



Jason A. Perkins, Esq.



Samantha H. Spencer, Esq.

## ***First District Court of Appeal Interprets Florida's Construction Lien Law***

**T**he First District Court of Appeal recently issued an opinion in *JAX Utilities Management, Inc. v. Hancock Bank*, 164 So. 3d 1266 (Fla. 1st DCA 2015) that has significant implications on a bank's liability with respect to construction loan disbursements. More specifically, the appellate decision interprets Florida Statute section 713.3471, which establishes that if a lender stops giving advances on a construction loan before all of the proceeds have been distributed, then it will not be liable to a contractor, provided the lender gives the contractor proper notice within five (5) business days of the lender's decision. The statute also sets guidelines for liability in the event such notice is not given.

### **Factual and Procedural Background**

Plummer Creek, LLC (hereinafter, "Plummer Creek"), as owner, and JAX Utilities Management, Inc. (hereinafter, "JAX"), as contractor, entered into a standard form agreement for the development of a community with 429 single family building lots (hereinafter, the "Project"). To fund the development, Plummer Creek, as borrower, entered into a loan agreement with Peoples First Community Bank (hereinafter, "Peoples First"), as lender. Pursuant to the loan agreement, Plummer Creek was required to make scheduled payments to Peoples First and submit payment requests. In exchange, Peoples First was required to make construction loan disbursements. The loan agreement sets forth the scenarios which constituted a default (e.g., Plummer Creek's failure to make a scheduled payment, a material adverse change in Plummer Creek's financial condition, etc.). Between 2006 and 2009, Plummer Creek performed its obligations under the loan agreement.

In June of 2009, Plummer Creek informed Peoples First that it was no longer able to make payments on the loan. Subsequently, Peoples First notified Plummer Creek that it would cease making further advances. Then, on June 27, 2009, Plummer Creek missed an interest payment.

On June 30, 2009, JAX submitted two payment applications to Plummer Creek totaling \$480,603.08. Plummer Creek neither issued payment nor submitted the payment applications to Peoples First.

In December 2009, pursuant to a Purchase and Assumption Agreement with the Federal Deposit Insurance Corporation as receiver of Peoples First,

Hancock Bank assumed Peoples First's assets and liabilities, including the note, mortgage, and loan documents relating to the Project. Subsequently, Hancock Bank initiated foreclosure proceedings and obtained a final judgment of foreclosure against the Project.

On December 29, 2011, JAX brought an action against Plummer Creek and Hancock Bank asserting a breach of contract claim against Plummer Creek (Count I) and equitable lien and unjust enrichment claims against Hancock Bank (Counts II and III). The lower court granted Hancock Bank's motion for summary judgment based upon its affirmative defenses that the statute of limitations barred JAX's equitable lien claim and that Florida Statute section 713.3471 precluded both of JAX's common law claims.

### **Florida Statute § 95.11(5)(b)**

Rejecting JAX's argument that the statute of limitations period started to run when Hancock Bank initiated foreclosure proceedings on the Project, the First District Court of Appeal explained that "section 95.11(5)(b) requires that a claim for equitable lien be brought within one year of the last furnishing of labor, services, or material for the improvement of real property."<sup>1</sup>

### **Florida Statute § 713.3471**

Rejecting JAX's argument that the trial court misapplied Florida Statute section 713.3471 to preclude JAX's common law claims of equitable lien and unjust enrichment, the First District Court of Appeal focused on the plain language of the statute and determined that after the enactment of Florida Statute section 713.3471, the common law remedies no longer remain.

As a part of Florida's Construction Lien Law, section 713.3471 was enacted in 1992 and is titled "Lender responsibilities with construction loans." Section 713.3471(2) defines a lender's responsibilities to a contractor for construction work where the lender decides to stop making advances prior to the distribution of all the construction loan funds. Subsection 2(a) sets forth the lender's duties and provides for no liability if those duties are satisfied. Subsections 2(b) and 2(c) define a lender's liability where it fails to provide the requisite notice.

Prior to the enactment of section 713.3471, lenders were prohibited from misleading contractors about advances, but the common law did not impose an obligation to notify contractors

of a decision to stop making advances.<sup>2</sup> Section 713.3471(2) changed the common law “by imposing on lenders an affirmative duty to notify, thereby protecting contractors from continuing work on projects without notice that further funds will not be advanced.”<sup>3</sup> This statute, the First District Court of Appeal explained, precludes common law claims because “the plain language of section 713.3471(2) evinces a legislative intent to displace the common law remedies and the statute is so repugnant to common law remedies that the two cannot exist.”<sup>4</sup>

The court explained, “[s]ection 713.3471(2) expressly immunizes lenders who provide

notice, prescribes the damages where notice is not provided, and states that the cause of action cannot become the basis for an equitable lien claim. Moreover, a common law claim would conflict with the statute. If a lender complies with the statute, it has no liability. If the lender fails to comply, a contractor may seek damages as prescribed by the statute.”<sup>5</sup> Additionally, the court explained that the omission of a provision that preserves common law remedies “reinforces the conclusion that section 713.3471 displaces the common law remedies.”<sup>6</sup>

**Jason A. Perkins, Esq.**, a shareholder, and **Samantha H. Spencer, Esq.**, an associate,

practice banking and construction law in the Orlando office of Carlton Fields Jordan Burt, P.A. They have been members of the OCBA since 2005 and 2013, respectively.

<sup>1</sup>*Hancock Bank*, 164 So. 3d at 1269 (citing *Roebner v. Atl. Coast Dev. Corp.*, 356 So. 2d 1296, 1297 (Fla. 4th DCA 1978)).

<sup>2</sup>*Id.* at 1271 (citing *Giffen Indus. of Jacksonville, Inc. v. Se. Assocs., Inc.*, 357 So. 2d 217 (Fla. 1st DCA 1978); *J.G. Plumbing Serv., Inc. v. Coastal Mortg. Co.*, 329 So. 2d 393 (Fla. 2d DCA 1976)).

<sup>3</sup>*Id.* (citing *Whitehead v. Tyndall Fed. Credit Union*, 46 So. 3d 1033, 1035-36 (Fla. 1st DCA 2010)).

<sup>4</sup>*Id.* at 1272.

<sup>5</sup>*Id.*

<sup>6</sup>*Id.* (citations omitted).



**Invite your colleagues to join the OCBA today!**

Go to [www.orangecountybar.org](http://www.orangecountybar.org) to join online and see our calendar of upcoming events, seminars, and activities!

For more information, please contact the membership department at 407-422-4551, ext. 225.

## MARIA E. ESPINOSA, ESQ. MEDIATION SERVICES

- Florida Attorney since 1987
  - Florida Supreme Court Certified Family Mediator since 2005
  - Florida Supreme Court Certified Circuit Mediator since 2009
  - Florida Supreme Court Certified Appellate Mediator since 2015
- Bilingual English/Spanish*



**407-733-3662**  
[espiesq@aol.com](mailto:espiesq@aol.com)

# Downtown Orlando's Ideal Meeting Location



Price • Service • Technology

The OCBA is the perfect place for . . .

- Mediations & Arbitrations (neutral setting)
- Depositions
- Firm Retreats
- Employee Training Events
- Staff Luncheons
- Seminars
- Video Conferencing

Room	Full-day Rate	Half-day Rate	Capacity
Grand Cypress	\$340	\$170	up to 100
Palm	\$175	\$75	16
Magnolia	\$125	\$65	12
Gardenia	\$80	\$40	6
Azalea	\$80	\$40	6

**New pricing** makes the OCBA unbeatable for value, service and technology. State-of-the-art technology includes video conferencing, wireless Internet, Smart Boards, dedicated laptops and more. Our professional meeting coordinator is at your service to assist with everything from tech support to ordering food, arranging hotel accommodations and making dinner reservations.

MEMBER BENEFIT: OCBA members receive 15% off our already low room rates.

Technology Fee \$100/day, \$50/half-day

**Call today to reserve your next meeting.**

Contact 407-422-4551 Ext. 233, or [mariew@ocbanet.org](mailto:mariew@ocbanet.org)



**ORANGE COUNTY BAR ASSOCIATION**

880 North Orange Avenue // Orlando, FL 32801 // 407-422-4551 // [orangecountybar.org](http://orangecountybar.org)