Real Estate Case Summaries

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Florida's Supreme Court holds estate held in fee by the Florida Department of Transportation ("DOT") that was used in part for highway right-of-way cannot be extinguished by the Marketable Record Title Act ("MRTA"), specifically finding that use of any part of the estate as a highway right-of-way preserved the DOT's interest and excluded the remainder from the effect of the MRTA. This case resolves a conflict with *Florida Department of Transportation v. Dardashti Properties*, 605 So. 2d 120 (Fla. 4th DCA 1992) on whether exceptions to the MRTA may apply to an estate held in fee by the DOT.

Florida Department of Transportation v. Clipper Bay Investments, LLC, 40 Fla. L. Weekly S164, 2015 WL 1379975 (Fla. 2015) (Fla. S. Ct. Mar. 26, 2015)

In this case, at its inception, Clipper Bay Investments, LLC ("Clipper Bay") sought to quiet title to a portion of land adjacent to I-10 under the MRTA. DOT contended it held fee title, and the property was exempt from the MRTA under the exception found in § 712.03(5), Florida Statutes, for easements or rights-of-way. The trial court ruled partially in favor of Clipper Bay and partially in favor of DOT. Clipper Bay appealed and DOT cross-appealed. On the relevant question of whether the MRTA exception applied to DOT, the Second District Court reversed in favor of Clipper Bay, holding that MRTA would apply to property held for easement or right-of-way purposes, but that DOT had not shown the land was ever used for right-of-way purposes. (*See Clipper Bay Investments, LLC v. Department of Transportation,* 117 So. 3d 7 (Fla. 2d DCA 2013).

DOT sought review by the Florida Supreme Court on the grounds that the 2013 Clipper Bay decision expressly and directly conflicts with *Dardashti* on whether exceptions to the MRTA apply to an estate held in fee by the DOT.

DOT obtained fee simple title to the subject property in 1965. Clipper Bay alleges to have obtained fee simple title to the same property in 1970. For purposes of the case, the Clipper Bay 1970 Deed constitutes the "root title." Clipper Bay filed the instant action to quiet title to the contested 7 acres. DOT contends that it has used part of the underlying fee simple for I-10 right-of-way and leased part of the property to Santa Rosa County for a county road for over 30 years and therefore the MRTA exception applies and the MRTA cannot extinguish its interest.

The MRTA exception at § 712.03(5), Florida Statutes, specifically provides for exception from the MRTA for recorded or unrecorded easements or rights-of-way, "so long as the same are used and the use of any part thereof shall except from the operation hereof the right to the entire use thereof." A definition of "right-of-way" is not found in the MRTA. However, in *Clipper Bay*, the District Court analyzed the MRTA's intent and purpose and applied the definition of "right-of-way" found in the transportation code at § 334.03(22), Florida Statutes. This definition includes "land in which the state, the department, a county, or a municipality owns the fee or has an easement devoted to or required for use as a transportation facility." The Florida Supreme Court found the First District's analysis to be correct that the focus of the MRTA exception is on the purpose or reason the state holds the land, rather than the manner in which the title is actually held. For this reason, the Florida Supreme Court rejected the holding in *Dardashti.*

Therefore, citing to the MRTA exception, the Florida Supreme Court found that it was undisputed that DOT maintains a right-of-way with respect to access to I-10, and furthermore that a portion of DOT's estate has been conveyed to Santa Rosa County to maintain a county road, and that DOT's use of part of its estate is sufficient to apply the exception.

The Bert J. Harris, Jr., Private Property Rights Act, which provides property owner protection from a governmental law, regulation or ordinance which inordinately burdens private property, does not apply where plaintiff's property is not itself subject to any governmental regulatory action.

City of Jacksonville v. Smith, 159 So. 3d 888, (Fla. 1st DCA 2015)

The property owners, the Smiths, purchased a parcel of undeveloped property along the riverfront in the City of Jacksonville. At the time of their purchase, the City owned an adjacent parcel which contained a deed restriction, limiting use of the City's lot to the leisure and recreation of Duval County employees. Both parcels were zoned "residential low density". The City obtained a release of its deed restriction, rezoned their parcel, and constructed a fire station which, when completed, included a two-story, 13,000 square foot building, a 265-foot dock with berths for two large fireboats, and a Florida Marine Patrol boat.

The Smiths filed a challenge under the Bert J. Harris, Jr. Private Property Rights Protection Act ("Harris Act"), alleging the City's construction and operation of a fire station next to their property "inordinately burdened" their property, by impacting their ability to market and sell the property as a luxury home site, and in fact diminished its value by $470,000. The trial court found that the Smiths were entitled to relief under the Harris Act. The First District Court of Appeal reversed on the basis that the Harris Act is not intended to protect an

individual property owner from all acts of the government which may negatively impact their property, the Harris Act is intended only to protect against those regulations which are directly applied to the individual private property.

The Harris Act provides protections when a governmental action is directly applied to private property. The Act was intended to "fill a void in then-existing Florida law, because, prior to its enactment, there was no means by which an owner could receive compensation for the adverse financial effects of governmental regulation of his land without satisfying the constitutional standards for a taking, namely, physical invasion or the loss of all economically viable use."

The First District Court of Appeal analyzed the underlying intent and purpose of the Harris Act, and determined that the Act, "simply contains no language to indicate that the Legislature intended to create a whole new class of takings claimants who do not have to demonstrate that a governmental law, rule, or regulation had been applied to their property, nor is there language which would clearly allow for claims-based non-regulatory actions of government," finding that the "specific language of the Act indicates that in order to have a cause of action under the Act, governmental action must be directly "applied" to the claimant's property."

> "because the trial court's opinion broadens the scope of the Harris Act far beyond its intended purpose and has the potential to open the floodgates for claims under the Act against state, regional, and local governmental entities whenever they approve development on one property (or conduct activities on their own property) that adversely impacts the value of another property, we reverse. We would leave it to the Legislature to expand the scope of the Act to encompass claims such as the claim filed by the Smiths in this case, if it is the will of that body to do so."

The First District Court of Appeal also certified the following question to the Florida Supreme Court in accordance with the Florida Rules of Appellate Procedure, as one of great public importance: "[m]ay a property owner maintain an action pursuant to the Harris Act if that owner has not had a law, regulation, or ordinance directly applied to the owner's property which restricts or limits the use of the property?"

Subsequent to this case in its 2015 regular session, the Florida Legislature amended the Harris Act to clarify the term "property owner." The revised definition of "property owner" includes the language "that is the subject of and directly impacted by the action of a governmental entity." This new definition appears to codify the decision reached in *City of Jacksonville v. Smith*, 159 So. 3d 888 (Fla. 1st DCA 2015). See House Bill 383 which is as of this writing currently enrolled and if passed, would take effect on October 1, 2015.

The Marketable Record Title Act does not extinguish restrictive covenants included in a muniment of title that names the homeowners' association.

Barney v. Silver Lakes Acres Property, 159 So. 3d 181 (Fla. 5th DCA 2015)

Several property owners within the Silver Lakes Acres subdivision sought declaratory relief asserting that certain restrictive covenants of Silver Lakes Acres were extinguished by the MRTA. The trial court entered judgement in favor of the homeowners' association, determining that the MRTA did not extinguish the restrictive covenants. At issue was whether the statutory exception found in § 712.03(1), Florida Statutes, was applicable to the restrictive covenants and the homeowners' association. The property owners argued that the language set forth in their respective deeds was a mere "general reference" and therefore insufficient to keep any restrictive covenants of Silver Lakes Acres from being extinguished by the MRTA.

§ 712.03(1), Florida Statutes, exempts from extinguishment under the MRTA use restrictions "disclosed by . . . muniments of title; provided, however, that a general reference in any of such muniments to easements, use restrictions or other interests . . . shall not be sufficient to preserve them unless specific identification by reference to book and page of record or by name of recorded plat be made therein to a recorded title transaction . . ."

The following language was included in the various deeds, "subject to restrictive covenants, reservations and easements of record applicable to Silver Lakes Acres"; "subject also to the obligations of the owners of each lot at Silver Lakes Acres to the Silver Lakes Acres Property Owners Association, their successors and assigns, which obligations Grantee assumes and agrees to pay"; and "subject to restrictive covenants and amendments thereto of record affecting the property; and subject also to easements of record affecting said property; and subject also to the obligations of the owners of each lot of Silver Lakes Acres s/d to the Silver Lakes Acres Property Owners Association, their successors and assigns, which said obligations Grantee assumes and agrees to pay."

The District Court of Appeal upheld the trial court's finding that citation to an official record book and page is not the only evidence necessary to overcome "general reference." Specific ratification and assumption of the obligations of the Association constitutes sufficient notice to meet the core concern of the MRTA which is that no hidden interest in property be asserted without limitation against a record property owner.

In an action for fraud, constructive fraud, breach of fiduciary duty, and legal malpractice against a title insurance company, the attorney that represented the party and the attorney's law firm as the title insurance company's title agent, and the attorney's law firm that was

the closing agent, claims were all barred under statute of limitations.

West Brook Isles Partner's 1, LLC v. Commonwealth Land Title Insurance Company, 40 Fla. Law Weekly D976a, 2015 WL 1874453 (Fla. 2d DCA Apr. 24, 2015)

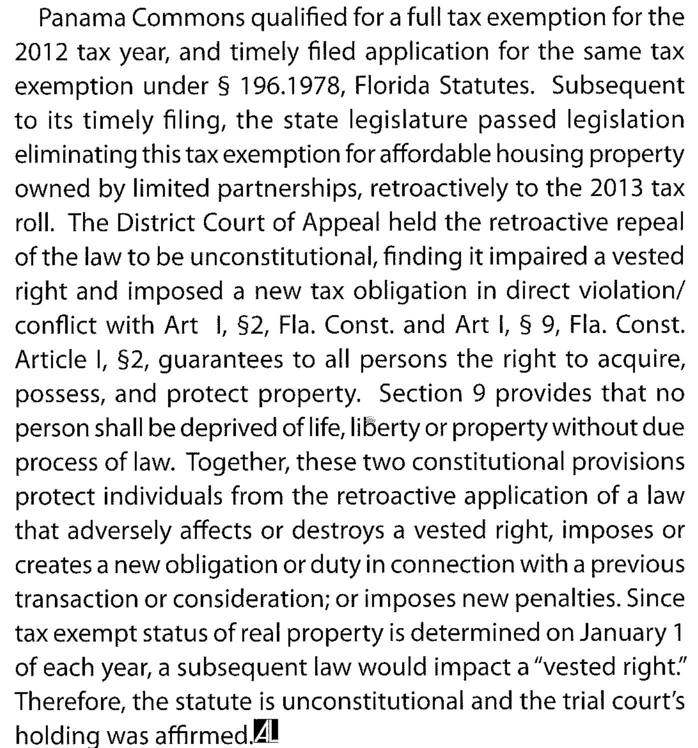
West Brook Isles Partner's 1, LLC ("WBI") sued Commonwealth Land Title Insurance Company et al., ("Commonwealth") for a real estate transaction that allegedly went bad. WBI alleged breach of fiduciary duty and constructive fraud against Commonwealth as closing agent and breach of contract for the title commitment; legal malpractice, fraud, and constructive fraud against Mr. Navaretta in his capacity as WBI's attorney; and constructive fraud and breach of fiduciary duty against Mr. Navaretta's law firm in its role as closing agent. All three parties pleaded an affirmative defense that the statutes of limitations bared WBI's claims. WBI alleges it was not aware that property it purchased was not "raw land", but was rather "condominium units." However, according to the District Court of Appeal, all evidence showed that WBI was provided with numerous documents indicating it was purchasing "condominium units" as opposed to raw land.

The District Court of Appeal held that WBI was confusing fraud and fraudulent concealment. The statute of limitations for fraud begins to run when the plaintiff should have discovered, exercising any diligence that the allegedly fraudulent transaction was suspect. See *Breitz v. Lykes-Pasco Packing Co.,* 561 So. 2d 1204, 1205 (Fla. 2d DCA 1990). Fraudulent concealment focuses on subsequent actions to keep the improper conduct from sight. See Nardone v. Reynolds, 333 So. 2d 25, 37 (Fla. 1976). Where there is no active concealment and a party with the exercise of due diligence could have discovered the facts, the statute of limitations is not tolled.

Taxation - In a case of first impression, the First District Court of Appeal held that the retroactive repeal of a tax exemption for a nonprofit limited partnership affordable housing project property was unconstitutional because it impaired a vested right and imposed a new tax obligation on the nonprofit limited partnership.

Stranburg v. Panama Commons L.P., 160 So. 3d 160 (Fla. 1st DCA 2015)

This case was brought by a Panama Commons, L.P., a nonprofit limited partnership that constructed a 92-unit affordable housing project in Panama City, Bay County, Florida. Panama Commons challenged the Bay County Property Appraiser's decision to deny its renewal application for tax exemption for its affordable housing property. Bay County's decision was based on legislation that was passed after Panama Commons filed a timely application. The trial court entered final summary judgment concluding that Panama Commons was entitled to a property tax exemption, finding that the Legislature's attempt to retroactively repeal the property tax exemption was unconstitutional.



Panama Commons qualified for a full tax exemption for the 2012 tax year, and timely filed application for the same tax exemption under § 196.1978, Florida Statutes. Subsequent to its timely filing, the state legislature passed legislation eliminating this tax exemption for affordable housing property owned by limited partnerships, retroactively to the 2013 tax roll. The District Court of Appeal held the retroactive repeal of the law to be unconstitutional, finding it impaired a vested right and imposed a new tax obligation in direct violation/conflict with Art I, §2, Fla. Const. and Art I, § 9, Fla. Const. Article I, §2, guarantees to all persons the right to acquire, possess, and protect property. Section 9 provides that no person shall be deprived of life, liberty or property without due process of law. Together, these two constitutional provisions protect individuals from the retroactive application of a law that adversely affects or destroys a vested right, imposes or creates a new obligation or duty in connection with a previous transaction or consideration; or imposes new penalties. Since tax exempt status of real property is determined on January 1 of each year, a subsequent law would impact a "vested right." Therefore, the statute is unconstitutional and the trial court's holding was affirmed.

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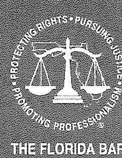

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