

DIRT Periodic Development for Tuesday, September 30, 2014  
*J. Milton Dadeland, LLC v. Abala, Inc.*

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**SYNOPSIS: A real estate broker may, by contract, impose a valid lien on the property sold to aid in recovery of broker's commission.**

*J. Milton Dadeland, LLC v. Abala, Inc.*, 145 So.3d 175 (Fla. App. 2014)

Colony owned a piece of commercial real estate, and signed a listing agreement with Abala, a broker, to sell it. Abala included in the listing agreement the following: "Broker has the right to place a Lien on the property for the full amount of commission due."

Shortly thereafter Colony signed a contract of sale of the property for \$25 million with Dadeland. This was short sale, approved by the existing lender. Then, before the closing, Abala (apparently worried that Colony was going to stiff it for the commission), recorded a notice of lien in the public records. When Dadeland discovered the lien prior to closing, it was (understandably) concerned. Dadeland brought a suit against Colony to remove the lien, but the suit was settled by giving Dadeland a price reduction on the sale of \$570,000. However, the lien was still there.

The closing occurred, and the deed acknowledged that Abala claimed a lien on the property. (Apparently, Abala was not paid the commission at the closing.) Following the closing, Dadeland sued Abala to have the lien removed. However, the trial court found the lien valid and refused to remove it. This appeal followed.

Florida has a statute providing for a broker's lien on the undisbursed "net proceeds" of the sale of real estate; see Fla. Stat. sec. 475.703. However, the statute expressly states that this lien "does not attach to any interest in real property."

The court found that this statutory language was irrelevant, since Abala's lien was not under the statute at all. It pointed out that a lien under the statute would have been worthless in any event, since this was a short sale, so that after paying the mortgage there were no "net proceeds." The court concluded that the broker was free to impose a lien on the real estate by contract, completely independently of the statute. It upheld the lien for \$1.47 million, which was 6% of the final sales price.

Another Florida statute seemed to recognize this concept implicitly. It expressly prohibited a broker from claiming a lien on real estate that the broker knows to be false – which seems to suggest that if the claim underlying the lien is valid, a lien imposed on the real estate pursuant to contract is OK. Perhaps Dadeland would have been able to

take free of the lien if it had been a BFP, but it obviously wasn't; it knew all about the lien, which was even mentioned in the deed to Dadeland. And besides that, the claim of lien was recorded, giving Dadeland record notice of it.

**COMMENT:** More than half of the states have passed statutes in recent years providing brokers a lien on the real estate to help them recover their commissions. These statutes are almost all limited to sales of commercial (not residential) property, and they usually require recording of the claim of lien in the local real estate records. The interesting thing about the Dadeland case is that it suggests such statutes are unnecessary; a lien could be created by language in the listing agreement even if there were no statute specifically authorizing it.

One other implication of the opinion is that a purchaser of real estate would be well-advised to obtain from the broker a lien waiver at the closing. This precaution would be similar to the practice of getting mechanics lien waivers from contractors and subcontractors who are known to have done recent work on the property. In this case, Dadeland not only didn't get a lien waiver, but knowingly bought subject to Abala's claim of lien. It could hardly have been surprised at the result.

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