# Real Estate Case Summaries

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**For purposes of attaching constructive notice to subsequent purchasers for value, compliance with the recording statute, Section 695.11, Fla. Stat. (2011), is determinative of whether constructive notice attaches. If there is compliance with the recording statute, error by the clerk after the instrument is recorded will not affect constructive notice, irrespective of whether the subsequent purchaser had actual notice in the public records**

*Mayfield v. First City Bank of Florida*, 37 Fla. L. Weekly D1848 (Fla. 1st DCA 2012)

The trial court granted summary final judgment of foreclosure in favor of the Plaintiff, First City Bank of Florida ("First City"). Michael D. Mayfield, Bonnie J. Mayfield (collectively the "Mayfields") and Branch Banking and Trust Company ("BB&T"), Defendants in that action, appealed to set aside the summary final judgment of foreclosure.

In October 2009, the Mayfields purchased real property (hereinafter "Lot 2") from Blue Water Bay Real Estate Investments, LLC ("Blue Water"), and the Mayfields granted a purchase money mortgage to Old National Bank, which was subsequently acquired by BB&T. The Mayfields' deed and the BB&T mortgage were recorded in the public records on November 2, 2009. Unbeknownst to the Mayfields, in 2006 Blue Water had previously conveyed Lot 2 to Wright and Associates of Northwest Florida ("W&A"), and W&A had granted a mortgage to First City Bank. The W&A deed and First City mortgage were sent to the clerk of Walton County for recording, and on July 2, 2006, the clerk opened a recording transaction in the computer and affixed an official register book and page number on the original documents, which were then returned to the parties. Shortly after recording those instruments, the clerk realized an error had been made and voided the W&A deed and First City mortgage with the intention of re-recording those instruments to correct the error, which the clerk failed to do and mistakenly recorded similar instruments concerning another parcel of property. Since the W&A deed and First City mortgage were voided those instruments no longer appeared in the Walton County electronic official records except for a brief period of 73 minutes on July 6, 2006.

In 2010, First City filed foreclosure following default by W&A, and named the Mayfields and BB&T as subordinate lien holders in that action. The Mayfields and BB&T filed for summary judgment on the grounds they were bona fide purchasers without notice, and First City filed for summary judgment contending that it complied with the recording statute, which resulted in constructive notice. The trial court found that although the W&A deed and BB&T mortgage were voided from the public records, they were recorded in accordance with Section 695.11, Fla. Stat. (2011). Since those instruments were recorded, the Mayfields and BB&T were not entitled to protection under Section 695.01, Fla. Stat. (2011) for subsequent purchasers without notice.

The First District Court of Appeal noted that prior Florida cases have found that when a party complies with the recording statute, constructive notice attaches and will not be destroyed by errors committed by the clerk. The Court concluded that under the current version of Section 695.11, Fla. Stat. (2011), constructive notice attaches upon compliance with the recording statute. The Court concluded that since First City complied with the recording statute constructive notice attached at the time of recording, and dismissed the Mayfields and BB&T's argument that the W&A deed and First City mortgage had to remain in the public records to impart constructive notice. The Court noted the harsh result, and that the Mayfields and BB&T may have a cause of action against the clerk of Walton County.

**Where the final judgment of foreclosure specifically adopts the framework of Section 45.031, Fla. Stat. (2011), publication of the notice of sale is required, and failure to so publish is grounds to set aside the foreclosure sale irrespective of the adequacy of the foreclosure bid or whether mistake, fraud or other irregularity was present**

*Simonson v. Palm Beach Hotel Condominium Assoc.* 37 Fla. L. Weekly D1631 (Fla. 4th DCA 2012)

The trial court denied a homeowner's Objection and Motion to Set Aside Judicial Sale on the grounds that no pre-sale publication notice was made pursuant to Section 45.031, Fla. Stat. (2011).

After entering a judgment of foreclosure for $66,314.12, the trial court set the date of the foreclosure sale for several months later. The Final Judgment of Foreclosure stated that "the clerk of this Court shall sell the subject property at public sale . . . to the highest bidder for cash . . . in accordance with section 45.031, Florida Statutes". A third party purchaser was the high bidder at the online public auction for $100,100.00. On the same date as the sale, the condominium association filed a motion to vacate and

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set aside the foreclosure sale because the Notice of Sale had not been published. The third party purchaser then moved to confirm the sale. At the hearing to confirm the sale, counsel for the condominium association and the third party purchaser presented the trial court with an agreed order admitting publication had not occurred and confirming the sale. One day after that hearing, the homeowner received the signed order that directed the clerk to issue a Certificate of Sale to the purchaser. The homeowner served and filed Objections to Judicial Sale and Motion to Set Aside Judicial Sale. Two days after the agreed order was entered the clerk issued the Certificate of Sale that contained language stating that the Notice of Sale had been published as shown by the Proof of Publication.

At the hearing on the Motion to Set Aside Judicial Sale, the homeowner argued that Section 45.031, Fla. Stat. (2011) requires advance notice of a sale, while the purchaser and condominium association argued that Section 45.031 does not provide a mandatory framework, and further argued that the homeowner failed to demonstrate that the foreclosure bid was grossly or startlingly inadequate, and that the inadequacy of the bid resulted from some mistake, fraud, or other irregularity in the sale. The Fourth District Court of Appeal reviewed the requirements of Section 45.031 and confirmed the plain reading of that statute supports the interpretation that a foreclosure sale should not be confirmed if the notice of sale was not published. The Court acknowledged the purchaser and condominium association's argument that Section 45.031 is not the exclusive procedure for scheduling a foreclosure sale, but deemed that issue moot since the final judgment of foreclosure explicitly adopted the statutory framework of Section 45.031. The Court also dismissed the argument that the trial court must find the foreclosure bid grossly inadequate and resulting from mistake, fraud or other irregularity to set aside the sale. Failure to publish the notice of sale is sufficient by itself to set aside the sale, irrespective of the foreclosure bid, when final judgment specifically adopts the framework of Section 45.031. *See also HSBC Bank , N.A. v. Nixon*, 37 Fla. L. Weekly D2011 (Fla. 4th DCA 2012) (adhered to ruling in *Simonson* and reversed trial court order denying motion to vacate sale for failure to publish notice of sale as required by Section 45.031(3), Fla. Stat.).

**In a betterment action, where it is undisputed that a third party made the improvements to the subject property and that the party claiming betterment never had title to the property improved, it is then irrelevant whether the party claiming betterment actually believed it held title to the property improved. In such instance, evidence of improvements made by a third party to the subject property would be properly excluded**

*Centennial Homeowners Assoc. Inc. v. Dolomite Co. Inc.*, 37 Fla. L. Weekly D1763 (Fla. 3rd DCA 2012)

The trial court granted Dolomite Co. Inc.'s ("Dolomite") motion in limine to exclude evidence presented by Centennial Homeowners Association, Inc. ("Homeowners Association") as to improvements made by the developer of the residential community in support of the Homeowners Association's betterment action against Dolomite.

The developer of a residential community made improvements to common areas (the "Common Areas") before the developer abandoned the community. The developer still had title to certain common areas after abandonment. Thereafter, in 1999, Dolomite's predecessor-in-interest purchased the Common Areas at a sheriff's sale. The Homeowners Association then moved to set aside the sale; however, the trial court confirmed the sale after the Homeowners Association was unable to submit proof of ownership of the Common Areas. Dolomite then pursued an ejectment action against the Homeowners Association and obtained final judgment of ejection, which was affirmed by this Court. The Homeowners Association then filed a betterment action seeking compensation for improvements made to the Common Areas by the developer before the developer abandoned the community. Dolomite filed a motion in limine to exclude evidence related to improvements made by the developer, which was granted by the trial court. The jury found that although the Homeowners Association occupied the Common Areas, it did not make any permanent improvements. After the jury made its findings, the trial court entered final judgment in favor of Dolomite. The Homeowners Association did not challenge the jury's findings, but contended that the trial court erred by excluding evidence of improvements made by the developer.

The Third District Court of Appeal found that the evidence of improvements made by the developer were properly excluded, noting that "the betterment cause of action was created to prevent unjust enrichment by compensating a party that has lost an ejectment case for any value of improvements that were made by the losing party and are received by the successful party along with the land." Sec-

tion 66.014(3), Fla. Stat. (2009) requires the party seeking betterment to establish he or she "made the improvements or purchased the property improved." Since the improvement were undisputedly made by the developer, and since the Homeowners Association never had title, it is irrelevant whether the Homeowners Association actually believed it held good and valid title. Accordingly, the trial court properly excluded the evidence.

**The exception to the local action rule provided for in Section 702.04, Fla. Stat. for a mortgage encumbering property in more than one county, also includes separate and distinct mortgage instruments each encumbering property in different counties, as long as those mortgages both secure the same promissory note, and are accordingly part of one transaction**

*Frym v. Flagship Community Bank*, 37 Fla. L. Weekly D2001 (Fla. 2nd DCA 2012)

The trial court denied Catherine M. Frym's ("Frym") writ of prohibition to restrain the circuit court in and for Pinellas County from exercising jurisdiction in a foreclosure action over property located in Hillsborough County.

In 2006, Frym executed and delivered a promissory note which was secured by two mortgages: one on commercial property in Pinellas County and one on Frym's personal residence in Hillsborough County. In 2009, the Bank filed a complaint in Pinellas County seeking to foreclose on each mortgage. Frym filed a motion to dismiss, alleging that the trial court lacked subject matter jurisdiction to foreclose on the mortgage encumbering land in Hillsborough County. Frym challenged the denial of that motion by filing the current petition for writ of prohibition. Frym claimed that Section 47.011, Fla. Stat. (2011) requires that actions involving property shall only be brought in the county in which the property is located, known as the "local action rule." Section 702.04, Fla. Stat. provides an exception to the local action rule when a mortgage includes lands lying in two or more counties, which allows the foreclosure to proceed in any one of said counties as if it had all the mortgaged land. Frym claimed that exception does not apply in this case because the mortgage in Pinellas County secures only the commercial property, and not her personal residence in Hillsborough County. In support of that position, Frym cited *Hudlett v. Sanderson*, 715 So. 2d 1050, 1052 (Fla. 4th DCA 1998), which ruled that an exception to the local action rule is not applicable to a mortgage which on its face is applicable to property in only one county.

The Second District Court of Appeal noted that although two separate mortgages existed in this case encumbering property in two different counties, both mortgages secured the same promissory note. In contrast, *Hudlett* dealt with three separate promissory notes, each secured by a separate mortgage instrument. The Second District Court of Appeal confirmed the trial court's reasoning that since the two mortgages secured the same promissory note, both mortgages were part of the same transaction. Therefore, this case falls under the umbrella of Section 702.04, Fla. Stat, and the trial court's denial of the writ of prohibition was proper.

**Summary final judgment cannot be granted in favor of a defendant as to a plaintiff's stated cause of action when such judgment is based on a determination by the trial court that the facts supporting the stated cause of action are actually another cause of action that is barred by the statute of limitations**

*Bistricer v. Palmer*, 37 Fla. L. Weekly D1914a (Fla. 2nd DCA 2012)

The trial court granted summary final judgment in favor of William and Cathy Palmer (the "Palmers"), and against Alex Bistricer, as limited partner of Gulf Island Resort, L.P., and Gulf Island Resort, L.P. ("Bistricer") who had filed a quiet title action against the Palmers.

In March 2008 Bistricer filed a quiet title action challenging the validity of a deed that transferred property to the Palmers in March 2003. Bistricer was a limited partner of a limited partnership that owned several condominium units in one development. The general partner of that limited partnership was a corporation, and Bistricer and two other men were the sole shareholders. Those three shareholders had entered a restrictive covenant agreement whereby the conveyance of any of the condominium units required the signature of all three men. One of the two shareholders filed improper documents with the Florida Secretary of State that made it appear that that one shareholder had authority to sign deeds on behalf of the corporate entity. In March 2003, that one shareholder signed the deed to the Palmers without Bistricer's consent. Bistricer claimed the deed to the Palmers was voidable since it was not signed by a person legally authorized to do so.

The Second District Court of Appeal determined that the sole issue before the court was whether this action to quiet title is barred by the statute of limitations for actions alleging fraud. The Court noted the trial court's findings that the claim in this case, although captioned as a quiet title action, was primarily founded on allegations of fraudulent misconduct. The Court disagreed with the trial court's ruling because the complaint simply does not allege a claim in fraud. The Court concluded that if the Palmers believed the Complaint was not a quiet title action, but a claim for fraud, then the Palmers should have filed a motion to dismiss for failure to state a cause of action. The Palmers could not simply file a motion for summary judgment on the theory that a different complaint would have been barred by the statute of limitations for fraud. Accordingly, the Court reversed and remanded the summary final judgment entered by the trial court in favor of the Palmers.