Florida State University Law Review

Volume 7 | Issue 4 Article 6

Fall 1979

Bessemer v. Gersten, No. 52,264 6 Fla. L.W. 78 (Sup. Ct. Feb. 8, 1979)

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Real Property—HOMESTEAD—LIEN FOR RECREATION RENTAL ARISING FROM NONPAYMENT WILL PREVAIL OVER BUYER'S HOMESTEAD RIGHT—*Bessemer v. Gersten*, No. 52,264, 6 FLA. L.W. 78 (Sup. Ct. Feb. 8, 1979).

On February 25, 1969, Robert and Dina Gersten executed a "Contract for Purchase and Sale" with the Behring Corporation for the construction and purchase of a home in The Mainland of Tamarac Lakes, a subdivision being developed by Behring.[1] The contract specifically provided that the purchaser would pay a monthly maintenance and recreational facility charge to the seller or his assigns. In return, the seller agreed to convey title free of all encumbrances "except easements, restrictions, reservations and mortgages, if any."[2]

Behring Corporation recorded a declaration of restrictions pertaining to The Mainland on January 8, 1970. The document restated the obligation of each unit owner to pay the monthly recreational fee and provided for a lien upon the lot for nonpayment of the fee.[3] Furthermore, the declaration stated that its provisions "shall be considered and construed as covenants, restrictions, reservations, and servitudes running with the land."[4]

On April 9, 1970, Behring entered into a lease for recreational land with July Investment Corporation as lessor. The lease restricted the use of the premises to recreational purposes and gave the lessor the right to enforce the liens which Behring might acquire through the declaration of restrictions. Moreover, both the lessor and the Behring Corporation had the right to enforce the liens against the unit owners' property and to apply any sums collected to the rent owed by Behring under the lease.[5]

On November 27, 1970, the Gerstens took title to their home and received a deed. The deed incorporated by reference the previously recorded declaration of restrictions. In five years, the Gerstens' recreational lease fee increased from $26 to $52.91 per month.[6] Robert

1. Gersten v. Bessemer, 352 So. 2d 68 (Fla. 4th Dist. Ct. App. 1977), *rev'd*, No. 52,264, 6 FLA. L.W. 78 (Sup. Ct. Feb. 8, 1979).

2. 6 FLA. L.W. at 78. The pertinent provisions are: "Purchaser agrees to pay $26.00 (approx.) monthly maintenance and recreational facility charge to the Seller . . . or assigns . . . . The Seller will supply to the Purchaser a Release of Lien Certificate and Warranty Deed, conveying title free and clear of all encumbrances, except easements, restrictions, reservations, and mortgages, if any." *Id.*

3. *Id.* The Declaration provided that each lot owner would be obligated for payment of 1/476th of the total monthly rent of $4760, or $10 per month. The instrument declared the developer's intention to enter into a long-term lease of the land and to pledge to the prospective lessor the right to receive payments from the lot owners as security for the rent.

4. *Id.* Behring was the sole owner of the property at this time.

5. *Id.*

6. *Id.*

Gersten organized his neighbors in protest of the fee increases and foreclosure upon nonpayment.[7] On December 11, 1975, the executor and trustees of the Bessemer estate, successor in interest to the Behring Corporation, brought a foreclosure suit against Gersten for the nonpayment of recreational land rent. Judgment was entered against the Gerstens despite their assertions of the homestead protections in article X, section 4 of the Florida Constitution.[8]

The Fourth District Court of Appeal reversed. The court acknowledged the obligation to pay but found that since the original contract did not refer to a lien, a contractual lien could not have been formed at that time. The court found that the lien was created contractually when the purchasers accepted the deed at closing.[9] This obligation was, however, unenforceable against homestead property because when a lien attaches after or contemporaneously with the establishment of homestead, priority is afforded to the homestead right.[10] Pursuant to this rationale, the court held that foreclosure was prohibited by the homestead provisions of the Florida Constitution.[11]

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7. Clemings & Pelligrino, *Decision Upholding Rec Leases to Affect Thousands in Condos*, Fort Lauderdale News and Sun-Sentinel, Feb. 10, 1979, § B, at 6, col. 1.

8. 6 FLA. L.W. at 78. FLA. CONST. art. X, § 4 provides:

> (a) There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for the house, field or other labor performed on the realty, the following property owned by the head of a family:
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> (1) a homestead, if located outside a muncipality, to the extent of one hundred sixty acres of contiguous land and improvements thereon, which shall not be reduced without the owner's consent by reason of subsequent inclusion in a municipality; or if located within a municipality to the extent of one-half acre of contiguous land, upon which the exemption shall be limited to the residence of the owner or his family;
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> (2) personal property to the value of one thousand dollars.
>
> (b) These exemptions shall inure to the surviving spouse or heirs of the owner.
>
> (c) The homestead shall not be subject to devise if the owner is survived by spouse or minor child, except the homestead may be devised to the owner's spouse if there be no minor child. The owner of homestead real estate, joined by the spouse if married, may alienate the homestead by mortgage, sale or gift and, if married, may by deed transfer the title to an estate by the entirety with the spouse. If the owner or spouse is incompetent, the method of alienation or encumbrance shall be as provided by law.

9. 352 So. 2d 68 (Fla. 4th Dist. Ct. App. 1977), *rev'd*, No. 52,264, 6 FLA. L.W. 78 (Sup. Ct. Feb. 8, 1979).

10. 352 So. 2d at 70. *See generally* Quigley v. Kennedy & Ely Ins., Inc., 207 So. 2d 431 (Fla. 1968).

11. 6 FLA. L.W. at 79. *See generally* Avila S. Condo. Ass'n v. Kappa Corp., 347 So. 2d 599 (Fla. 1977); Quigley v. Kennedy & Ely Ins. Inc., 207 So. 2d 431 (Fla. 1968).

For an excellent study of Florida's homestead laws, see Crosby & Miller, *Our Legal Chameleon, The Florida Homestead Exemption*, 2 U. FLA. L. REV. 12 (1948). *See also* Maines & Maines, *Our Legal Chameleon Revisited: Florida's Homestead Exemption*, 30 U. FLA. L. REV. 227 (1978).

On review for rehearing, a per curiam denial by the appellate court certified five questions to the supreme court.[12] The supreme court framed the issue as:

> [W]hether a developer can impose upon lots in a subdivision encumbrances creating affirmative duties to make cash payments for recreational purposes, to be enforced against a buyer through the mechanism of a foreclosable lien, and whether, where the only act of the buyer showing intent to pledge the property as security is the acceptance of a deed embodying the covenant and lien provisions, the lien arising from nonpayment will prevail over the buyer's homestead right, where homestead attached at the time of the buyer's taking title by deed.[13]

The court quashed the decision of the district court and found the lien to be enforceable. However, a petition for rehearing has been granted.[14]

Two days after the supreme court issued its opinion, the interest stemming from the decision was reflected in a local newspaper article proclaiming, "Decision Upholding Rec Leases to Affect Thousands in Condos."[15] Simply stated, a "rec lease" requires a monthly fee for the use and maintenance of the recreational property, which could include club houses, swimming pools, tennis courts, etc. Recreation leases are often challenged on various grounds. One recent case attacked their validity and enforceability on the basis of Sherman antitrust violations, false representations, breach of contract, self-dealing, and unconscionability.[16] What then is the pernicious nature of this creature, the recreation lease?

Recreation leases are the "add-ons" in many developments. A buyer cannot enter certain developments without such a lease. These inescapable costs perhaps would not be so objectionable and overbearing if it were not for the escalator clauses. They are commonly pegged to the consumer price index or some other barometric variable.[17]

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12. 352 So. 2d at 71.

13. 6 FLA. L.W. at 78.

14. Petition for rehearing without argument granted May 4, 1979.

15. Clemings & Pelligrino, *supra* note 7.

16. Bennett v. Behring, 466 F. Supp. 689 (S.D. Fla. 1979). The unconscionability challenge was based upon three grounds: (a) gross price disparity, *i.e.*, excessive rents; (b) onerous and oppressive elevator clause; (c) unconscionability of having the property subject to liens. In a memorandum opinion, United States District Court Judge Jose A. Gonzalez, Jr., held that the record did not support a finding of unconscionability. *See also* FLA. STAT. § 718.122 (1977) regarding unconscionable leases in condominium projects.

17. Monthly rental fees may, however, be fixed. The terms are usually contained in the declaration of restrictions, executed and recorded by the developer.

In its most elementary form, a lien is a charge on property for the payment or discharge of a debt or duty,[18] a legal right which the law creates in order to satisfy a debt from a particular res.[19] A lien may be created by contract between the parties or by operation of law.[20] Florida has codified certain liens in chapter 713, Florida Statutes.[21] In addition to contractual and statutory liens, an equitable lien may also be created when an intent to pledge or charge property is found.[22] Liens on real property may be created contractually (mortgage agreement);[23] equitably ("in the interest of right and justice");[24] or statutorily (mechanics lien).[25]

Bessemer concerns the narrow issue of when the lien attaches and its enforceability against homestead property. Although the opinion is somewhat unclear, the resolution is simple because of well-developed case law in this area.

The Gerstens asserted a homestead defense against the lien because the purpose of the homestead exemptions is to protect the debtor's family from being reduced to destitution, and thus prevent the foreclosure of homestead property.[26] Moreover, the homestead exemption is liberally construed to protect the family home.[27] The right of the owner to have the family home exempt from certain liability is superior to the claims of creditors in many cases. Yet homestead property is subject to levy under judgments recorded prior to the time such property becomes homestead.[28] Therefore, with regard to liens and homestead claims, the determination of superior rights is a time-dependent issue.[29]

The "material time" which resolves whether a lien will be subordinate to the homestead exemption is the time of "attachment."[30] If the lien attaches prior to the establishment of homestead status, the lien prevails. If homestead is established prior to the attachment of the lien, the exemption rights prevail.[31] Due to the liberal treat-

18. Phillips v. Atwell, 80 So. 180 (Fla. 1918).
19. Sanford v. McClelland, 163 So. 513, 514 (Fla. 1935).
20. Wills v. Andrews, 72 So. 174 (Fla. 1916); *see* 21 FLA. JUR. LIENS § 3 (1958).
21. (1977).
22. Jones v. Carpenter, 106 So. 127 (Fla. 1925); Carter v. Suggs, 190 So. 2d 784 (Fla. 1st Dist. Ct. App. 1966).
23. FLA. STAT. § 697.02 (1977).
24. Jones v. Carpenter, 106 So. 127, 129 (Fla. 1925).
25. FLA. STAT. §§ 713.01-.37 (1977).
26. *See* Slatcoff v. Dezen, 76 So. 2d 792, 794 (Fla. 1954). *See also* Maines & Maines, *supra* note 11.
27. Quigley v. Kennedy & Ely Ins. Inc., 207 So. 2d 431, 432 (Fla. 1968).
28. *See* Aetna Ins. Co. v. LaGasse, 223 So. 2d 727, 728 (Fla. 1969).
29. *See* Crosby & Miller, *supra* note 11, at 35.
30. *Id. See also* First Nat'l Bank v. Peel, 145 So. 177 (Fla. 1932).
31. *See* 40 AM. JUR. 2d *Homestead* § 94 (1968).

ment afforded the homestead exemption, if the lien attaches simultaneously with the acquisition of homestead status, the exemption prevails.[32] Despite the fact that these established rules of priority were unquestioned by the trial court, the district court of appeal, and the supreme court in *Bessemer,* each forum differed as to the date of attachment.[33]

Basically, a lien comes into existence on the date of attachment.[34] Liens are generally satisfied in the order of their creation; "first in time is first in right."[35] The usual rule of priority between a statutory lien and another lien is determined by the order in which they are made of record.[36] For example, a mortgage lien gives constructive notice from the time of recording;[37] a statutory lien, from the time labor or materials are furnished.[38]

In *Bessemer*, the supreme court determined that the recreational lease was an affirmative covenant running with the land.[39] In *Vetzel v. Brown,*[40] the court earlier had held that the "unilateral" recording of a declaration of restrictions was constructive notice of the recorded use restrictions so that a developer may institute a general plan and be assured that his designs for the property will not be frustrated. As in the present case, the grantees in *Vetzel* received a deed from the grantor which contained a statement that title was "subject to easements and restrictions of record."[41] Likewise, the Gerstens were made aware of the recreation charge in the contract for purchase and sale by reference to the declaration of restrictions in the deed itself. As in *Vetzel,* the deed restrictions involved in *Bessemer* were recorded and a matter of public record prior to the closing. So, the question remains for rehearing whether the enforcement mechanism (the lien) attaches.

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32. *See* Quigley v. Kennedy & Ely Ins., Inc., 207 So. 2d 431, 433 (Fla. 1968).

33. 352 So. 2d at 68; 6 FLA. L.W. at 78.

34. *See* Heddon v. Jones, 154 So. 891 (Fla. 1934).

35. *See* United States v. First Fed. Sav. & Loan Ass'n, 155 So. 2d 192 (Fla. 2d Dist. Ct. App. 1963).

36. *See* Sikes v. Dade Lumber Co., 123 So. 918 (Fla. 1929).

37. 22 FLA. JUR. *Mortgages* § 123 (1958).

38. *Id.* For a complete listing of the varieties of statutory liens, *see* ch. 713 FLA. STAT. (1977).

39. 6 FLA. L.W. at 79. The court stated:

> A developer, in carrying out a uniform plan of development for a residential subdivision, may arrange for the provision of services to the subdivision or for the maintenance of facilities devoted to common use, and may bind the purchasers of homes to pay for them. In this case, all of the elements of an affirmative covenant running with the land have been established. Of course, we are not directly concerned with whether the covenant to make the payments runs with the burdened land since the party sought to be charged is the actual covenantor.

Id. (footnotes omitted).

40. 86 So. 2d 138 (Fla. 1956).

41. *Id.* at 140.

Diamond v. Woodlands Homeowner's Association, Inc.[42] involved an action for nonpayment of recreation fees on a different section in the same Tamarac development. The facts are virtually identical. The Fourth District Court of Appeal ruled that the failure to pay the ground rent for the recreational facility entitled Behring to a lien on the property. However, the opinion does not indicate whether a homestead defense was raised. Instead, the decision was based on the liability of the lot owner to pay the ground rent on a covenant running with the land. The liability for the ground rent is controlled by the deed or other instrument of conveyance under which the rent is reserved or created.[43] Generally, a covenant for the payment of ground rent is a real covenant that runs with the land and it binds all heirs and assigns of the covenantor.[44] In *Bessemer* the declaration of restrictions expressly provided that the lease for ground rent would be a covenant running with the land. Since the rent is tied to such a covenant, the one in possession of the land is responsible for the payment. Furthermore, the prevailing view is that a lien for arrears in ground rent relates back to the time when the ground rent deed was executed.[45] Thus the Gerstens took title to land which was subject to a real covenant, evidenced by a prior recorded declaration of restrictions and recreation lease, and a lien in effect as to subsequent purchasers.[46]

In response to the real covenant contention, the Gerstens argued that a lien may stem only from a valid debt and a valid debt must have a corresponding contractual obligation.[47] However, as the *Bessemer* court found, a debt *was* created with the execution of the lease on April 9, 1970, and the subsequent completion of the facility gave rise to a definite obligation to pay. The consideration required to support the lease was the actual construction of the recreation grounds which, in turn, enhanced the value of the development.[48] Even an option to create an encumbrance, supported by valid consideration, albeit without an existing debt, would be superior to subsequent encumbrances.[49] Likewise, in the case of a mortgage to secure future advances, a lien is created at the time it is executed

42. 348 So. 2d 8 (Fla. 4th Dist. Ct. App. 1977).

43. *Id. See* 38 C.J.S. *Ground Rents* § 11(a) (1943). *See also* Anderson v. Susquehanna Power Co., 160 A. 286 (Md. App. 1932).

44. 38 C.J.S. *Ground Rents* § 11(c)(2)(b) (1943); *see* Broadwell v. Banks, 134 F. 470 (C.C.S.W.D.Mo. 1905).

45. 38 C.J.S. *Ground Rents* § 11(e)(1) (1943).

46. 6 FLA. L.W. at 79.

47. Brief of Respondents at 7 (citing Hendrie v. Hendrie, 94 F.2d 534 (5th Cir. 1938)).

48. 6 FLA. L.W. at 79.

49. *See* Feemster v. Schurkman, 291 So. 2d 622 (Fla. 3d Dist. Ct. App. 1974).

or recorded although the debt does not yet exist.[50]

At this point the supreme court should have ended its inquiry. Florida law supports the simple conclusion that the lien attached to the affirmative covenant for ground rent at the time the obligation was created, *i.e.*, the recording of the lease and the subsequent completion of the facility. The Gerstens accepted title with full knowledge of the maintenance fee and the lien. Thus, a contractual lien arose prior to the time the Gerstens accepted title and established their homestead. To hold otherwise would be to permit the homestead to become an instrument of fraud.[51]

The court's opinion, however, is perplexing. First, the court examined its options. "We could find that the lien attached along with the covenant prior to conveyance and was therefore a preexisting encumbrance which the [Gerstens] took the land subject to."[52] Second, and alternatively, the court considered finding the lien and the homestead right attached simultaneously, in which case the homestead right would prevail unless a "relation back" mechanism is used. Finally, it contemplated holding that the lien attached after the Gerstens took title, in which case the homestead would have priority unless the "relation back" mechanism is adopted. After reviewing the alternatives, the court avoided any direct answer. It considered the Gerstens' argument, alleging that the lien cannot come into existence prior to the conveyance of title because the developer was not obligated to make the payments secured by the lien. The court did not make reference to *Diamond v. Woodlands Homeowner's Association, Inc.*[53] or other ground rent cases. It based its decision, in part, on *Mendrop v. Harrell,*[54] a Mississippi case which supports the existence of a lien attaching to an affirmative covenant to pay for paving running with the land. The Mississippi court held, *"The intention of the parties is the test,* with resort to the words of the covenant read in the light of the surroundings of the parties and the subject of the grant."[55] The Mississippi court used the phrase, "intention of the parties," in referring to the *original* parties to the ground rent lease. In *Bessemer* the parties to the ground rent lease expressly indicated their intent to affix a lien

50. *See generally* Simpson v. Simpson, 123 So. 2d 289 (Fla. 2d Dist. Ct. App. 1960). The execution of the mortgage is the effective date for persons with actual notice. The recording of the mortgage is the effective date for the rest of the world (constructive notice).

51. *See generally* Vandiver v. Vincent, 139 So. 2d 704 (Fla. 2d Dist. Ct. App. 1962); Milton v. Milton, 58 So. 718 (Fla. 1912).

52. 6 FLA. L.W. at 79.

53. 348 So. 2d 8 (Fla. 4th Dist. Ct. App. 1977).

54. 103 So. 2d 418 (Miss. 1958).

55. *Id.* at 424 (emphasis added).

upon nonpayment. Indeed, such intention was filed as a matter of public record.

The fact that the language in this opinion is demonstrably capable of misinterpretation immediately becomes evident by the Gerstens' contention in a motion for rehearing that the issue of intent was never raised in the lower courts, *i.e.*, the intention of Gersten and Behring rather than the intention of the original lessor and lessee.[56] The Gerstens also argue that an equitable lien was decreed and that they never had an opportunity to litigate that claim (the issues concerned a contractual lien).[57] An amicus curiae brief, filed by the Office of the Attorney General on behalf of the Gerstens, also questions the court's finding of an equitable lien.[58]

The confusion lies in the language of the *Bessemer* decision itself. The court concluded that a *contractual lien* was enforceable (the lien affixing to the real covenant) but it discussed various equitable doctrines. " '[E]quitable' liens on real property are recognized upon a showing of intent of the owner to pledge or charge his property or upon a decree of a court of equity under considerations of right and justice."[59] The court was apparently straining to emphasize that "[a] lien is not a 'thing' necessarily having a definite time of inception and termination, but is a right, of a special nature, to have a thing stand as security for an obligation."[60] It concluded that "[w]hen an equitable lien is decreed and held enforceable against homestead property, the courts are not concerned with the niceties of when the lien attached."[61] Indeed, the court's opinion is replete with needless equitable overtones. "If the covenant was attached to the land, as an encumbrance or servitude, when the purchasers took title, it would seem only reasonable and fair to hold that the enforcement mechanism was attached also."[62] It is not only "reasonable and fair," it is the law in Florida.

If the court decreed an equitable lien, then the Gerstens were denied due process of law. Furthermore, would not the "equities" of the situation compel the court to pass on questions of unconscionability and public policy?

The supreme court ruled correctly but its equivocal opinion offers little guidance to the student and practitioner. Hopefully the opinion on rehearing will clarify the ambiguities and declare the exist-

56. Brief of Respondents on Rehearing at 5.
57. *Id.* at 9.
58. Amicus Curiae Brief of Attorney General at 2.
59. 6 FLA. L.W. at 79.
60. *Id.*
61. *Id.*
62. *Id.*

ence of a lien in law. Although recreation leases may yet be overturned on alternate grounds, the lien established by recording a declaration of restrictions and a ground rent lease prior to the establishment of homestead should not be subordinate to the homestead exemption, especially where the purchaser is aware that he is buying into a development with a recreation lease.

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