

## **Statute Requiring Lenders to Notify Contractors of Decisions to Cease Funding on Construction Loans Precludes Claims for Equitable Lien and Unjust Enrichment**

**By Tom Wert**, Board Certified Specialist – Construction Law

Two weeks ago, in a case of first impression, the First District Court of Appeal ruled that Section 713.3471, Florida Statutes, barred a contractor's common law claims for equitable lien and unjust enrichment against a lender, which decided to cease funding on a construction loan, because "the statute expressly precludes such claims and is so repugnant to the existence of the common law remedies that the two cannot coexist." *Jax Utilities Management, Inc. v. Hancock Bank*, 2015 WL 3622360 (Fla. 1st DCA, June 11, 2015). In *Jax Utilities*, the construction lender on a \$16 million housing development project decided to cease making advances under the loan agreement before all the funds had been disbursed, due to the developer's default. Subsequently, the developer failed to pay the general contractor \$477,000 for work completed by the contractor. The contractor brought an action against the lender asserting equitable lien and unjust enrichment claims. Florida common law allows equitable lien and unjust enrichment claims against construction lenders to combat fraud, other misconduct, and where all of the proceeds of a construction loan have not been disbursed, but construction has been completed, giving the lender "more security than it bargained for." *J.G. Plumbing Service, Inc. v. Coastal Mortgage Co.*, 329 So. 2d 393, 395 (Fla. 2d DCA 1976). The contractor, in *Jax Utilities*, did not assert a claim under Section 713.3471, Florida Statutes, which provides a claim to contractors who are not timely notified a construction lender's decision to stop making advances prior to the distribution of all funds available under a construction loan. The trial court entered summary judgment in favor of the lender based, in part, upon the lender's affirmative defense that Section 713.3471 precluded both of the contractor's equitable lien and unjust enrichment claims, reasoning that the Legislature clearly intended to alter the common law when it enacted the statute.

Section 713.3471, entitled "Lender responsibilities with construction loans," was enacted in 1992 as part of the Construction Lien Law, and governs construction lenders who, prior to the distribution of all funds available under a loan, make a final determination that they will cease further advances. Such lenders must give notice of the decision to cease funding to the contractor and other lienors within five days and if the lender complies with this notification duty, it has no liability to the contractor or lienors. If the lender fails to comply with this notification duty, it is liable to the contractor, but the damages are calculated as prescribed by the statute, unless the noncompliance was intended to defraud the contractor. Under § 713.3471, the statutory claim may not interfere with any foreclosure action and "may not be the basis of any claim for an equitable lien or for equitable subordination of the mortgage lien ...." Thus, the statute provides benefits and burdens to both lenders and contractors. Section 713.3471 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. The *Jax Utilities* court concluded the statute "constitutes comprehensive regulation in this narrow area."

Courts generally presume that the common law remains in effect when a statute is enacted in derogation of the common law, but this presumption is inapplicable where the statute expressly says otherwise or “is so repugnant to the common law that the two cannot coexist.” Major League Baseball v. Morsani, 790 So. 2d 1071 (Fla. 2001). The *Jax Utilities* court held that § 713.3471 does both because it 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. The First District Court of Appeal went on to say that common law claims for equitable lien and unjust enrichment would conflict with the statute because if a lender complies with § 713.3471, it has no liability. If the lender fails to comply, a contractor may seek damages as prescribed by the statute. This reasoning was bolstered because § 713.3471 lacks a provision expressly preserving common law remedies, e.g., § 403.191(1), Fla. Stat. (2011) (“Nothing contained herein shall be construed to abridge or alter rights of action or remedies in equity under the common law ....”), which the Legislature routinely includes where it does not intend to displace the common law.

As a result, the *Jax Utilities* court held that § 713.3471 precluded the contractor’s equitable lien and unjust enrichment claims because the plain language of the statute evinces a legislative intent to displace the common law remedies and the statute is so repugnant to the common law remedies that the two cannot coexist.

This case is clearly a win for lenders and a warning to contractors, subcontractors, materialmen and suppliers. The warning is this: timely serve your notices to owner and, if a project fails and the construction lender stops funding the project without providing timely notice to you, preserve your claim under Section 713.3471 because you probably will not be able to bring equitable claims in the alternative, in the absence of fraud by the lender.<sup>i</sup>

Please address any questions with regard to the implications of the *Jax Utilities* decision to the following Roetzel Construction Law attorneys.

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<sup>i</sup> The *Jax Utilities* reasoning would probably not apply to cases where the lender’s noncompliance with § 713.3471 was intended to defraud the contractor because the Legislature expressly provided that the statutory damages do not apply to such circumstances.