COMMUNITY COUNSEL

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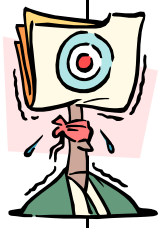
KNOWING DISSEMBLERS OR JUST PLAIN STUPID?

One of the more widely known decisions to come out of the Florida Supreme Count is its 1985 decision in Johnson v. Davis, a case that held that all sellers of property have a duty to disclose to prospective buyers all known defects that materially effect the value of the property, when such defects are not readily observable by the prospective buyer. Since 1985 nondisclosure claims have been frequently brought by disgruntled buyers and appeals of those cases have resulted in the Johnson v. Davis decision being cited no less than 190 times in other decisions and legal treatises. The most recent appearance of the doctrine is in the Second District case of Jensen v. Bailey, 2D10-939 (Fla.App. 2 Dist. 11-30-2011).



The issue in Jensen was whether the Jensens, as sellers of the property, were liable to the buyers (the Baileys) for failing to disclose a sewerage problem that caused periodic backups into the residential structure, and the existence of multiple improvements that had been made without benefit of building permits nor compliance with applicable building codes. The work had been performed by contractors hired by the Jensens. At the time they sold the house to the Baileys, they had completed a disclosure questionnaire on which they indicated that no work had been performed without benefit of a permit.

The trial court found for the Baileys and entered a judgement for money damages. The trial court, reasoned that the evidence showed that if the Jensens didn't actually know about the problems they "should have known" about them, and determined that this was enough to hold them liable under Johnson v. Davis.

However, the Second District Court of Appeals reversed the judgment and directed the trial court to enter a judgment for the Jensens. The basis for the appellate decision was that there was no evidence that the Jensens actually knew about any of the problems with their house, notwithstanding that they hired the workers who performed the work in the residence. The court analyzed cases decided since Johnson v. Davis and decided that the Florida Supreme Court requires not just constructive knowledge (as in "should have known" situations), but instead, the disgruntled buyers bear the burden of proving that the sellers had actual knowledge of a material defect that they failed to disclose.

In taking this approach the court addressed concerns first raised in a dissenting opinion in the Johnson v. Davis case, i.e. that the doctrine of that case would likely transform over time to require all sellers to become guarantors of the condition of the property they sell. By requiring a buyer to prove seller's actual knowledge of a defect, the applicability of Johnson v. Davis nondisclosure claims is narrowed to only cases where the buyers can produce evidence to show a seller's actual knowledge of a defect.

While succeeding in keeping sellers from becoming guarantors of the condition of their property, the decision is disturbing. It may tend to encourage a seller to become what the Fourth District referred to in one of its decisions as a "knowing dissembler." When a principal delegates duties to an agent, or a master to a servant, the law normally continues to hold the principal and the master liable for the acts of their representatives. Not so in this case. And even though the Jensens affirmatively represented in a signed questionnaire that no work requiring a permit had been performed on the property. It is troubling that the court absolved persons who made representations about what they knew - which were false - but for which they had no liability to the persons relying on them.

RECENT CASES

- A RECEIVER IS A NEUTRAL THIRD PARTY WHOSE ROLE IS TO PROTECT DISPUTED ASSETS. IT WAS IMPROPER FOR A COURT TO ALLOW A RECEIVER TO DISSIPATE DISPUTED ASSETS BY PAYING ONE PARTY'S ATTORNEY WITH THEM.
- THE POWER TO APPOINT A RECEIVER FOR AN ASSOCIATION ARISES NOT ONLY BY STATUTE, BUT VIA THE COURT'S INHERENT POWERS TO DO EQUITY.

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RECENT CASE SUMMARIES

In **Fortune International Hospitality, LLC, et al., vs. M Resort Residences Condominium Association, Inc., et al.,** 36 Fla. L. Weekly D2552g (Fla. 3rd DCA, November 23, 2011) Association sued Developers to establish that the unit owners had a fee simple interest in the high-rise structure and the ground beneath it, rather than some lesser property interest. Developer had planned and marketed a condominium-hotel property whereby unit owners would have the right, subject to management and rental agreements, to allow the use of their units as hotel rooms. The primary issue between Association and Developer was whether the condominium units were sold as fee simple interests or as air rights, with others retaining ultimate control over the lower parts of the building and the land beneath. Ultimately, during the litigation a receiver was appointed and took custody and control of all income, disbursements, and records relating to the properties. The receiver and Association entered into an agreement whereby Association's own accountant would hold unit owner assessments in escrow and pay from such funds the condominium-related expenses designated by Association. The escrow agreement included a mechanism for payment of Association's legal fees upon written approval by the receiver, with no provision for (a) notice to the defendants in the lawsuit or (b) approval by the trial court. The trial court approved the escrow agreement, but with a proviso that any payments to be made to Association's attorneys would require prior court approval. Developer opposed Association's motion to approve further payments of attorneys' fees and sought disgorgement of those fees that had been paid previously. The trial court denied the disgorgement motion and authorized a further payment of Association's attorney's fees that brought the total fees to $345,000. Developer then filed a petition for writ of certiorari with the Third District Court of Appeal. On appeal, the Third District Court of Appeal reversed the order permitting payment of the fees. The appellate court noted that a trial court may not authorize the release of disputed property to a party to the dispute and under the protection of the receiver unless that action directly benefits the property in care of the receiver as determined by the trial court. From this well-established principle it follows that an award of fees to an attorney for one of the parties, proposed to be paid from the receivership assets, would also be prohibited before the disposition of the parties competing claims to those assets. The appellate court noted that the linchpin of a receivership is the principle that a receiver, like the appointing court itself, is a neutral party in the underlying dispute. The receiver's role is to preserve and protect assets in dispute, not to act as a paying agent for the litigation-related legal expenses of one of the parties.

In **Santa Barbara Landings Property Owner's Association, Inc., et al., vs. Granada Lakes Villas Condominium, Inc., et al.,** 36 Fla. L. Weekly D2548c (Fla. 2nd DCA, November 23, 2011) Santa Barbara filed suit for damages and other relief against Granada Lakes based on what Santa Barbara considered to be improper management of Granada Lakes. Santa Barbara and Granada Lakes initially agreed to have the same property manager oversee all of the condominiums in Granada Lakes Villas and to have the owners of all of the condominiums collectively pay the fees and assessments to Granada Lakes. But a falling-out among the parties resulted in the condominiums being managed by two separate entities, and Santa Barbara alleged that Granada Lakes failed to pay them the related expenses owed after collecting its condominium fees and assessments. Santa Barbara maintained that as a result of Granada Lakes failure to pay, Santa Barbara was unable to pay for utilities and maintenance expenses for the common areas of Granada Lakes. In December 2010, Santa Barbara filed an emergency motion to appoint a receiver. The trial court conducted a hearing and appointed a receiver. However, Granada Lakes filed a motion for rehearing, contending that the trial court had no statutory basis to appoint a receiver under sections 617.1432, 718.117, and 718.1124, Florida Statutes. After conducting a hearing, the trial court agreed with Granada Lakes and found that it did not have the authority to appoint a receiver. Santa Barbara then filed its appeal to the Second District Court of Appeal. In reversing the trial court, the appellate court noted that the power to appoint a receiver lies in the sound discretion of the trial court. Because the trial court believed it lack jurisdiction, it denied the appointment of a receiver. However, the appellate court noted that a trial court's right to appoint a receiver in this instance is inherent in a court of equity, not a statutorily created right.

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