

GARGANESE | WEISS D'AGRESTA & SALZMAN PA

ATTORNEYS AT LAW

Remedies for Real Property Disputes in Florida

August 2017 ©

Prepared by: Gary S. Salzman, B.C.S., ESQ.

Garganese, Weiss, D'Agresta & Salzman, P.A.
111 N. Orange Avenue, Suite 2000
Orlando, Florida 32801
(407) 425-9566
gsalzman@orlandolaw.net
www.orlandolaw.net

© 2018 Gary S. Salman, BCS, ESQ.

GARGANESE | WEISS D'AGRESTA & SALZMAN PA
ATTORNEYS AT LAW

Table of Contents

I. Defaults Under Purchase and Sale Contracts 3
A. Nature of Defaults. 3
B. Notice of Default and Right to Cure. 3
C. Waiver of Notice and Default. 3
D. Excuse of performance. 4
II. Seller's Remedies 5
A. Compensatory, Incidental and Consequential Damages. 5
B. Liquidated Damages. 5
C. Specific Performance. 6
D. Rescission. 6
E. Reformation. 6
III. Buyer's Remedies 7
A. Specific Performance. 7
B. Notice of Lis Pendens. 7
C. Equitable Liens. 8
D. Compensatory, Incidental and Consequential Damages. 9
E. Rescission 9
F. Reformation. 10
G. Injunctions. 10
IV. Collection Issues 10
A. Attachment, Garnishment & Levy. 10
B. Fraudulent Transfers & Tracing Assets. 12
C. Piercing the Corporate Veil. 15
V. Business Practices To Avoid (And Win) Disputes 16
VI. Disclaimer 16
Appendix 17

I. Defaults Under Purchase and Sale Contracts

A. Nature of Defaults.

A default under a contract for the sale and purchase of real estate in Florida must be material to be legally justified. If a material default occurs, the contract for sale, if enforceable under Florida law, generally governs the parties' rights and remedies. Although there can be numerous grounds to declare a default, they generally fall within two categories: monetary and non-monetary defaults.

1. Monetary Defaults.

A monetary default is where a party, usually the buyer, fails to meet a financial obligation due the other party, usually the seller, under the contract for sale. Typically, this occurs when a buyer fails or refuses to pay a deposit or pay the final purchase price for the property. A seller can also cause a monetary default, although it is less common and depends on the terms of the contract for sale. For example, a contract for sale could provide for the seller to pay for agreed upon repairs or improvements to the property and to provide evidence of such payment before closing. The seller's failure to do so would arguably constitute a monetary default under the contract for sale. A monetary default is almost always considered material, although the timing of the default may or may not be material depending on whether the contract for sale provides that "time is of the essence." [1]

2. Non-Monetary Defaults.

Non-monetary defaults under contracts for sale can be more problematic. For example, a seller could fail to disclose known, material, latent defects to the property prior to closing, such as termite infestation or roof leaks. A title search could also reveal a title defect which the seller is unwilling to cure, despite the terms of the contract requiring such a cure. The contract for sale could require the seller to actually perform repairs or improvements to the property, but the seller fails to do so prior to closing. The seller could fail to sufficiently maintain a minimum level of tenants before closing. The ways in which either party could cause a non-monetary default are only limited by the obligations set forth in the contract for sale and to the extent that the default is material. In general, a non-monetary default will be judicially enforced provided there is evidence that the non-defaulting party has been materially prejudiced.

B. Notice of Default and Right to Cure.

Most contracts for sale require one party to give the other party notice of a material default and a reasonable opportunity to cure the default. Such notice is a condition precedent to the non-defaulting party enforcing his or her rights under the contract for sale.

C. Waiver of Notice and Default.

By closing on any sale with knowledge of a default under the contract, the non-defaulting party may be deemed to have waived any right to enforce the default, unless such rights are expressly reserved in a writing signed by all parties. However, many contracts for sale include "anti-waiver" provisions to prevent the assertion of a continuing waiver. The following is one example of such a provision:

[1] *Sun Bank of Miami v. Lester*, 404 So. 2d 141, 142 (Fla. 3d DCA 1981).

> Either party's forbearance or waiver of any breach or violation of this contract shall not be construed as a continuing waiver or consent to any subsequent breach or violation and shall not bar any party's right to demand strict compliance with that provision or any other provision of this agreement. No course of dealing between the seller and the buyer shall constitute a waiver of any of the seller's rights or any of the buyer's obligations as due hereunder.

Notwithstanding a similar provision, a party's conduct of accepting a cure of a default could still be deemed a waiver of the default and similar types of future defaults. For example, the seller may accept a deposit that is untimely made under the contract. Even though the contract for sale may provide that time is of the essence for all obligations, the seller may have thereby waived this requirement to refuse a future untimely deposit. For a court to make that determination, it would have to conclude that the default from the first untimely deposit was waived, along with the anti-waiver provision itself.

Florida's parol evidence rule may provide some protection against a party to a contract alleging that its terms were modified or waived by an oral agreement. The rule is that, if the terms of a contract are unambiguous and the contract is a complete agreement, those terms are not subject to modification, variance or contradiction by parol (oral) evidence.[2] If the contract for sale is ambiguous as to the parties' intent on any matter, parol evidence will be admissible on the issue.[3] "The parol evidence rule serves as a shield to protect a valid, complete and unambiguous written instrument from any verbal assault that would contradict, add to, subtract from it, or affect its construction."[4] Since the rule only applies if the parties' agreement is unambiguous and complete, it is important that the contract is clear in its terms and expressly states that it is "the entire agreement between the seller and the buyer and all other oral or written understandings and agreements are merged into the contract and are deemed void."

D. Excuse of performance.

Florida law excuses performance of a contract, if performance is either impossible or the contract purpose has become commercially frustrated.[5] However, the performance must be more than difficult or burdensome.[6] The defense of impossibility of performance refers to the occurrence of an event that is beyond the parties' control[7] which, given the purpose for which the contract was made, renders one side's performance to be impossible.[8] Supervening impossibility of performance based upon an event which occurs after inception of a contract is ***not*** an excuse for non-performance of a contract.[9] Likewise, an unexpected impediment to the performance of a contract will not relieve a party from his contractual obligations, unless his performance is rendered impossible by an "act of God."[10] Such an "act of God" must be so extraordinary

[2] *See Titusville Assocs., Ltd. v. Barnett Banks Trust Co*., 591 So. 2d 609, 611 (Fla. 1991); *see also Co & Co Enters., Inc. v. Robertson*, 761 So. 2d 1179, 1179 (Fla. 4th DCA 2000); *Newbern v. Am. Plasticraft, Inc.*, 721 So. 2d 351, 352 (Fla. 2d DCA 1998); *Polk v. Crittenden*, 537 So. 2d 156, 159 (Fla. 5th DCA 1989); *Rodriguez v. Tombrink Enter., Inc*., 870 So. 2d 117, 119 n. 2 (Fla. 2d DCA 2003).
[3] *See 3679 Waters Ave. Corp. v. Water St. Ovens, Ltd.*, 779 So. 2d 349, 351 (Fla. 2d DCA 2000).
[4] *Crittenden*, 537 So. 2d at 159 (quoting *Sears v. James Talcott, Inc.*, 174 So. 2d 776, 778 (Fla. 2d DCA 1965)).
[5] *Home Design Ctr.-Joint Venture v. County Appliances of Naples, Inc.*, 563 So. 2d 767, 769-70 (Fla. 2d DCA 1990); *see also Florida Dep't of Fin. Servs. v. Freeman*, 921 So. 2d 598, 608 (Fla. 2006) (Cantero, J., concurring).
[6] *Home Design Ctr.–Joint Venture*, 563 So. 2d at 769-70.
[7] *See Gulf American Land Corp. v. Wain*, 166 So. 2d 763 (Fla. 3d DCA 1964).
[8] *Zephyr Haven Health & Rehab Ctr., Inc. v. Hardin*, 122 So. 3d 916, 920 (Fla. 2d DCA 2013).
[9] Metro. Dade County v. Babcock Co., 287 So. 2d 139, 142 n.1 (Fla. 3d DCA 1973).
[10] *Enid Corp. v. Mills*, 101 So. 2d 906, 908-09 (Fla. 3d DCA 1958).

and unprecedented that human foresight could not anticipate or guard against it, and the effect of which could not be prevented or avoided by the exercise of reasonable prudence, diligence and care.[11]

Further, a party's performance will not be excused if the other party has fully performed[12] or if the impossibility or frustration of purpose was foreseeable at the time the contract was formed.[13] Even an "act of God" will not excuse non-performance under a contract where one party has substantially or fully performed under the contract.[14]

II. Seller's Remedies

Should the buyer breach a material term of a contract for sale, the seller has several alternative remedies.[15] The seller may choose to retain the property and sue for breach of contract or the seller may elect to sue in equity for specific performance.[16] In other words, the seller may sue for actual damages caused by a default, or request a court, under limited circumstances, to order specific performance and require the buyer to complete the sale.[17] As a practical matter, however, courts generally do not grant specific performance against a buyer who refuses to complete any sale in the absence of evidence that the buyer has the financial ability to close.

A. Compensatory, Incidental and Consequential Damages.

If the seller chooses to retain the property and sue the buyer for damages, the proper measure of actual damages is the difference between the agreed purchase price in the contract and the fair value of the property at the time of the breach,[18] less any money received by the seller under the contract for sale. Unless expressly precluded by the contract for sale, the seller may also recover such incidental and consequential damages that were reasonably contemplated by the parties at the time the contract was executed and which directly and proximately result from the buyer's default.[19] A seller's incidental and consequential damages may include title search expenses, closing fees or broker's fees which would not have otherwise been paid, but for the buyer's default.

B. Liquidated Damages.

Most contracts for sale provide that the seller may retain, as liquidated damages, all deposits made by the buyer in the event of a material breach. The amount of liquidated damages, however, must be reasonably related to: (i) the actual damages incurred by the seller; (ii) other facts and circumstances known to the parties as of the date the contract was signed; and (iii) with due regard to future expectations. The sum for liquidated damages cannot be disproportionate to any compensatory damages that may have been

[11] *Fla. Power Corp. v. City of Tallahassee*, 18 So. 2d 671, 675 (Fla. 1944); *see Seaboard Air Line Ry. Co. v. Mullin*, 70 So. 467, 470 (Fla. 1915); *see also Norris v. Savannah, F. & W. Ry. Co.*, 1 So. 475, 478 (Fla. 1887) (stating that an extraordinary flood is an act of God).
[12] *See Moon v. Wilson*, 130 So. 25, 27 (Fla. 1930).
[13] *Home Design Ctr.-Joint Venture v. County Appliances of Naples, Inc.*, 563 So. 2d 767, 769-70 (Fla. 2d DCA 1990); *see also Valencia Ctr., Inc. v. Publix Super Mkts., Inc.*, 464 So. 2d 1267, 1269 (Fla. 3d DCA 1985).
[14] *Moon, 130 So. at 27.*
[15] *Clements v. Leonard,* 70 So. 2d 840, 843 (Fla. 1954); *see also Miller v. Rolfe*, 97 So. 2d 132, 134 (Fla. 1st DCA 1957).
[16] *Miller*, 97 So. 2d at 134.
[17] *Clements*, 70 So. 2d at 843; *see also Frank Silvestri, Inc. v. Hilltop Developers, Inc.*, 418 So. 2d 1201, 1203 (Fla. 5th DCA 1982).
[18] *Buschman v. Clark*, 583 So. 2d 799, 800 (Fla. 1st DCA 1991); *see also Frank Silvestri, Inc.*, 418 So. 2d at 1203.
[19] *Hardwick Props., Inc. v. Newbern*, 711 So. 2d 35, 40 (Fla. 1st DCA 1998); s*ee Buschman*, 583 So. 2d at 800.

reasonably expected to result from a breach at the time the contract was executed.[20] Further, the liquidated damages may not be a penalty, otherwise the contract provision will not be enforced.[21] The enforcement of a liquidated damages clause may also be called into question if the seller has the express contractual option to recover actual compensatory damages in excess of the amount of liquidated damages.[22]

C. Specific Performance.

The obligations for performance under the contract for sale must be clear, definite and certain for a court to order specific performance in the event the buyer fails or refuses to close.[23] The seller must also be ready, willing and able to complete the sale in accordance with the contract terms.[24] Ultimately, the court has discretion whether to grant specific performance, even where all other elements of the claim are proven.[25] If an adequate remedy at law exists, it is error for the court to grant specific performance.[26] Whether a monetary judgment is collectible is not to be considered by the court in determining whether the movant has an adequate legal remedy.[27]

D. Rescission.

A seller seeking rescission of a contract for sale must be able to return the buyer to the *status quo* prior to the execution of the contract for sale. To do so, the seller must return to the buyer all amounts paid to the seller or paid into escrow. However, the seller may deduct any financial damage sustained, along with any amount of financial benefit the buyer received if he or she was in possession of the real property prior to the default.[28]

E. Reformation.

A court may equitably reform an executed agreement to effect the intent of an agreement previously entered into by the parties, but which by mistake of the draftsman, does not fulfill the parties' mutual intent. In short, if a written instrument fails to express the mutual intent of the parties, a court in equity may reform the instrument, although the failure may have resulted from a mutual mistake as to the legal meaning and operation of the terms used in the writing.[29] If merely one party is mistaken as to the legal meaning, scope and effect of the agreement he or she has signed, then reformation is only permitted when the other party

[20] *See Valenti v. Coral Reef Shopping Ctr., Inc.*, 316 So. 2d 589, 592 (Fla. 3d DCA 1975); *see also Hooper v. Breneman*, 417 So. 2d 315, 317 (Fla. 5th DCA 1982).
[21] *Hutchison v. Tompkins*, 259 So. 2d 129, 132 (Fla. 1972); *see also Berndt v. Bieberstein*, 465 So. 2d 1264, 1265 (Fla. 2d DCA 1985).
[22] *See Lefemine v. Baron*, 573 So. 2d 326, 328 (Fla. 1991); *see also Crosby Forrest Prods., Inc. v. Byers*, 623 So. 2d 565, 568 (Fla. 5th DCA 1993); *Ropiza v. Reyes*, 583 So. 2d 400, 401 (Fla. 3d DCA 1991).
[23] *Our Savior Lutheran Church v. Tom Jones Enter., Inc.*, 421 So. 2d 738, 739 (Fla. 4th DCA 1982).
[24] *Leverette v. Cochran*, 876 So. 2d 2, 3 (Fla. 4th 2004); *Sterling Crest, Ltd. v. Blue Rock Partners Realty Grp., LLC*, 164 So. 3d 1280 (Fla. 5th DCA 2015).
[25] *Mann v. Thompson*, 100 So. 2d 634, 637 (Fla. 1st DCA 1958); Open Permit Servs. Of Florida, Inc. v. Curtiss, 15 So. 3d 822, 825 (Fla. 3d DCA 2009).
[26] *Vagabond Travel & Tours, Inc. v. Universal Inns of Am., Inc.*, 440 So. 2d 482, 483 (Fla. 2d DCA 1983); *see Terex Trailer Corp. v. McIlwain*, 579 So. 2d 237, 241 (Fla. 1st DCA 1991).
[27] *Employee Benefit Plans, Inc. v. Radice Corporate Ctr. I, Inc.*, 593 So. 2d 1125, 1127 (Fla. 4th DCA 1992).
[28] *See Braman Dodge, Inc. v. Smith*, 515 So. 2d 1053, 1054-55 (Fla. 3d DCA 1987); *Niesz v. Gehris,* 418 So. 2d 445, 447-48 (Fla. 5th DCA 1982).
[29] *Miley v. Miley*, 402 So. 2d 557, 558 (Fla. 2d DCA 1981).

has engaged in inequitable conduct.[30] Also, the statute of frauds is not a bar to reformation of a land contract.[31]

III. Buyer's Remedies

Where a seller wrongfully fails or refuses to perform under a contract for sale or to convey the quality of title agreed to be conveyed to the buyer, the buyer has several legal and equitable remedies against the seller.[32] One of those remedies is for the buyer, under certain circumstances, to bring an action for specific performance of the contract for sale. If the buyer is unsuccessful in an action for specific performance, the buyer may be precluded from bringing a subsequent suit for damages based upon the doctrine of *res judicata*.[33] For this reason, a buyer should bring a multiple count lawsuit for specific performance and, in the alternative, damages should the court decline to grant specific performance. Consideration should be given to any controlling contract provisions for liquidated damages or a limitation of liability.

A. Specific Performance.

As with a seller requesting specific performance, a buyer may only seek specific performance if the obligations for performance under the contract for sale are clear, definite and certain.[34] The buyer must also be ready, willing and able to complete the sale.[35] Again, the court has discretion whether to grant specific performance even where all other elements of the claim are proven.[36] If the buyer has an adequate remedy at law, the court may not grant specific performance.[37]

B. Notice of Lis Pendens.

If a buyer desires to pursue specific performance of a contract for sale, the buyer needs to consider recording a notice of lis pendens against the property to prevent the seller from transferring title to a subsequent buyer pending the outcome of the lawsuit. Florida's lis pendens statute governs when that can be done, which states in part:

> When the pending pleading does not show that the action is ***founded on*** a duly recorded instrument or on a lien claimed under part I of chapter 713 or when the action no longer affects the subject property, the court ***shall*** control and discharge the recorded notice of lis pendens as the court would grant and dissolve injunctions.[38]

In order for a notice of lis pendens to be filed and recorded by any party without first posting a bond, the lawsuit must be "founded on" a duly recorded instrument or upon a lien claimed under part I of Chapter 713, *Florida Statutes*. If the action is "founded on" an unrecorded document, such as a contract for sale, the proponent of the lis pendens should consider first obtaining leave of court before filing and recording the lis

[30] *Jacobs v. Parodi*, 39 So. 833, 836-37 (Fla. 1905); *Smith v. Royal Auto. Group, Inc.*, 675 So. 2d 144, 150 (Fla. 5th DCA 1996).
[31] *Royal Auto.*, 675 So. 2d at 153; *Gennaro v. Leeper*, 313 So. 2d 70, 72 (Fla. 2d DCA 1975).
[32] *See John Ringling Estates, Inc. v. White*, 141 So. 884, 885 (Fla. 1932).
[33] *Greenstein v. Greenbrook, Ltd.*, 443 So. 2d 296, 297 (Fla. 3d DCA 1983).
[34] *Our Savior Lutheran Church v. Tom Jones Enter., Inc.*, 421 So. 2d 738, 739 (Fla. 4th DCA 1982).
[35] *Leverette v. Cochran*, 876 So. 2d 2, 3 (Fla. 4th 2004); *Sterling Crest, Ltd. v. Blue Rock Partners Realty Grp., LLC*, 164 So. 3d 1273, 1280 (Fla. 5th DCA 2015).
[36] *Mann v. Thompson*, 100 So. 2d 634, 637 (Fla. 1st DCA 1958); *Open Permit Servs. Of Florida, Inc. v. Curtiss*, 15 So. 3d 822, 825 (Fla. 3d DCA 2009).
[37] *Vagabond Travel & Tours, Inc. v. Universal Inns of Am., Inc.*, 440 So. 2d 482, 483 (Fla. 2d DCA 1983).
[38] FLA. STAT. § 48.23(3) (2017) (emphasis added).

pendens. The court must then determine whether to require the posting of a bond to secure the opposing parties' damages, interest thereon, and attorneys' fees and costs that may be incurred to dissolve the lis pendens.[39] For any lawsuit to be "founded" upon a duly recorded instrument, the primary rights asserted by the proponent of the lis pendens must have "arose from the recorded instrument."[40]

The Florida Supreme Court has addressed whether it is mandatory under Florida Statute §48.23(3) for a trial court to require a lis pendens bond where the action is not based upon a recorded instrument or a construction lien.

> [I]t is within the trial court's discretion to determine whether to require the lis-pendens proponent to post a bond when the property-holder defendant can show that damages will likely result to that defendant in the event the notice of lis pendens is unjustified.[41]

The Florida Supreme Court stated that the amount of the bond is also within the discretion of the trial court, but should bear a reasonable relationship to the amount of damages the seller proves are likely to result if the lis pendens is unjustified.[42]

In addition, the lis pendens may be dissolved where the buyer does not establish a "fair nexus between the apparent legal or equitable ownership of the property and the dispute embodied in the lawsuit."[43] A fully executed contract for sale establishes a fair nexus between a buyer's claim for specific performance and ownership of the real property for purposes of defeating a seller's motion to dissolve a lis pendens. This is because any order dissolving the notice of lis pendens could jeopardize the rights of subsequent buyers or lienors and could also jeopardize the buyer's unrecorded claim against the property, should the buyer prevail in his action for specific performance.[44] Where the lawsuit is not founded upon a duly recorded instrument, a lis pendens requires the posting of a bond.[45] Where the lis pendens was based upon a duly recorded instrument, one Florida court has also held that courts have no authority to require a bond to maintain the lis pendens.[46]

C. Equitable Liens.

Equitable liens arise from two sources: "(a) a written contract which shows an intention to charge some particular property with a debt or obligation, and (b) when declared by a court of equity out of general considerations of right and justice ... ."[47]

---

[39] *See Avalon Assocs. of Del. Ltd. v. Avalon Park Assocs., Inc.*, 760 So. 2d 1132, 1135 (Fla. 5th DCA 2000); *see also Suarez v. KMD Constr., Inc.*, 965 So. 2d 184, 187-88 (Fla. 5th DCA 2007).
[40] *Hough v. Bailey*, 421 So. 2d 708, 709 (Fla. 5th 1982).
[41] *Med. Facilities Dev., Inc. v. Little Arch Creek Props., Inc.*, 675 So. 2d 915, 916 (Fla. 1996); *accord Nickerson v. Watermark Marina of Palm City, LLC*, 978 So. 2d 187, 189 (Fla. 4th DCA 2008).
[42] *Med. Facilities Dev., Inc.*, 675 So. 2d at 918 n. 2.
[43] *Chiusolo v. Kennedy*, 614 So. 2d 491, 492 (Fla. 1993).
[44] *Christian v. Sanderhoff*, 731 So. 2d 804, 805-06 (Fla. 4th DCA 1999); *see Von Mitschke-Collande v. Kramer*, 869 So. 2d 1246, 1249-50 (Fla. 3d DCA 2004).
[45] *Munilla v. Espinosa*, 533 So. 2d 895, 895 (Fla. 3d DCA 1988); *Porter Homes, Inc. v. Soda*, 540 So. 2d 195, 195 (Fla. 2d DCA 1989).
[46] *Mohican Valley, Inc. v. MacDonald*, 443 So. 2d 479, 480-81 (Fla. 5th DCA 1984).
[47] *Carter v. Suggs*, 190 So. 2d 784, 787 (Fla. 1st DCA 1966) (citing *Tucker v. Prevatt Builders, Inc.*, 116 So. 2d 437, 439 (Fla. 1st DCA 1959)).

For example, a written contract containing an agreement for a property owner to grant a mortgage ***at some time in the future*** as security may create a right to an equitable lien.[48]

Upon seller's default, a non-defaulting buyer under an executory contract for sale is entitled to rescind the contract and recover all purchase money paid with interest, along with other expenses incurred by reason of seller's default. The buyer further has a claim to an equitable lien against the property to secure such damages.[49] If the buyer chooses to proceed with a specific performance claim, the fact that he or she may be entitled to record a notice of lis pendens has the same effect as creating an equitable lien on the property subject to the final determination of the claim for specific performance.

D. Compensatory, Incidental and Consequential Damages.

If the seller's default was in good faith and the property has not been sold, the buyer's measure of damages is the buyer's "out-of-pocket" damages, such as any money paid to the seller, interest on that sum and any other actual damages incurred as a result of the default.[50] If the default was in bad faith and the property has not yet been sold, the buyer is entitled to recover its "benefit of the bargain" damages, which are measured as the difference in the purchase price in the contract for sale and the fair market value of the property at the time of the breach.[51] Bad faith is determined by the intent of the seller and is deemed present where the seller knew or should have known that the seller could not perform under the contract for sale, or where the seller simply refuses to close on the sale without legal justification.[52]

Should a seller default under a contract by failing to close and *later sells* the property to another buyer, the initial buyer may pursue the seller for "benefit of the bargain" damages, measured by all monies paid to the seller, interest on that amount, special damages and any profit made by the seller on the subsequent sale.[53] The foregoing is the rule regardless of whether the seller's default was in good faith or bad faith.

E. Rescission.

For a buyer to rescind a contract for sale, the buyer must re-convey the real property if the sale has already closed and return all benefits received from the sale. In return, the buyer is entitled to a refund of all purchase money paid to the seller and the rescission of any purchase money note and mortgage held by the seller or others who are not good faith purchasers for value, such as holders in due course.[54]

A buyer, who in good faith has made improvements to the property, is also entitled to receive the reasonable value of those improvements upon rescission of the contract for sale.[55] A trial court is not permitted to rescind a contract for sale and a deed where it is proven that rescission will not return the parties to their *status quo* prior to the sale, particularly where one party has made improvements to the property for which no

[48]*Meyer v. Schwartz*, 391 So. 2d 310, 310-11 (Fla. 4th DCA 1980).
[49]*Sparks v. Charles Wayne Group*, 568 So. 2d 512, 515 (Fla. 5th DCA 1990) receded on other grounds by *Chiusolo v. Kennedy*, 589 So. 2d 420, 421 (Fla. 5th DCA 1991); limitation on other grounds recognized by *Chiusolo v. Kennedy*, 614 So. 2d 491, 492-93 (Fla. 1993).
[50]*See Avellone v. Mehta*, 544 So. 2d 1122, 1123 (Fla. 3d DCA 1989).
[51]*Port Largo Club, Inc. v. Warren*, 476 So. 2d 1330, 1333 (Fla. 3d DCA 1985).
[52]*Wolofsky v. Behrman*, 454 So. 2d 614, 615-16 (Fla. 4th DCA 1984).
[53]*See Coppola Enters., Inc. v. Alfone*, 531 So. 2d 334, 335-36 (Fla. 1988).
[54]*See Niesz v. Gehris,* 418 So. 2d 445, 447-48 (Fla. 5th DCA 1982).
[55]*Royal v. Parado*, 462 So. 2d 849, 856 (Fla. 1st DCA 1985)*; Walker v. Galt*, 171 F.2d 613, 615-16 (5th Cir. 1948).

compensation is or can be received.[56] This rule may not be applicable if the improvements were made by a party in possession *after* suit was instituted.[57]

F. Reformation.

Reformation is proper to equitably reform an executed agreement to effect the mutual intent of an agreement previously entered into by the parties, but which by mistake of the draftsman, does not fulfill the parties' mutual intent. However, If merely one party is mistaken as to the legal meaning, scope and effect of the agreement he or she has signed, then reformation is only permitted when the other party has engaged in inequitable conduct.[58]

G. Injunctions.

A temporary injunction is an extraordinary remedy. The movant must prove all essential elements for a temporary injunction with competent, admissible evidence.[59] Those elements are as follows: (1) the likelihood of irreparable harm; (2) the unavailability of an adequate remedy at law; (3) a clear legal right to the relief requested and a substantial likelihood of success on the merits; and (4) the injunction is in the public interest.[60]

A prospective irreparable injury must be more than a remote possibility; it must be imminent and probable.[61] There must be a reasonable probability, not a bare possibility, that a real irreparable injury will occur.[62] If the irreparable injury is doubtful or contingent, injunctive relief may not be granted.[63]

Irreparable harm and the lack of an adequate remedy at law are not established where any potential loss can be adequately compensated by a monetary judgment.[64] The irreparable injury must be of a peculiar nature, so that monetary compensation will not be adequate.[65] Similarly, collectability of a monetary judgment is not to be considered by the court in determining whether the movant has an adequate legal remedy.[66]

IV. Collection Issues

A. Attachment, Garnishment & Levy.

A writ of attachment creates a lien against the non-exempt real or personal property before or after a debt becomes due. A writ of attachment may be obtained when a debt is due where the debtor:

---

[56] *Royal*, 462 So. 2d at 856.
[57] *See Walker*, 171 F.2d at 615.
[58] *Jacobs v. Parodi*, 39 So. 833, 836-37 (Fla. 1905); *Smith v. Royal Auto. Group, Inc.*, 675 So. 2d 144, 150 (Fla. 5th DCA 1996).
[59] *State Agency for Health Care Admin. v. Cont'l Car Servs., Inc.*, 650 So. 2d 173, 175 (Fla. 2d DCA 1995).
[60] *Id.*; *Richard v. Behavioral Healthcare Options, Inc.*, 647 So. 2d 976, 978 (Fla. 2d DCA 1994).
[61] *City of Coral Springs v. Fla. Nat'l Prop., Inc.*, 340 So. 2d 1271, 1272 (Fla. 4th DCA 1976).
[62] *Miller v. MacGill*, 297 So. 2d 573, 575 (Fla. 1st DCA 1974); *A1A Mobile Home Park, Inc. v. Brevard County*, 246 So. 2d 126, 128 (Fla. 4th DCA 1971).
[63] *Sanstrom v. Garren*, 187 So. 2d 366, 367 (Fla. 3d DCA 1966); *First Nat'l Bank in St. Petersburg v. Ferris*, 156 So. 2d 421, 424 (Fla. 2d DCA 1963).
[64] *B.G.H. Ins. Syndicate, Inc. v. Presidential Fire & Cas. Co.*, 549 So. 2d 197, 198 (Fla. 3d DCA 1989).
[65] *First Nat'l Bank in St. Petersburg*, 156 So. 2d at 423.
[66] *Employee Benefit Plans, Inc. v. Radice Corporate Ctr. I, Inc.*, 593 So. 2d 1125, 1127 (Fla. 4th DCA 1992).

> 1. Will fraudulently part with the property before judgment can be obtained against him or her.
>
> 2. Is actually removing the property out of the state.
>
> 3. Is about to remove the property out of the state.
>
> 4. Resides out of the state.
>
> 5. Is actually moving himself or herself out of the state.
>
> 6. Is about to move himself or herself out of the state.
>
> 7. Is absconding.
>
> 8. Is concealing himself or herself.
>
> 9. Is secreting the property.
>
> 10. Is fraudulently disposing of the property.
>
> 11. Is actually removing himself or herself beyond the limits of the judicial circuit in which he or she resides.
>
> 12. Is about to remove himself or herself out of the limits of such judicial circuit.[67]

Any creditor may have an attachment on a debt not due, when the debtor:

> 1. Is actually removing the property out of the state.
>
> 2. Is fraudulently disposing of the property to avoid the payment of his or her debts.
>
> 3. Is fraudulently secreting the property to avoid payment of his or her debts.[68]

Once the writ is issued and served, the creditor must complete the lawsuit and then execute upon the property through a sheriff's sale.[69] Before any writ of attachment will issue, the creditor must post a bond equal to double the debt demanded. This bond will be security for the debtor should the court later determine the writ was improperly obtained.[70]

After a monetary judgment is obtained, a writ of garnishment is available to a creditor to collect non-exempt money owed to a buyer by a third-party:

> After judgment has been obtained against the defendant but before the writ of garnishment is issued, the plaintiff, the plaintiff's agent or attorney, shall file a motion (which shall not be

[67] FLA. STAT. § 76.04 (2017).
[68] FLA. STAT. § 76.05 (2017).
[69] FLA. STAT. §§ 76.13-.17 (2017).
[70] *See* FLA. STAT. § 76.12 (2017).

> verified or negative defendant's exemptions) stating the amount of the judgment. The motion may be filed and the writ issued either before or after the return of execution.[71]

Even before a monetary judgment is obtained, a writ of garnishment is available to a creditor to collect non-exempt money owed to the debtor by a third-party upon compliance with the following procedure:

1. To obtain issuance of the writ, the plaintiff, or the plaintiff's agent or attorney, shall file in the court where the action is pending a verified motion or affidavit alleging by specific facts the nature of the cause of action; the amount of the debt and that the debt for which the plaintiff sues is just, due, and unpaid; that the garnishment is not sued out to injure either the defendant or the garnishee; and that the plaintiff believes that the defendant will not have in his or her possession, after execution is issued, tangible or intangible property in this state and in the county in which the action is pending on which a levy can be made sufficient to satisfy the plaintiff's claim. The writ of garnishment shall set forth a notice to the defendant of the right to an immediate hearing for dissolution of such writ pursuant to s. 77.07. Upon issuance of the writ of garnishment, the clerk of the court shall provide by mail a copy of the writ to the defendant.

2. Except when the plaintiff has had an attachment writ issued, no writ of garnishment before judgment shall issue until the plaintiff, or the plaintiff's agent or attorney, gives a bond with surety to be approved by the clerk payable to the defendant in at least double the amount of the debt demanded, conditioned to pay all costs, damages, and attorney's fees that the defendant sustains in consequence of the plaintiff's improperly suing out the writ of garnishment. A garnishment bond is not void or voidable because of an informality in it, nor shall the obligors be discharged because of the informality, even though the garnishment is dissolved because of the informality.

3. The motion or pleading need not negative any exemptions of the defendant.[72]

A continuing writ of garnishment is similarly available to collect a debtor's non-exempt wages, provided the debtor is not considered the "head of household":

> Notwithstanding any other provision of this chapter, if salary or wages are to be garnished to satisfy a judgment, the court shall issue a continuing writ of garnishment to the judgment debtor's employer which provides for the periodic payment of a portion of the salary or wages of the judgment debtor as the salary or wages become due until the judgment is satisfied or until otherwise provided by court order. . . .[73]

B. Fraudulent Transfers & Tracing Assets.

A corporate buyer may go out of business and default on its contract for sale with the seller. The seller may then obtain a monetary judgment against the corporate buyer only to learn that the corporation no longer has any assets to satisfy the judgment. If the corporation had substantial assets at one time, it is prudent for the seller to learn how those assets were disposed of by the buyer. Given the right facts, the individual principals

[71] FLA. STAT. § 77.03 (2017).
[72] FLA. STAT. § 77.031 (2017).
[73] FLA. STAT. § 77.0305 (2017).

of the corporate buyer and other persons who received the corporate assets may be liable for the seller's judgment.

Several statutory tools are available to attack a fraudulent transfer, including setting aside the transfer and levying upon the assets transferred or other substitute property of the transferee. The following are the operable fraudulent transfer statutes:

> **56.29. Proceedings supplementary.**
>
> (6)(a) When, within 1 year before the service of process on him or her, defendant has had title to, or paid the purchase price of, any personal property to which the defendant's spouse, any relative, or any person on confidential terms with defendant claims title and right of possession at the time of examination, the defendant has the burden of proof to establish that such transfer or gift from him or her was not made to delay, hinder, or defraud creditors.
>
> (b) When any gift, transfer, assignment or other conveyance of personal property has been made or contrived by the judgment debtor to delay, hinder, or defraud creditors, the court shall order the gift, transfer, assignment or other conveyance to be void and direct the sheriff to take the property to satisfy the execution. This does not authorize seizure of property exempted from levy and sale under execution or property which has passed to a bona fide purchaser for value and without notice. Any person aggrieved by the levy may proceed under ss. 56.16-56.20.[74]
>
> **726.105. Transfers fraudulent as to present and future creditors**.
>
> (1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> (a) With actual intent to hinder, delay, or defraud any creditor of the debtor; or
>
> (b) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
>
> > 1. Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
> >
> > 2. Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

[74] FLA. STAT. § 56.29(6) (2017).

(2) In determining actual intent under paragraph (1)(a), consideration may be given, among other factors, to whether:

(a) The transfer or obligation was to an insider.

(b) The debtor retained possession or control of the property transferred after the transfer.

(c) The transfer or obligation was disclosed or concealed.

(d) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.

(e) The transfer was of substantially all the debtor's assets.

(f) The debtor absconded.

(g) The debtor removed or concealed assets.

(h) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred.

(i) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.

(j) The transfer occurred shortly before or shortly after a substantial debt was incurred.

(k) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.[75]

726.106. Transfers fraudulent as to present creditors.

(1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

(2) A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.[76]

[75]FLA. STAT. § 726.105 (2017).
[76]FLA. STAT. § 726.106 (2017).

In addition to setting aside a fraudulent transfer, a corporation's shareholders may be liable for the corporation's debts to the extent that they received any distributions of the corporation's assets at a time when they knew or should have known that the corporation had the outstanding debts. "[T]he properties of a corporation are to be deemed a trust fund for the payment of the debts of the corporation, so that the creditors have a lien upon it or right of priority out of it in preference to any shareholder of the corporation."[77] A corporation is required to maintain a sufficient amount of its funds to pay the claims of its creditors, including its contingent creditors.[78]

Similarly, Florida Statutes will hold the directors of a corporation personally liable for any distributions to shareholders that the directors affirmatively authorize in violation of Florida law. The directors of a corporation may be personally liable for distributions if the effect of which precludes the corporation's ability to pay its debts as they become due. "No distribution may be made ***if, after giving it effect***: (a) The corporation would not be able to pay its debts ***as they become due*** in the usual course of business; or (b) The corporation's total assets would be less than the sum of its total liabilities. . . ."[79] Any director who votes for or assents to a distribution made in violation of Florida Statutes is personally liable for the amount of the distribution that exceeds what could have been distributed in accordance with Florida law.[80]

C. Piercing the Corporate Veil.

One of the advantages of doing business though a corporation is that its shareholders are not liable for the corporation's debts. Nevertheless, this corporate shield or veil may be pierced under limited circumstances.

Florida courts will hold a corporation's shareholders liable for the corporation's debts where the corporation was organized or used to mislead its creditors, to perpetrate a fraud on the corporation's creditors or the corporation has been used for some illegal purpose.[81] The mere ownership of a corporation by one or a handful of shareholders, however, is an insufficient reason to pierce the corporate veil.[82]

"A critical issue in the determination of whether the corporate veil will be pierced for the imposition of personal liability is whether the corporate entity was organized or operated for an improper or fraudulent purpose."[83] Unless there is a showing that a corporation was formed or employed for an unlawful or improper purpose, such as subterfuge to mislead or defraud creditors, to hide assets, to evade the requirements of a statute or some betrayal of trust, the corporate veil cannot be pierced.[84]

The rule of law to hold a parent corporation liable for the debts of its subsidiary is similar to the above rules. "[T]o pierce the corporate veil under Florida law, it must be shown not only that the wholly-owned subsidiary

[77]*Beach v. Williamson*, 83 So. 860, 863 (Fla. 1919); *see U.S. Fire Ins. Co. v. Morejon*, 338 So. 2d 223, 224 (Fla. 3d DCA 1976), *cert. den.* 345 So. 2d 426 (Fla. 1977).
[78]*See U.S. Fire Ins. Co.*, 338 So. 2d at 224; *see also Diamond Int'l Corp. v. SJH EntersEnter., Inc.,* 487 So. 2d 1089, 1091 (Fla. 5th DCA 1986).
[79]FLA. STAT. § 607.06401(3) (2017) (emphasis added).
[80]FLA. STAT. § 607.0834(1) (2017).
[81]*Gershuny v. Martin McFall Messenger Anesthesia Prof'l Ass'n*, 539 So. 2d 1131, 1133 (Fla. 1989); *Dania Jai-Alai Palace, Inc. v. Sykes*, 450 So. 2d 1114, 1121 (Fla. 1984); *Aztec Motel, Inc. v. State ex rel. Faircloth*, 251 So. 2d 849, 852 (Fla. 1971); *Advertects, Inc. v. Sawyer Indus.*, 84 So. 2d 21, 23 (Fla. 1955); *McFadden Ford, Inc. v. Mancuso*, 766 So. 2d 241, 242 (Fla. 4th DCA 2000); *see Gen. Builders Corp. of Ft. Lauderdale, Inc. v. Sisk*, 461 So. 2d 104, 104 (Fla. 1984).
[82]*Advertects, Inc.,* 84 So. 2d at 23.
[83]*Kanov v. Bitz*, 660 So. 2d 1165, 1166 (Fla. 3d DCA 1995).
[84]*See Aztec Motel, Inc.*, 251 So. 2d at 852; *Munder v. Circle One Condo., Inc.*, 596 So. 2d 144, 145 (Fla. 4th DCA 1992).

is a mere instrumentality of the parent corporation but also that the subsidiary was organized or used by the parent to mislead creditors or to perpetrate a fraud upon them."[85]

V. Business Practices To Avoid (And Win) Disputes

Legal disputes are won and lost based upon various factors, including the quality and persuasiveness of the evidence. Although a seller's or buyer's termination of a contract for sale must comply with the pre-requisites of the contract for sale and Florida law, proving the presence of lawful grounds to terminate the contract is a separate issue of concern.

At a minimum, sellers and buyers should prepare contemporaneous memoranda or telephone logs of all substantive conversations regarding the negotiation and performance of contracts for sale. Even better, confirming letters create a stronger evidentiary position in the event of a dispute.

This practice serves two functions. First, a confirming letter provides a written instrument for the parties to refer back to in the event of a good faith misunderstanding. Second, a confirming letter, log or memorandum is physical evidence of the facts at the time they occurred. This physical evidence, if made contemporaneous with the conversation and in the normal course of business, is generally admissible in court. When faced with a "he said, she said" claim or defense, the party who also has a contemporaneous document evidencing the conversation will, more often than not, prevail in the dispute. Some examples of these practices are reflected in the Appendix.

VI. Disclaimer

This commentary is for informational purposes only, is not legal advice and does not establish an attorney-client relationship. You should seek appropriate legal advice from a licensed attorney before making any decision based on these comments. The hiring of a lawyer is an important decision that should not be based solely upon advertisements.

[85] *Ocala Breeders' Sales Co. v. Hialeah, Inc.*, 735 So. 2d 542, 543 (Fla. 3d DCA 1999); *USP Real Estate Inv. Trust v. Disc. Auto Parts, Inc.*, 570 So. 2d 386, 390 (Fla. 1st DCA 1990).

Appendix

Memorandum

To: XYZ file
From: ABC
Date: June 15, 2014

Re: Conference with John Doe, Broker for XYZ Corp.

This morning, I met with John Doe, broker for XYZ corp. We discussed the fact that XYZ has failed to make its deposit for the contract for sale on the Zoomer Property. He stated that his client, Jason Roe of XYZ Corp., did not have any good reason for not making the deposit, which was now over 90 days past due. I told John that, if the deposit was not made within 10 days, I would declare a breach of the contract.

John assured me that the payment would be made by that date.

ABC's signature
June 15, 2004

ABC Corp. Telephone Log

ABC Employee Name: ABC
ABC Account: XYZ corp.

Date	Name of Caller	Log of Discussion
6/15/14	ABC	I called John Doe today about XYZ's failure to make the deposit due on the contract for sale. I told him that the deposit was over 90 days past due and the matter would be turned over to our lawyer, unless we received the deposit within ten days. John assured me that the payment would be made by that date. I told John that I could not give his client any further extensions. John acknowledged this. Nothing further was discussed. *ABC's signature*

ABC's Letterhead

June 15, 2015

John Doe, Broker for XYZ Corp.
Address

Re: XYZ Corp's account number with ABC

Dear Mr. Doe:

Thank you for meeting with me this morning. As we discussed, XYZ has failed to make its deposit for the contract for sale on the Zoomer Property. I appreciate your candid statement that your client, XYZ Corp., did not have any good reason for not making the deposit, which is now over 90 days past due. I told you that, if the payment was not made within 10 days, I will be forced to declare a breach of the contract. In response, you advised that the payment would be made by that date. Please allow me to reiterate that I cannot give your client any further extensions on this matter.

Very truly yours,

ABC's signature
Print Name and Title

cc. Gary S. Salzman, Esq.