documents executed at the same time by the same parties for the same transaction and concerning the same subject matter are to be read together. Accordingly, a party cannot enforce one provision of one document (a lease) when it has waived that provision by proceeding to closing under a different document (the purchase and sale agreement) notwithstanding an apparent violation of the lease.

***Michael Anthony Co. v. Palm Springs Townhomes*, --- So. 3d ---, 2015 WL 4095243 (Fla. 4th DCA 2015).**

An oral promise to not sue in exchange for new house windows reaching the end of their warranty period is enforceable and not illusory as it supported by consideration (an agreement to not sue) and definite in time (the upcoming end of the warranty period). Any application of the Statute of Frauds is limited by equitable estoppel.

***Loper v. Weather Shield Mfg., Inc.***, --- So.3d ----, 2015 WL 3875549 (Fla. 1st DCA 2015).

Unless solely for the payment of money or if time is the material part of the contract, a contract lacking a "time of the essence" provision is not breached by failure to perform on its due date.

***Blue Lagoon Development, LLC v. Maury***, --- So.3d ----, 2015 WL 3875437 (Fla. 3d DCA 2015).

A merger and integration clause in a contract does not bar a fraud claim. Real estate contracts are subject to an implied duty of good faith and fair dealing, but the implied duty cannot contravene an express term, must be pursued in conjunction with a breach of contract claim, and applies only to the purportedly breached term.

***Hahamovitch v. Delray Property Investments, Inc.***, --- So.3d ----, 2015 WL 1652713 (Fla. 4th DCA 2015).

Construction of a contract against its drafter is a secondary rule of interpretation to be used only when intent cannot be ascertained by other means. Moreover, an ambiguous contract may be interpreted as a matter of law when the ambiguity can be resolved through undisputed parol evidence of the parties.

***Life Care Ponte Vedra, Inc. v. H.K. Wu***, --- So.3d ----, 2015 WL 477815 (Fla. 5th DCA 2015).



# Defamation

The litigation privilege does not apply when all the elements of the tort of malicious prosecution are satisfied. However, a more lenient standard applies to attorneys as attorneys have a duty of representation that requires certain actions.

***Rivernider v. Meyer***, --- So.3d ----, 2015 WL 5244635 (Fla. 4th DCA 2015).

A defamatory statement made during the course of a judicial proceeding, i.e., a deposition, is absolutely privileged. *DelMonico v. Traynor*, 116 So.3d 1205 (Fla.2013), is distinguished as it involved defamation outside of a court proceeding, i.e., defamation during the out of court questioning of a non-party witness.

***McCullough v. Kubiak***, --- So.3d ----, 2015 WL 672353 (Fla. 4th DCA 2015).

# Title Issues

Agreements between business partners as to disposition of ownership interests upon death may trump testamentary instruments regarding the same interests.

***Blechman v. Estate of Blechman***, --- So.3d ----, 2015 WL 1500021 (Fla. 4th DCA 2015).

Pursuant to Florida Statute section 689.15, joint tenants may agree to have ownership interests contain survivorship rights even if the joint interests are not equal.

***Simon v. Koplín***, --- So.3d ----, 2015 WL 895319 (Fla. 2d DCA 2015).

# Homestead

Chapter 13 bankruptcy debtors who do not claim the homestead exemption may instead choose the "wildcard" exemption" under Florida Statute section 222.25(4) even if they protect their home through the use of the Chapter 13 bankruptcy process.

***In re Valone***, --- F.3d ----, 2015 WL 1918138 (11th Cir. 2015).



The investment of homestead sale proceeds in securities was not so inconsistent with the purposes of the homestead exemption that the funds lost their status as protected claims of creditors.

***JBK Associates, Inc. v. Sill Bros., Inc.***, --- So.3d ----, 2015 WL 1040603 (Fla. 4th DCA 2015).

# MRTA

Land held in fee simple by the Florida Department of Transportation ("FDOT") qualifies for the right of way exception under the Marketable Record Title Act, Florida Statute section 712.03 ("MRTA"), and all parts of the property held in fee by FDOT (whether currently used as a right of way or not) are exempt from the application of MRTA.

***Florida Department of Transportation v. Clipper Bay Investments, LLC***, --- So.3d ---, 2015 WL 1379975 (Fla. 2015).

Holding title to and "using" real property do not constitute "possession" for purposes of invoking the exception to extinguishment under Florida Statute section 712.03(3) of the Marketable Record Title Act.

***Department of Transportation v. Mid-Peninsula Realty Investment Group, LLC***, --So. 3d ---, 2015 WL 4549196 (Fla. 2d DCA 2015).

# Liens

The one year statute of limitations to enforce an equitable lien under Florida Statute section 95.11(5)(b) runs from the last furnishing of labor, materials or services to improve the project. Moreover and by its enactment, Florida Statute section 713.3471 (2) eliminated common law remedies of contractors to sue lenders for improvements to projects by contractors and lienors.

***Jax Utilities Management, Inc. v. Hancock Bank***, --- So.3d ---  
-, 2015 WL 3622360 (Fla. 1st DCA 2015).

# Judgements

A foreign judgment recorded under Florida's Enforcement of Foreign Judgments Act is subject to Florida's twenty-year statute of limitations for enforcement of judgments, beginning from the date the foreign judgment was rendered in the foreign forum.

***Hess v. Patrick***, --- So.3d ----, 2015 WL 1443113 (Fla. 2d DCA 2015).



The interest rate applied to unpaid amounts on a judgment changes whenever the statutory rate changes, i.e., the interest rate on date of a judgment does not remain the same if the statutory rate changes over the life of the unpaid judgment.

***R.J. Reynolds Tobacco Co. v. Townsend***, --- So.3d ----, 2015 WL 1578537 (Fla. 1st DCA 2015).

# Landlord-Tenant

The trial court must hold an evidentiary hearing to determine dollar amounts that might be due if a triple-net lease requires additional payments for monies received by the tenant from subtenants in excess of those owed to the main landlord

***Double Park, LLC v. Kaine Parking 125, LLC, --- So.3d ----, 2015 WL 3875457 (Fla. 3d DCA 2015).***

A tenant cannot terminate a lease based on constructive eviction unless the premises are unsafe, unfit or unsuitable for the demised purposes; standing storm water on the premises is not a constructive eviction unless the standing water creates a safety issue or interferes with the tenant's operations. A landlord has no duty to mitigate damages, but if it does, a breaching tenant is responsible for the difference between its rent and rent paid by the substitute tenant if the landlord mitigates by obtaining a new tenant.

***Griffin Industries, LLC v. Dixie Southland Corp.***, --- So.3d ----, 2015 WL 1652599 (Fla. 4th DCA 2015).

# Brokers

A broker licensed in a state other than Florida (but not licensed in Florida) may nonetheless enforce a Florida commission agreement if the non-Florida broker "co-brokers" with a licensed Florida broker.

***Phoenix Asset Management LLC v. GCCFC 2005-GG5 Route 33 Indus., LLC, --So.3d ----, 2015 WL 5829782 (Fla. 3d DCA 2015).***

An agreement to pay commissions at different times in the future is a divisible contract subject to a separate breach with a separate statute of limitations for each payment.

***Access Ins. Planners, Inc. v. Gee***, --- So.3d ----, 2015 WL 5712568 (Fla. 4th DCA 2015).

A settlement agreement is a different contract than the underlying contract or claim, and does not impact Florida Statute 475.11 (real estate commissions can only be paid to licensed agents) even if the underlying claim is one for payment of real estate commissions.

***Ekins v. Harbourside Funding, LP***, --- Fed.Appx. ----, 2015 WL 1898451 (11th Cir. 2015).



# Easements

A party claiming a prescriptive easement must demonstrate the use was adverse; use of another's land is presumed to be with the consent of the owner and subordinate to the rights of the owner and use by patrons is not adverse if pursuant to a written lease.

***5730 Lake Underhill, LLC v. Smith-Horner, LLP, --- So.3d ----, 2015 WL 6757518 (Fla. 5th DCA 2015).***

The addition of the words "upon" and "across" to a ten-foot easement that is "over, upon and across" makes the easement conterminous with the ten-foot area.

***Condron v. Arey***, --- So.3d ----, 2015 WL 2364301 Fla. 5th DCA 2015).

# Restrictive Covenants

The non-compete provisions of Florida Statute section 542.335 are meant to apply to personal contracts, and are not meant to create exclusivity provisions for leases.

***Amelia Island Restaurant II, Inc. v. Omni Amelia Island, LLC,***  
--- So.3d ----, 2015 WL 1809308 (Fla. 1st DCA 2015).

A party who is aware of a covenant and proceeds at their own risk cannot later argue it would be harmed by an injunction enforcing the restrictive covenant.

***Planned Parenthood of Greater Orlando v. MMB Properties,***  
--- So.3d ----, 2015 WL 2414382 (Fla. 5th DCA 2015).

# Johnson v. Davis Claims

A trial court does not abuse its discretion by approving a special jury instruction for breach of contract based on *Johnson v. Davis* (instead of the standard contract jury instruction for breach of contract) when suit is based on misrepresentations arising out of a real estate sales contract containing a *Johnson v. Davis* disclosure requirement.

***Atlantica One, LLC v. Adragna*, --- So.3d ----, 2015 WL 6023402 (Fla. 5th DCA 2015).**



Presuming *Johnson v. Davis* applied to a claim for the sale of vacant land, claimants are not entitled to damages for subsurface conditions (layers of muck) that increased the cost of construction if claimants did not investigate the subsurface conditions prior to purchase, did not prove that defendants knew of the subsurface conditions, and purchased the property under an "as is" contract.

***Eiman v. Sullivan***, --- So.3d ----, 2015 WL 2432024 (Fla. 2d DCA 2015).

# Contractors

Whether a contractor is licensed or unlicensed under Florida Statute section 489.128 is determined as of the effective date of the construction contract.

***Taylor Morrison Services, Inc. v. Ecos***, --- So.3d ----, 2015 WL 3407929 (Fla. 1st DCA 2015).

# Community Associations

A bank's mortgage lien takes priority over a later filed community association lien; the association lien does not relate back to the declaration of the community association unless the association declaration reflects it will have priority over later filed mortgage liens.

***U.S. Bank, N.A. v. Grant***, --- So. 3d ----, 2015 WL 7752864 (Fla. 4th DCA 2015).

Homeowners bind all other homeowners under *res judicata* principles when they conclude a derivative action against an association.

***Udjck v. Harbor Hills Development, LP.***, Case No. 5014-2876, slip op. (Fla. 5th OCA November 20, 2015).

The five-year statute of limitations for condominium associations to bring actions to recover property improperly removed by the developer begins to run on turnover of the association, not the date of removal of the property.

***Silver Shells Corp. v. St. Maarten at Silver Shells Condominium Ass'n, Inc.***, --So.3d ----, 2015 WL 3875556 (Fla. 1st DCA 2015).

Florida Statute section 720.3085 unconstitutionally impairs the contract rights of owners in an association whose declaration states that present owners are not jointly responsible with prior owners for unpaid assessments.

***Pudlit 2 Joint Venture, LLP v. Westwood Gardens Homeowners Ass'n, Inc.***, --So.3d ----, 2015 WL 3388254 (Fla. 4th DCA 2015).



# Business Entities

Joint control of a separate corporation, which separate corporation is not part of the alleged joint venture, cannot be used to establish the existence of a joint venture.

***Marriott International, Inc. v. American Bridge Bahamas, Ltd.***, --- So. 3d ----, 2015 WL 8936529 (Fla. 3d DCA 2015).

The party seeking to prove the existence of a joint venture must prove that "(1) a community of interest in the performance of the common purpose, (2) joint control or right of control, (3) a joint proprietary interest in the subject matter, (4) a right to share in the profits[,] and (5) a duty to share in any losses." A single letter from one shareholder of purported joint venturer to the sole shareholder of the other purported joint venture does not establish an agreement to enter into the joint venture.

***A & A Elec. Services, Inc. v. Jurado***, --- So.3d ----, 2015 WL 5023126 (Fla. 2d DCA 2015).

A general partner may sell assets of a limited partnership in the ordinary course, but if outside of the ordinary course, only if permitted by the limited partnership agreement or with consent of the limited partners. Apparent authority of a general partner to act on behalf of the limited partners exists only when there is "a) a representation by the purported principal; (b) [reasonable) reliance on that representation by a third party; and (c) a change in position by the third party in reliance on the representation."

***Sterling Crest, Ltd., v. Blue Rock Partners Realty Group, Sterling Crest, Ltd., --So.3d ----, 2015 WL 3631608 (Fla. 5th DCA 2015).***

A member of an LLC that does not have an operating agreement may be expelled pursuant to a majority vote of the members, but his membership interest may not be distributed among the remaining members as the result of his expulsion.

***Froonjian v. Ultimate Combatant, LLC***, --- So.3d ----, 2015 WL 3388387 (Fla. 4th DCA 2015).

# Condemnation

Florida Statute section 73.092(2), not the straight "benefits achieved" method of section 73.092(1 ), is employed to determine the landowner's attorneys' fees when the condemning authority engages in excessive litigation.

***Joseph B. Doerr Trust v. Central Florida Expressway Authority***, --- So.3d ----, 2015 WL 6748858 (Fla. 2015).

A government authority with condemnation powers has the ability to purchase real property outside of the condemnation process, and if any offers it makes outside of the process are not considered written "first offers" for determining attorneys' fees pursuant to Florida Statute section 73.015(1).

***General Commercial Properties, Inc. v. State Dept. of Transp.***, --- So.3d ----, 2015 WL 5948530 (Fla. 4th DCA 2015).



"Condemnation blight" is not a taking and is relevant to the valuation of property that has already been taken but not to de facto takings claims; any diminution in value due to condemnation blight is awarded at the time of the actual taking.

***Teitelbaum v. South Florida Water Management Dist., --- So.3d ----, 2015 WL 3875464 (Fla. 3d DCA 2015).***

A landowner claiming her land has been taken by inverse condemnation is entitled to attorneys' fees only if her inverse condemnation claim is successful.

***Caribbean Condominium Ltd. Partnership v. City of Flagler Beach***, --- So.3d ----, 2015 WL 5456819 (Fla. 5th DCA 2015).

A potential reversionary interest is not a sufficient interest in land to permit a party to participate in condemnation proceedings.

***Homestead Land Group, LLC v. City of Homestead***, --- So.3d ---, 2015 WL 3479418 (Fla. 3rd DCA 2015).

# Bankruptcy

A mortgage is deemed an allowed secured claim under the Bankruptcy Code, thus a Chapter 7 debtor may not "strip off" a mortgage pursuant to 11 U.S.C.A. § 506(d) even if the mortgage is an inferior mortgage that is wholly "underwater."

***Bank of America, N.A. v. Caulkett***, --- S.Ct. ----, 2015 WL 2464049 (2015).

# Land Use

A trial court's incorrect interpretation of a municipal code on first stage certiorari review is addressable on second stage certiorari review as a "violation of a clearly established principle of law resulting in the miscarriage of justice."

***Shamrock-Shamrock, Inc. v. City of Daytona Beach*, --- So.3d ----, 2015 WL 4486501 (Fla. 5th DCA 2015).**

Second-tier certiorari, although rarely granted, will be issued when the local government's decision to rezone conflicts with its own code and the local government decision results in a miscarriage of justice.

***Alvey v. City of North Miami Beach***, --- So. 3d ----, 2015 WL 8937617 (Fla. 3d DCA 2015).



Appellate review of a trial court's decision on boundary lines is de novo when the trial court decision is based on interpretation of plats and deeds.

***HJH, L.L.C. v. Volusia County***, --- So.3d ----, 2015 WL 3915930 (Fla. 5th DCA 2015).

Substantive due process challenges to zoning regulations are reviewed under the rational basis test. Prohibiting the use of residential property for paid events is "facially" permissible, and "as applied" permissible as the term "non-residential" sufficiently conveys the restriction imposed by the local government.

***Bennett v. Walton County***, --- So.3d ----, 2015 WL 3824197 (Fla. 1st DCA 2015).

An owner of property adjacent to another property receiving governmental action can maintain a Bert Harris Act suit if the governmental action on the adjoining property inordinately burdens the property owner; conflict certified with *City of Jacksonville v. Smith*, 159 So.3d 888 (Fla. 1st DCA 2015).

***FINR II, Inc. v. Hardee County***, --- So.3d ----, 2015 WL 3618521 (Fla. 2d DCA 2015).

# Tax Deeds

Upon the Clerk of Court receiving back an unopened letter that notifies of an upcoming tax deed, due process requires the Clerk take additional steps to give notice that are appropriate under the circumstances such as "checking the records of the taxing authorities for a change of address submitted by the legal titleholder; resending notice by regular mail so that no signature is required; posting notice on the property to be sold, not merely at the last known address of the titleholder; or sending a notice addressed to 'occupant' by regular mail."

***Thompson v. Markham***, --- So.3d ----, 2015 WL 3777708 (Fla. 1st DCA 2015).

# Mortgages

A purported oral modification of a mortgage cannot be enforced as it violates the Statute of Frauds, and the Statute of Frauds cannot be circumvented by claims of promissory estoppel.

***Ocwen Loan Servicing, LLC v. Delvar***, --- So. 3d ----, 2015 WL 8347300 (Fla. 4th DCA 2015).

The balloon mortgage statute (Florida Statute 697.05) does not apply to seller-financed mortgages and typically not to first mortgages.

***Zander v. Cima***, Case No. 2014-5866 (Fla. 2nd OCA November 13, 2015).



Applying New York law, the Fourth District holds that a guarantee operative only when the mortgagor engages in "gross negligence or willful misconduct" requires a "deliberate act beyond a party merely acting out of its economic self-interest," and that an intentional non-payment of the mortgage or the "de-leasing" (e.g., seeking short-term "Mom and Pop" stores instead of long-term credit-worthy tenants) is not sufficient to call into operation the guarantee. Moreover, New York law defines "insolvency" as inability to make payments when due and not "equity-insolvency" of the property.

***Wells Fargo Bank, N.A. v. Palm Beach Mall, LLC, --- So.3d ----, 2015 WL 5712341 (Fla. 4th DCA 2015).***

The Doctrine of After Acquired Title applies to mortgages, and runs with the land to bind successors of both the grantor and the grantee.

***BMCL Holding LLC v. Wilmington Trust, N.A.***, --- So.3d ----, 2015 WL 5603490 (Fla. 3d DCA 2015).

A conflict between the legal descriptions and street addresses on two disputed mortgages requires the trial court to make factual findings as to the intent of the parties and requires that a motion for summary judgment be denied.

***Fowler v. TD Bank***, --- So.3d ----, 2015 WL 4945008 (Fla. 5th DCA 2015).

# Lis Pendens

Review of orders regarding *lis pendens* is by certiorari, and a recorded declaration of condominium is a "duly recorded instrument" under Florida Statute section 48.23.

***100 Lincoln Rd SB, LLC v. Daxan 26 (FL), LLC***, --- So.3d ----, 2015 WL 6499331 (Fla. 3d DCA 2015).

A non-party in the trial court proceedings cannot appeal a judgment, even if the nonparty is the property owner which purchased the property after the *lis pendens* was filed.

***YHT & Associates, Inc. v. Nationstar Mortg. LLC***, --- So.3d ----, 2015 WL 5710054 (Fla. 2d DCA 2015).

One who purchases property during a pending foreclosure case in which a *lis pendens* has been filed is generally not entitled to intervene.

***Market Tampa Investments, LLC v. Stobaugh*, --- So.3d ----  
2015 WL 5131679 (Fla. 2d DCA 2015).**

# Adverse Possession



Although she must do so by clear and convincing evidence, an adverse possessor's burden is only to prove the property is possessed "under claim of right or color of title, and [that the adverse possession was] actual, open, visible, notorious, continuous and hostile to the true owner and to the world at large."

***Dadd v. Houde***, --- So.3d ----, 2015 WL 5245138 (Fla. 3d DCA 2015).

# Attorney's Fees

The Florida Supreme Court has revised Rule Regulating the Florida Bar 4-1.5 (e) to define "retainer," "advance fee," and "flat fee."

***In re Amendments to Rule Regulating The Florida Bar 4-1.5- Fees and Costs for Legal Services, --- So.3d ----, 2015 WL 5445616 (Fla. 2015).***

There can be more than one "prevailing party" for attorneys' fees purposes in litigation between a condominium association and a unit owner.

***Environ Towers I Condominium Association, Inc. v. Virginia Hokenstrom And Holly Hokenstrom***, Case No. 4014-3376, slip op. (Fla. 4th OCA November 18, 2015).

# Void and Voidable

A default based on a complaint which fails to state a cause of action is voidable, not void, and thus actions to vacate default judgments based on improperly pled complaints must, pursuant to the requirements of Florida Rule of Civil Procedure 1.540, be brought within one year of date of judgment.

***The Bank Of New York Mellon v. Condominium Association Of La Mer Estates, Inc., --- So.3d ----, 2015 WL 5445645 (Fla. 2015).***

# Estates

A trial court cannot appoint a curator of an estate without revoking or suspending letters issued to the personal representatives.

***Gordin v. Estate of Maisel***, --- So.3d ---- 2015 WL 7566353  
(Fla. 4th DCA 2015).



The claim of a known (or reasonably known) creditor - which creditor is not served with a notice to creditors - is not barred notwithstanding creditor filed its claim more than three months after publication of the opening of the estate. However, the claim must be filed within two years after publication under all circumstances otherwise it is barred.

***Jones v. Golden***, --- So.3d ----, 2015 WL 5727788 (Fla. 2015).

# Taxes

A homeowner has a strict jurisdictional time limit under Florida Statute section 194.171 (2) to appeal the valuation of their property, and this limitation cannot be circumvented by enveloping a challenge to last year's assessment in the challenge to the current year assessment.

***Nikolits v. Neff***, --- So. 3d ----, 2015 WL 8348320 (Fla. 4th DCA 2015).

The Internal Revenue Service's "Economic Substance" test holds that transactions that lack economic effect or substance (other than generating tax losses) or that have no business purpose will not be recognized. While both must be satisfied, the first prong – economic effects – is objective and the second prong – business purpose – is subjective.

***Kearney Partners Fund, LLC ex rel. Lincoln Partners Fund, LLC v. U.S.***, --- F.3d ---' 2015 WL 5944308 (11th Cir. 2015).

# Deeds

The estate conveyed by a deed and the actual property conveyed is determined by the intent of the grantor, and not by whether the consideration was nominal or whether "strips and gores" are created.

***Rogers v. U.S.***, --- So.3d ----, 2015 WL 6749915 (Fla. 2015).

The words "trustee" or "as trustee" added to the name of deed grantee do not automatically vest title in the trustee, despite the language of Florida Statute section 689.071 (1). Subsection (1), which is meant to protect bona fide third party purchasers from secret trusts, must be read in conjunction with subsection (4), which allows proof of the trust's existence to be established before or after the deed is recorded.

***Heiskell v. Morris***, --- So. 3d ----, 2015 WL 9258277 (Fla. 1st DCA 2015).

# Partition



A court cannot order the sale of portioned property if no party requested a sale.

***Crusaw v. Crusaw***, --- So.3d ---- 2015 WL 7444186 (Fla. 1st DCA 2015).