O.A. 4-7-94 DF

IN THE SUPREME COURT
STATE OF FLORIDA

FLANIGAN'S ENTERPRISES, INC.,

Petitioner,

vs.

BARNETT BANK OF NAPLES, et al.,

Respondents.
_____/

CASE NO.: 81,563
5TH DCA NO.: 92-104

PETITIONER'S INITIAL BRIEF

ON REVIEW FROM THE DISTRICT COURT OF APPEAL,
FIFTH DISTRICT, STATE OF FLORIDA

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TABLE OF CONTENTS

TABLE OF CITATIONS

STATUTES

FEDERAL STATUTES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

In this brief, the Petitioner, Flanigan's Enterprises, Inc., will be called Flanigan. The Respondent, Barnett Bank of Naples, Inc., will be called Barnett.

References to pages of the record will be designated by (R.____) and in the case of exhibits by (Ex.____), with the respective page number of the record or exhibit shown. References to the appendix will be designated by (A.____) with the tab number shown.

STATEMENT OF THE CASE AND FACTS

STATEMENT OF THE CASE

This is an appeal from a decision of the appellate court which affirmed the final judgment of the circuit court denying Flanigan recovery against Barnett under section 818.01, Florida Statutes (1983).

On August 20, 1985, Flanigan filed a three-count complaint against Barnett, among others, Count I of which was an action against Barnett for unlawful conversion. (R.186-217). The other counts of the complaint were directed to the remaining Defendants. Count I alleged that Barnett had unlawfully converted a 4-COP Beverage Liquor License, license no. 58-312 ("the Liquor License") by selling it to Hickory Point Industries, Inc. ("Hickory Point"). (R.187-195). Flanigan alleged an interest in the Liquor License superior to any interest of Barnett by virtue of its landlord's lien pursuant to section 83.03, Florida Statutes (1977). (R.190).

Barnett moved to dismiss the complaint. (R.221-223). On June 17, 1986, the court granted the motion as to Count I, the only count directed to Barnett. (R.231-232). On July 23, 1986, Flanigan filed an amended complaint (R.234-262) to which Barnett responded by filing a motion to dismiss. (R.265-268). On October 22, 1986, the court dismissed the amended complaint as to

Barnett and granted Flanigan leave to file a second amended complaint. (R.270).

On December 4, 1986, Flanigan filed a motion for stay of proceedings (R.272-273) which the Court granted on December 18, 1986. (R.274). The case remained stayed until January 27, 1988 when Flanigan filed a second amended complaint (R.276) to which Barnett responded by filing a motion to dismiss. (R.304-307). On June 15, 1988 the court dismissed the action as to Barnett, without prejudice. (R.308).

Flanigan filed a third amended complaint (R.309-334) to which Barnett responded by filing a motion to dismiss. (R.335-339). On October 12, 1988, the court entered an order deferring its ruling on the motion to dismiss and ordering Barnett to file an answer. (R.342). On October 31, 1988, Barnett filed its answer and affirmative defenses. (R.344-347).

On March 5, 1990, by stipulation of the parties (R.391), Flanigan filed its fourth amended complaint in which it added a cause of action against Barnett for violation of section 818.01, Florida Statutes (1983). (R.369-390). Barnett filed an answer and affirmative defenses to the fourth amended complaint on April 2, 1990. (R.394-399).

On October 2, 1990, Flanigan filed a motion for partial summary judgment against Barnett on the issue of liability on Count II of the fourth amended complaint (R.483-484) and a memorandum of law in support. (R.485-496). On October 3, 1990, Barnett filed a motion for final summary judgment. (R.499-506).

On April 23, 1991, the court entered its order on Plaintiff's Motion for Partial Summary Judgment and Defendant's Motion for Final Summary Judgment in favor of Flanigan on the issue of liability under Count II of the Fourth Amended Complaint. (R.540-544, A.Tab 1).

The parties entered into a pre-trial joint stipulation (R.570-575) and the case proceeded to

trial on Count II of the fourth amended complaint on the issue of damages and the defenses of estoppel, laches and waiver. (R.570).

The matter was tried non-jury on September 18 and 20, 1991, before the Honorable Lawrence R. Kirkwood. On October 11, 1991, the trial court entered final judgment in favor of Barnett (R.645) and made findings of fact. (R.641-643, A.Tab 2). The trial court found that Barnett had proven the affirmative defense of estoppel, but made an additional finding that Flanigan's damages could not exceed $18,281.55. (R.641-643, A.Tab 2).

Flanigan filed a post-judgment motion in the alternative for rehearing or for amended findings of fact and conclusions of law, and to amend judgment accordingly on October 21, 1991 (R.648-653) which was denied on December 11, 1991 (R.659). On January 9, 1992, Flanigan filed an appeal to the Fifth District Court of Appeal seeking review of the trial court's final order denying it recovery based on its finding of estoppel. (R.660). Barnett filed a cross-appeal seeking review of the trial court's finding that it had violated s. 818.01. (R.664-665).

The District Court held that the record supported the trial court's conclusion that Flanigan was estopped from asserting its landlord's lien. The court further held that the written consent requirement of s. 818.01 has been impliedly repealed by the Uniform Commercial Code and, therefore, Barnett's actions could not subject it to liability under section 818.01. (A.Tab 3). In its opinion, the Court acknowledged conflict with decisions from the Third and Fourth District Courts of Appeal. (A.Tab 3).

This appeal was filed on April 5, 1993 and on December 28, 1993, this Court entered its Order Accepting Jurisdiction and Setting Oral Argument.

STATEMENT OF THE FACTS

Petitioner, Flanigan's Enterprises, Inc. f/k/a Castlewood International Corporation ("Flanigan"), as lessee, entered into a lease dated July 26, 1983 with Hyman Lake, as landlord, for rental of certain real property located in Orange County, Florida on South Orange Blossom Trail ("the Leased Premises") for the operation of a lounge known as "Big Daddy's." (R.125,571).

Flanigan operated the Big Daddy's lounge business until January 26, 1978 when it entered into a sublease agreement with Level III of Orlando, Inc. ("Level III") (R.125,571). Under the sublease, Level III took possession of the Leased Premises and continued the operation of a lounge business. (R.571). The sublease provided that upon default by Level III, Flanigan "shall have all the rights and remedies available at law to a landlord for breach of lease." (R.705, Ex.2). The prime lease which was incorporated into the sublease agreement granted Flanigan a first lien upon any liquor license and further provided that such lien was "in addition to the rights of a landlord given under the statutes of the state of Florida, which are now or might thereafter be in effect." (R.687, Ex.1). The term of the sublease commenced January 28, 1978 and was to expire June 30, 1999. (R.571).

In conjunction with the sublease agreement, Flanigan sold to Level III a 4-COP liquor license, license number 58-312 (the " Liquor License" or "License"), as well as its furniture, fixtures, equipment, business goodwill and interest pertaining to the Leased Premises. (R.571). The sublease agreement granted Flanigan a security interest in the Liquor License. (R.704). Level III took possession of the Leased Premises on January 28, 1978 (R.571) and at that time, a landlord's lien arose in favor of Flanigan pursuant to section 83.08, Florida Statutes (1977), which covered all property usually kept on the Leased Premises. (R.41, 45, 540). Level III operated a lounge business

on the Leased Premises until approximately July 14, 1984. (R.571). The Liquor License remained on the Leased Premises as required by section 561.23(2), Florida Statutes, from January 28, 1978 until approximately July 14, 1984. (R.571).

On April 8, 1983, Level III granted Barnett a security interest in the Liquor License as collateral for a loan made to a related corporation known as Naples Beverage Group, Inc. ("Naples Beverage"). (R.571-572).

It was Barnett's standard practice to request a landlord's lien waiver when making a loan to a borrower that leases its business premises. (R.74). In following its standard practice, Barnett required Naples Beverage to furnish Barnett with a landlord's lien waiver from Flanigan since part of the collateral for the loan would be located on the premises Flanigan sublet to Level III. (R.68). To comply with that requirement, Naples Beverage's attorney, Thomas R. Grady, mailed to Flanigan a waiver form and a letter dated April 25, 1983 requesting Flanigan to waive its landlord's lien. (R.129,720-721, Ex.5).

Flanigan responded to Mr. Grady's letter by letter dated May 4, 1983, in which it informed Mr. Grady, in part, that "Flanigan's does not wish to waive its landlord lien against the property at this location which is Flanigan's only security for timely payments of rent and other obligations under the sublease agreement." (R.129-130,725, Ex.7). Barnett's attorney, Joseph McMackin, was involved with the loan prior to the closing (R.78) and testified that Mr. Grady provided him copies of correspondence between Naples Beverage and Flanigan, and that it was reasonable to assume that he received a copy of Flanigan's letter. (R.107). In any event, McMackin admits that at the time of the loan closing, he was aware that Flanigan was the landlord (R.83) and that Flanigan refused to waive its landlord's lien. (R.572).

On or about December 12, 1983, Level III changed its name to Spirits Orlando South, Inc. (R.572) (for purposes of continuity, the corporate entity will be referred to as "Level III" throughout the brief).

On or about July 14, 1984, Level III closed its doors and ceased doing business at the Leased Premises. (R.572). Soon after closing, Level III surrendered the Liquor License to Barnett in partial consideration for its loan obligations to Barnett. (R.572).

On or about August 9, 1984, Barnett submitted to the Department of Business Regulation-Division of Alcoholic Beverages and Tobacco an application for an alcoholic beverage license together with a supporting affidavit in an effort to transfer the Liquor License from Level III to Barnett. (R.572). Barnett intended to hold the license in escrow until it could be sold as part of the liquidation of the collateral securing the loan obligations to Barnett. (R.572).

On or about August 15, 1984, Barnett began negotiations for the sale of the Liquor License to Hickory Point Industries, Inc. ("Hickory Point"). (R.572). Barnett and Hickory Point entered into an oral agreement on September 28, 1984 for the sale of the License. (R.91-92). At that time, Hickory Point escrowed $11,000.00 (10 % of the purchase price) with Joseph McMackin's law firm, Quarles & Brady, P.A., as a statement of good faith and intention to purchase the License. (R.92). In order to close the sale, Barnett's attorney, McMackin, agreed with Hickory Point's representatives to meet in Orlando on October 10, 1984 to sign the written contract and go to the Department of Revenue and the Division of Alcoholic Beverages to begin the process of having the License transferred. (R.92).

In the meantime, Level III had failed to make rent payments to Flanigan under the sublease since May, 1984. (R.131,573). When Level III failed to pay any rent for four (4) consecutive

months, its account was turned over to Flanigan's general counsel, Jeffrey Kastner. (R.132). On or about September 5, 1984, Kastner forwarded to Level III a three (3) day notice and demand for payment or to vacate the premises. (R.132). Later, after learning that Level III had already vacated the premises, Kastner placed a telephone call to Level III's parent company, Collier County Enterprises, to inquire about the status of the Liquor License. (R.132-133). He was informed that Barnett had obtained the Liquor License and was provided Joseph McMackin's name and telephone number as Barnett's attorney. (R.132-133).

Kastner called McMackin on the telephone in early October, 1984. (R.183). By this time, Barnett had already agreed to sell the Liquor License to Hickory Point. (R.183). Kastner told McMackin that Flanigan was the landlord and that it had a claim against the License. (R.183). Kastner explained to McMackin that on page three, paragraph six of its sublease agreement with Level III, Flanigan reserved all rights and remedies available at law to a landlord for breach of a lease. (R.135). McMackin confirmed that Barnett possessed the License (R.133), but never divulged that Barnett was attempting to sell it. (R.137).

At trial, there was conflicting testimony from Mr. Kastner and Mr. McMackin as to the substance of the telephone conversation regarding the nature of Flanigan's interest in the Liquor License. Kastner and McMackin both testified that McMackin asked whether Flanigan had perfected its security interest pursuant to the requirements of Chapter 679, Florida Statutes. (R.94,133). Kastner conceded that Flanigan had failed to record its financing statements and that its security interest was unperfected. (R.94,133). Nevertheless, Kastner insisted that as a landlord, Flanigan had lien rights through the sublease agreement (R.133) and that even though it failed to record the UCC documents, Flanigan had "landlord rights." (R.133). Kastner never told McMackin

that Flanigan would subordinate, waive or relinquish any of its statutory landlord's lien rights. (R.106,136).

When Barnett closed its loan to Naples Beverage, McMackin considered the borrower's inability to obtain a landlord's lien waiver from Flanigan a serious problem with respect to the priority of Barnett's interest over Flanigan's interest in the inventory. (R.731,Ex.10). However, McMackin did not have the same concern with respect to the Liquor License since he did not believe it was subject to Flanigan's landlord's lien. (R.84-86). McMackin interpreted section 83.08, Florida Statutes, to provide a landlord with a lien on tangible personal property only, and was unaware of any case law holding that a statutory landlord's lien applied to a liquor license. (R.103-104).

When McMackin learned that Flanigan's financing statements had never been recorded, he concluded that Flanigan had no claim to the License since, in his words, "unfiled is unperfected." (R.100). Although he conceded that a landlord can have contemporaneously a security interest and a landlord's lien in the same collateral, it was his opinion that a landlord's lien could not encumber a liquor license. (R.103). Consequently, McMackin did not believe Flanigan had a claim to the Liquor License (R.105) and advised Barnett to sell it to Hickory Point. (R.100).

Had he been aware of case law holding that a landlord's lien applies to a liquor license, McMackin testified that he would have advised Barnett that it had a problem with the priority of its lien on the License, that it should not transfer the License to Hickory Point and would need to deal with Flanigan to work out any problems. (R.134).

When McMackin failed to call Kastner regarding Barnett's response to Flanigan's claim, Kastner placed numerous telephone calls to McMackin to determine the status of the Liquor

License. (R.136). McMackin never returned any of Kastner's calls. (R.136).

After many telephone calls to Mr. McMackin went unreturned, Kastner wrote a letter to McMackin dated December 6, 1984 reasserting Flanigan's position that it had a "valid claim" to the License. (R.136, Ex.19). Unbeknownst to Flanigan, Barnett transferred the License to Hickory Point on January 10, 1985. (R.573). When McMackin failed to respond to his letter, Kastner wrote a letter dated February 5, 1985 to put the Division of Alcoholic Beverages & Tobacco on notice of Flanigan's claim. (R.136-137, Ex.21).

On May 14, 1985, Kastner wrote another letter to McMackin informing him that since he had failed to respond to earlier letters and telephone calls, he had no other choice than to inform the Division of Alcoholic Beverages & Tobacco about Flanigan's claim. (R.137, Ex.22).

McMackin never informed Kastner that he was trying to dispose of the License on behalf of Barnett or that he had located a buyer for the License and an agreement for its sale had been reached. (R.137). Kastner learned in April or May, 1985 that Barnett had sold the Liquor License. (R.137).

After Level III vacated and Barnett sold the Liquor License, Flanigan was unable to re-let the premises. (R.139). The building's design rendered it suitable only for the operation of a nightclub/lounge business, and Flanigan's inability to provide a liquor license to any prospective tenant greatly diminished its ability to re-let the premises. (R.139).

In the meantime, Flanigan continued to pay rent to the prime lessor, Hymen Lake. (R.131,573). By October 31, 1985, Level III owed Flanigan approximately $156,000.00. (R.131,573).

The Liquor License had a fair market value of $110,000.00. (R.95,574).

SUMMARY OF THE ARGUMENT

The points on appeal in this case are that (1) the appellate court erred in holding that the record sufficiently supports the trial court's conclusion that Flanigan was estopped from asserting its landlord's lien, (2) the appellate court erred in holding that s. 818.01, Florida Statutes (1983), affords no basis for recovery for Flanigan against Barnett because of the conflict that exists between sections 818.01 and 679.504(3), and (3) Flanigan is entitled to recover from Barnett the fair market value of the Liquor License.

The appellate court erred in holding that the record supports the trial court's conclusion that Flanigan was estopped from asserting its landlord's lien. The record, viewed in the light most favorable to Barnett, shows that Barnett did not change its position to its detriment in reliance on any representation or omission of Flanigan. Barnett's position changed in April of 1983 when it lent money to Naples Beverage and obtained a security interest inferior to Flanigan's landlord's lien. This change occurred well before Kastner first spoke to McMackin in early October of 1984.

Furthermore, after the loan default, Barnett recovered the License with the sole purpose of selling it to reduce the loan debt. Upon the default of its borrower, Barnett had always intended to obtain and sell the License. It is uncontroverted that Barnett searched for and located a buyer, and entered into an agreement for the sale of the License before Kastner contacted McMackin. Barnett's course of conduct was not altered or influenced by Kastner's comments to McMackin; therefore, Barnett could not show that it sold the License in reliance on any representation or ommission of Flanigan.

Moreover, any reliance McMackin may have placed on Kastner's failure to assert Flanigan's landlord's lien in precise terms during one telephone conversation was unreasonable. McMackin

knew that Flanigan had a landlord's lien that it was unwilling to waive, and he conceded that Kastner never agreed to relinquish or subordinate Flanigan's lien.

Additionally, the assertion of a security interest under Chapter 679, Florida Statutes, is not inconsistent with the assertion of a landlord's lien arising under section 83.08, Florida Statutes. One can enforce a security interest and later pursue rights under a landlord's lien because the interests are not inconsistent or mutually exclusive.

The appellate court erred further by holding that section 818.01 affords no basis for Flanigan to recover against Barnett because of the conflict that exists between sections 818.01 and 679.504(3). By its own terms, Article 9 of the Uniform Commercial Code, of which section 679.504(3) is a part, does not apply to landlord liens. Therefore, any conflict between the two statutes has no bearing on Flanigan's right to recover against Barnett for the loss of its right to enforce its landlord's lien.

Finally, Flanigan is entitled to recover from Barnett the fair market value of the Liquor License. Contrary to the trial court's ruling, Flanigan's damages should not be limited to $18,281.55. The Court based its finding on the fact that at the time the Liquor License was removed from the leased premises, Level III owed Flanigan $18,281.55 in rent. The trial court calculated damages based on the amount of rent due at the time Barnett seized the License. The court should have computed damages in the context of the commission of a tort thereby awarding Flanigan's those damages directly resulting from Barnett's action.

ARGUMENT

I.

THE APPELLATE COURT ERRED IN HOLDING THAT THE RECORD SUFFICIENTLY SUPPORTS THE TRIAL COURT'S CONCLUSION THAT FLANIGAN WAS ESTOPPED FROM ASSERTING A LANDLORD'S LIEN ARISING UNDER SECTION 83.03, FLORIDA STATUTES (1977).

Flanigan sued Barnett to recover damages arising from Barnett's violation of section 818.01, Florida Statutes (1983), which provides, in pertinent part:

> Whoever shall pledge, mortgage, sell or otherwise dispose of any personal property to him belonging, or which shall be in his possession, and which shall be subject to any written lien, or which shall be subject to any statutory lien, whether written or not ... without the written consent of the person holding such lien... shall be guilty of a misdemeanor of the first degree, punishable as provided in section 775.082 or section 772.083. (A.Tab 6).

Although it is a criminal statute, the courts have created a civil cause of action for violation of section 818.01. See Ford Motor Credit Company v. Hanus, 491 So.2d 570 (4th DCA 1986)(A. Tab 4); Coney v. First State Bank of Miami, 405 So.2d 257 (3d DCA 1981) and Littman v. Commercial Bank & Trust, 425 So.2d 636 (3d DCA 1983)(A.Tab 5).

The trial court found that the Liquor License was personal property that was subject to Flanigan's statutory landlord's lien arising under section 83.08, Florida Statutes (1977). (R.41,45,540). Section 83.08 provides, in pertinent part:

> LANDLORD'S LIEN FOR RENT - Every person to whom rent may be due, his heirs, executors, administrators or assigns, shall have a lien for such rent upon the property found upon or off the premises leased or rented, and in the possession of any person as follows:
>
> 1. [not applicable]
>
> 2. Upon all other property of the lessee or his sublessee or assigns, usually kept on the premises. This lien shall be superior

to any lien acquired subsequent to the bringing of the property on the premises leased.

3. [not applicable]

The trial court found that Flanigan's landlord's lien arose on January 28, 1978 and that it was superior to Barnett's security interest. (R.41,45,540). The court also found that Barnett's sale of the License to Hickory Point without the written consent of Flanigan violated section 818.01 (R.45,540).

Barnett sought to avoid liability at the trial by attempting to prove that Flanigan was estopped from asserting a statutory landlord's lien thereby precluding Flanigan from recovering under section 818.01.

To prove estoppel, the following elements must be established:

1) A representation as to a material fact that is contrary to later-asserted position;

2) A reasonable reliance on that representation; and

3) A change in position detrimental to the party claiming estoppel caused by the representation and reliance thereon. Warren v. Department of Administration, 554 So.2d 569 (5th DCA 1989).

The party asserting an estoppel must prove every essential fact by clear and satisfactory evidence. Ennis v. Warm Mineral Springs, 203 So.2d 514 (2d DCA 1967). The doctrine of estoppel is applied cautiously by the courts, and if conduct on which an estoppel is based is ambiguous and susceptible of two constructions, one of which is consistent with the right asserted by the party sought to be estopped, there is no estoppel. In re: Adoption of RMH, 538 So.2d 477 (2d DCA 1989). Estoppel rests on the premise that a party asserting estoppel has acted in reliance upon the prior inconsistent conduct of the other party. Pelican Island Property Owners Association, Inc. v. Murphy, 554 So.2d 1179 (2d DCA 1989). As discussed below, Barnett did not establish, nor could it have established, each element of estoppel.

A. Barnett failed to establish that it changed its position to its detriment in reliance on any representation or omission of Flanigan .

In its opinion, the appellate court devoted one paragraph to the issue of estoppel. (A.Tab 3). The court held that the record supports the conclusion that Flanigan took inconsistent positions with respect to the License; however, this conclusion addresses only one element of estoppel. Absent from the opinion is any discussion of how Barnett relied on any representation made by Flanigan and how such reliance damaged Barnett. With respect to the remaining elements of estoppel, the court simply stated:

> Had this claim been timely asserted, Barnett would not have sold the license to Hickory Point and the loss of Flanigan's lien following the sale could have been avoided. (A.Tab 3).

The court focused on what may have happened if Flanigan had timely asserted its claim, and completely glossed over how Barnett may have actually been damaged as a result of any reliance on Flanigan's actions.

It is absolutely essential that the party who claims the benefit of the doctrine of estoppel has been influenced or misled, or has relied upon the act, or omission to act, of the opposing party. See Miami Gardens, Inc. v. Conway, 102 So.2d 622 (Fla. 1958), Jarrard v. Associates Discount Corp., 99 So.2d 272 (Fla. 1958). Additionally, the party asserting estoppel must show that it would consequently be injured by an assertion of the truth , or that the other party has benefitted by its former position. See L.B. Price Mercantile v. Gay, 44 So.2d 87 (Fla. 1950), Boynton Beach State Bank v. Wythe, 126 So.2d 283 (2d DCA 1961). A position taken which does not injure the opposite party does not raise an estoppel. Cooley v. Rahilly, 200 So.2d 258 (4 DCA 1967). It is axiomatic

that any change in position by the party asserting estoppel which occurs before the representation or conduct of the other party cannot possibly form the basis of an estoppel. See 31 C.J.S. section 72.

Applying these principles to the instant case, it becomes readily apparent there was no estoppel. Barnett contends that the misrepresentation upon which it relied was made when Flanigan's general counsel, Jeffrey Kastner, placed a telephone call to Barnett's attorney, Joseph McMackin, in early October, 1984. (R.92-95,173-174). Therefore, any change in position by Barnett which occurred prior to October, 1984 could not have been influenced by Kastner's statements. In order to support a finding of estoppel, the change in position must have occurred **after** the telephone call . The chronology of events in this case demonstrates that Barnett could not have relied on any representation made by Flanigan and, therefore, the appellate court's holding on the estoppel issue was error.

Barnett obtained its security interest in the Liquor License on April 8, 1983. (R.571-572). Prior to the closing of the loan whereby it acquired its security interest, Barnett required its borrower, Naples Beverage, to obtain a landlord's lien waiver from Flanigan. (R.68). Barnett required the waiver because it knew that part of the collateral for the loan would be located on the premises leased from Flanigan to Level III. (R.68). At the time of closing, Barnett was fully aware that it had not been provided a landlord's lien waiver from Flanigan, yet it elected to close without it. (R.84-85,107). This fact is extremely significant. When Barnett closed the loan, it did so knowing that Flanigan's landlord's lien was superior to its security interest. (R.84-85). Once the loan was made, Barnett's rights were fixed and its interest in the License was subordinate to Flanigan's. The appellate court missed the fact that it was at the moment Barnett parted with the loan money and obtained an inferior security interest that Barnett's position changed. Because Barnett's change

in position occurred prior to any contact from Flanigan, it could not possibly have been influenced by Flanigan. Since Flanigan did not influence Barnett's decision to close the loan, there can be no estoppel.

It is evident that the appellate court concluded that the actual transfer of the License to Hickory Point on January 10, 1985 constituted the requisite change in position. This conclusion is flawed because it appears to be based on the assumption that once the transfer was made, Barnett would be damaged the enforcement of Flanigan's lien. In truth, there was nothing Flanigan could do to put Barnett in a worse position than it was when it made the loan to Naples Beverage. The court's analysis disregards the fact that when it made the loan in April of 1983, Barnett acquired a security interest that was inferior to Flanigan's lien. At that moment, Barnett's security interest was subordinate to Flanigan's lien.

If Flanigan had asserted its lien before Barnett sold the License, Flanigan would have been entitled to have the License sold and the proceeds applied to any judgment against Level III for unpaid rent. See section 83.19, Florida Statutes (1983). Barnett would not have been entitled to any proceeds of the sale until Flanigan's lien had been discharged. In the instant action, Flanigan seeks to recover from Barnett the same measure of damages it could have recovered if Barnett had not appropriated the License. In either scenario, the result to Flanigan and Barnett would be the same. Flanigan would receive the sales proceeds since its lien had priority over Barnett's security interest. If either of the lower courts had ruled in favor of Flanigan, Barnett would be in no worse position than if Flanigan had asserted its lien before Barnett sold the License.

By closing the loan to Naples Beverage with full knowledge of Flanigan's superior landlord's lien, Barnett cannot claim that enforcement of the lien would be unconscionable. If there is any

unconscionability it arises from Barnett dealing with the License as though it had the superior interest while knowing of Flanigan's lien - even though Barnett may not have fully appreciated the breadth of the lien - and then claiming that, because Flanigan did not assert its lien prior to a sale of which it had no knowledge, Flanigan should be denied redress. Flanigan is not asking this Court to impair any rights Barnett may have had in the License, but only to order Barnett to disgorge the windfall it received at Flanigan's expense.

Furthermore, even though Flanigan did not specifically assert a landlord's lien prior to the sale, it is clear from the record that this did not influence Barnett's decision to sell the License. The fact that Barnett obtained a security interest in the License demonstrates that Barnett contemplated that one day it might liquidate the License should its borrower default on its loan. When its borrower did default, Barnett intended to sell the License from the moment it obtained it from Level III in August of 1984. (R.87-93). Before Kastner ever placed the telephone call to McMackin, Barnett was fielding calls from prospective buyers. (R.70,90-91). In fact, before Kastner spoke to McMackin, Barnett had already orally agreed to sell the License to, and had accepted a deposit from, Hickory Point. (R.91-93).

It is notable that Barnett does not dispute that before Kastner called McMackin, Barnett intended to sell the License. When Barnett sold the License, it was merely completing an act it had always intended to do. Therefore, it is clear that Barnett was not misled or influenced by Flanigan in selling the License. This fact alone mandates a reversal of the appellate court's holding on the issue of estoppel. Boynton Beach State Bank v. Wythe, supra.

B. Any reliance Barnett may have placed on Flanigan's failure to assert its landlord's lien in precise terms was unreasonable.

The party asserting estoppel must prove not only that it relied on the conduct of the other party, but that such reliance was reasonable. Ennis v. Warm Mineral Springs, supra. To the extent that it can be said that Barnett relied on Flanigan's failure to assert specifically its landlord's lien, and Flanigan strenuously contends that it did not, any such reliance was unreasonable. After Barnett closed the loan to Naples Beverage on April 8, 1983, both Barnett and Naples Beverage continued its efforts to obtain a waiver from Flanigan. (R.720,723,729-730).

On April 25, Naples Beverage asked Flanigan to complete and return a landlord waiver form. (R.720,Ex.5). On April 26, 1983, Barnett requested information from Naples Beverage so it could forward a landlord waiver to Flanigan. (R.723,Ex.6). On May 4, 1983, Flanigan sent a letter to Naples Beverage rejecting its request to waive its lien and informing Naples Beverage's attorney, Thomas Grady, that,

> Flanigan's does not wish to waive its landlord lien against the property at this location, which is Flanigan's only security for timely payments of rent and other obligations under the sublease agreement. (R.129,725,726,Ex.7).

On July 29, 1983, Naples Beverage notified Barnett's attorney, McMackin, that it had requested a waiver from Flanigan and furnished Barnett with a copy of Flanigan's letter rejecting the request. (R.107,729-730,Ex.9). McMackin, responded on August 12, 1983 by informing Naples Beverage that,

> I believe we have a serious problem about the unwillingness or lack of cooperation on the part of the landlords to give the Landlord Waivers as requested and as required by the Loan Agreement between Naples Beverage Group and Barnett Bank of Naples. (R.731-732,Ex.10).

After Naples Beverage defaulted on its loan, Barnett obtained the Liquor License on or about July 14, 1984, had it transferred to Barnett and held it in escrow until it could be sold. (R.572). On or about August 15, 1984, Barnett began negotiations for the sale of the License to Hickory Point (R.572), and on September 28, 1984 Barnett and Hickory Point entered into an oral agreement for the sale and purchase of the License. (R.91-92). In early October, 1984, Kastner placed a telephone call to McMackin to inquire about the status of the License. (R.132-133). In this one and only conversation between them, Kastner and McMackin discussed the nature of Flanigan's interest in the License. (R.93-94,133). According to McMackin, the subject of a landlord's lien never came up in the conversation. (R.106). Confident that its interest was superior to Flanigan's, Barnett proceeded with the sale of the License to Hickory Point. (R.94-96).

In light of the fact that Barnett was aware that Flanigan possessed a landlord's lien and had denied earlier requests to waive it (R.85), it was unreasonable for McMackin to conclude Flanigan was relinquishing its rights. McMackin did not bring up the subject of Flanigan's lien (R.106), but instead claims that Kastner's silence on the matter led him to believe the only rights Flanigan had were based on an unperfected security interest. (R.93-94,105). However, estoppel does not arise merely from silence; there must be special circumstances requiring one to speak. Ennis v. Warm Mineral Springs, Inc., supra. There were no special circumstances in existence when Kastner spoke to McMackin which would impose a duty on him a duty to assert every possible claim Flanigan may have had at that time. If Kastner had been aware that Barnett was on the verge of transferring the License, then special circumstances may have existed which would have imposed such a duty. However, since McMackin neglected to reveal that Barnett had already orally contracted to sell the License, Kastner was not put on notice that Flanigan's lien was in danger of being lost.

C. Assertion of a security interest under Chapter 679, Florida Statutes, is not inconsistent with the assertion of a landlord's lien arising under section 83.08, Florida Statutes (1977).

In order for there to have been an estoppel, Flanigan would have had to assert a position inconsistent with or contrary to one holding a landlord's lien i.e., one not holding a landlord's lien. See Warren v. Department of Administration, supra. As stated above, the record clearly establishes that Flanigan refused to waive its lien and McMackin was aware of that fact. (R.78,85,731-732). The appellate court erroneously held that Flanigan's assertion of a claim against the License based on an unperfected Article 9 security interest was contrary to Flanigan's later-asserted claim of a statutory landlord's lien. (A.Tab 3).

The assertion of a consensual lien is not contrary to the assertion of a landlord's lien. One can have a landlord's lien and a consensual security interest; they are not inconsistent or mutually exclusive. Richardson v. Myers, 143 So. 157 (Fla. 1932). In the Richardson case, this Court rejected a lessee's contention that a lessor who had proceeded at law to enforce his statutory landlord's lien was precluded from later enforcing in equity his chattel mortgage which had been given to secure rent payments. The Court found that the lease was intended to be a chattel mortgage to secure the payment of rent in addition to the statutory lien for rent, and that enforcement of a landlord's lien is not inconsistent with the foreclosure of a consensual lien on property of the lessee.

Similarly, in the instant case, Flanigan obtained a security interest in the Liquor License through the sublease agreement with Level III. (R.704). By incorporating the prime lease between Flanigan and Hymen Lake into its sublease with Level III, Flanigan specifically provided that the

lien acquired through the sublease was in addition to the rights of a landlord given under the section 83.08. (R.687,703).

Furthermore, in the sublease agreement, Flanigan specifically provided that "in the event of default [by Level III] under this sublease ... [Flanigan] shall have the rights and remedies available at law to a landlord for breach of a lease..." (R.705). By obtaining the security interest in the License, Flanigan merely further secured rent payments owed by Level III. (R.687,703,705). No one should be denied the right to set up the truth unless it is in plain contradiction of his former acts. Enstrom v. Dunning, 186 So. 806 (Fla. 1939).

II.
THE APPELLATE COURT ERRED BY HOLDING THAT SECTION 818.01, FLORIDA STATUTES (1983), AFFORDS NO BASIS FOR FLANIGAN TO RECOVER AGAINST BARNETT BECAUSE OF THE CONFLICT THAT EXISTS BETWEEN SECTIONS 818.01 AND 679.504(3), FLORIDA STATUTES.

The appellate court erred by holding that section 818.01, Florida Statutes (1983) affords no basis for Flanigan to recover against Barnett. The court arrived at this conclusion by examining section 818.01 and section 679.504(3), and determining that an irreconcilable conflict exists between the statutory provisions. (A.Tab 3).

The court noted that section 818.01 requires a party who disposes of personal property to obtain the written consent of any lienholder. The court also observed that:

> Section 679.504 provides that after default, a secured creditor has the right to sell or dispose of the collateral, provided the conditions of the statute are met. One of the conditions is not obtaining the written consent of any other party... (A.Tab 3).

The court concluded that the conflict exists because the notice requirement found in section 818.01 imposes a burden on secured creditors that is not found in section 679.504(3).

Flanigan agrees with the appellate court that the notice requirements of both statutes do conflict. Flanigan also agrees that 679.504(3) cannot be reconciled with 818.01 in the context of sales of collateral where the only other interests in the collateral are governed by Chapter 679. However, where there are rights or interests in collateral which arise outside Chapter 679, the conflict perceived by the appellate court vanishes.

In the absence of a showing to the contrary, it is presumed that all laws are consistent with each other and that the legislature would not effect a repeal of a statute without expressing an intention to do so. Littman v. Commercial State Bank & Trust Company, supra. In reconciling apparent conflicts among statutes, the courts should give effect to all statutory provisions and, where possible, harmonize the related provisions with one another. Singleton v. State, 554 So.2d 1162 (Fla. 1990); Carawan v. State, 515 So.2d 161 (Fla. 1987). Courts must assume that later statutes were passed with knowledge of prior existing laws, and will favor a construction that will give a field of operation to both rather than construe one statute as meaningless or repealed by implication unless such a result is inevitable. Littman, supra. As noted by the Littman court, section 818.01 was amended following the adoption of the Uniform Commercial Code.

A close examination of the record reveals that the two statutory provisions can be harmonized in the context of the facts of this case. This becomes clear when one analyzes the nature of the interests asserted by each party. Barnett acquired a consensual security interest in the License by complying with the requirements enumerated in Chapter 679, Florida Statutes (1983). In order to perfect its interest it was required to file a financing statement with the Secretary of State. Section 679.504 governed Barnett's right to dispose of the License after Naples Beverage defaulted on the loan, and prescribed the procedure for conducting a sale and who was entitled to

receive notice.

On the other hand, Flanigan's interest in the License arose by operation of law pursuant to section 83.08, Florida Statutes, which grants a lien to any person to whom rent is due. Unlike Barnett's security interest, the landlord's lien does not have to be recorded in order to have priority over a subsequently acquired security interest or lien. See Lovett v. Lee, 193 So. 538 (Fla. 1940), William J. Mathias v. Walling Enterprises, Inc., 609 So.2d 1323 (5th DCA 1992). In fact, none of the provisions of Chapter 679 apply to landlord's liens. See section 679.104(2), Florida Statutes. Chapter 679 generally applies only to consensual security interests, not to judgment liens, judicial liens, statutory liens and other liens that arise by operation of law rather than by agreement of the parties. See sections 679.102, 104(2), Florida Statutes.

It appears that the appellate court did not fully appreciate the distinction between Flanigan's interest and Barnett's. This is evident from the court's comment on the secured creditor's right under section 679.504(3) to purchase the collateral at sale. The court stated,

> Obviously, this right would do the secured creditor little good if it then had to obtain the written consent of any superior or inferior **secured party** before it could sell the collateral to a third party. (A.3)(emphasis added).

The court also stated,

> Section 679.504 provides that additional **secured parties** who have filed financing statements indexed in the name of the debtor must be given reasonable notice of the intended sale or disposition. (A3)(emphasis added)

It seems as though the appellate court misconstrued Flanigan's argument because the court focuses on the rights of secured creditors vis-a-vis other secured creditors. Flanigan did not, and does not now, suggest that the court should construe section 818.01 to impose any condition on

secured creditors that is not already found in section 679.504 when the issue of priority is between two or more secured creditors. Furthermore, Flanigan has never contended that Barnett did not comply with section 679.504(3). What Flanigan asked of the trial court and appellate court, and now asks of this court, would not alter the conditions of section 679.504. Section 818.01 should be given effect in situations where personal property which is subject to a landlord's lien or other form of security not covered by Chapter 679 is transferred without the lienholder's consent. Of course, where the interests involved are covered by Chapter 679, then the provisions of that chapter should control who is entitled to receive notice of sale, and all related issues.

Where the interests or liens involved are specifically excluded from Chapter 679, it is not fair to apply the provisions of that chapter to adjudicate the rights of those who possess the excluded interests or liens. Because landlord's liens are carved out of the statutory scheme of Chapter 679, giving effect to section 818.01 for disposition of property subject to a landlord's lien would have no effect on the conditions imposed on a secured creditor under section 679.504(3). Imposition of liability under section 818.01 only in cases involving non-consensual liens obviates the conflict that disturbed the appellate court. Furthermore, by applying section 818.01 to the facts of this case would carry out the court's obligation to harmonize sections 818.01 and 679.504(3), and to give a field of operation to both. See Carawan v. State, Singleton v State and Littman v. Commercial Bank & Trust Company, supra.

Moreover, the appellate court's holding is bad policy and could have a devastating effect on the rights of landlord lienholders. For example, any creditor who obtains a security interest in personal property which is encumbered by a superior landlord's lien can improve its position and wipe out the landlord's lien without the landlord's knowledge or consent. Provided the secured

creditor obtains the collateral first and complies with the conditions set forth in section 679.504(3), the secured creditor can sell the collateral and rest assured that the landlord will have no recourse against it in the event the landlord is unable to proceed against the collateral in the hands of the purchaser. If a competing creditor holding an inferior security is unable to obtain a lien waiver from a landlord, the appellate court's decision provides a method by which the creditor can achieve the same result without the landlord's acquiescence. This is an anomalous situation that the appellate court surely did not intend to create. In interpreting statutes, courts should not ascribe to the Legislature an intent to create harsh consequences and, therefore, an interpretation that avoids such consequences is preferred. City of St. Petersburg v. Siebold, 48 So.2d 291 (Fla.1950).

III.

FLANIGAN IS ENTITLED TO RECOVER FROM BARNETT BANK THE FAIR MARKET VALUE OF THE LIQUOR LICENSE AT THE TIME IT WAS OBTAINED BY BARNETT, PLUS PRE-JUDGMENT INTEREST.

Admittedly, there is little guidance in the reported decisions as to the appropriate measure of damages in a case such as the one before this court. Violation of section 818.01, Florida Statutes, has been held to constitute a tort. See Rosenberg v. Ryder Leasing, Inc, 168 So.2d 678, 680 (3d DCA 1964). Therefore, Barnett should be held responsible for all the consequences directly resulting from its actions. See Florida East Coast Ry. Co. v. Peters, 83 So. 559 (Fla. 1919).

The undersigned has located only one Florida case which discusses the quantum of damages which may be awarded for the violation of section 818.01. In the case of Littman v. Commercial Bank and Trust Company, supra, a secured party brought an action for damages resulting from the Defendant's transfer of collateral which was subject to a security lien in favor of the secured party

without the secured party's consent. The Court stated,

> we think the proper course in the present case is to require [Defendants] to pay the remaining balance under the security agreement as damages, particularly in light of the fact that they both purchased and resold the forklift subject to the bank's lien, indicating at least some knowledge and acceptance of the lien as the property's true value." Id. at 641, footnote 6.

The Court noted, however, that

> appellants have made no attempt either in this court or below to show the actual value of the forklift or that any other measure of damages would be more just. Nothing in this opinion, however, shall preclude use of fair market value as the measure of damages in future cases under these statutes where it is shown to be an appropriate recovery. Id.

The primary purpose for damages is to compensate the injured party and to make him whole to the extent the injury can be measured in terms of money. Fisher v. City of Miami, 172 So.2d 455 (Fla. 1965). The instant case is one in which the use of fair market value as the measure of damages sustained by Flanigan is appropriate.

As of July 14, 1984, the date Barnett removed the Liquor License from the premises, Level III owed Flanigan unpaid rent in the amount of $18,281.55. (R.159). By October of 1985, Level III owed Flanigan unpaid rent in the approximate amount of $156,000.00. (R.131).

Even though Level III had defaulted, Flanigan was required to continue making payments to Hymen Lake, landlord under the prime lease, and made payments totalling the approximate sum of $156,000.00. (R.131). If Barnett had not wrongfully transferred the Liquor License to Hickory Point, Flanigan could have pursued its statutory remedy to have the License sold and have the proceeds applied to the rent owed by Level III. (R.139). Consequently, Flanigan could have reduced its liability to Hyman Lake by $110,000.00, the value of the License. (R.573).

Furthermore, if Barnett had not interfered with its landlord's lien, Flanigan would have been able to re-let the premises after Level III defaulted. (R.138-139). Flanigan attempted to re-let the premises but was unsuccessful since prospective sublessees were interested only if Flanigan could provide them with a liquor license. (R.139). Due to its loss of the Liquor License, Flanigan was unable to mitigate its damages by either re-letting the premises or selling the License. Barnett's wrongful transfer of the License deprived Flanigan of valuable security.

Flanigan was precluded from enforcing its lien against the License after it was transferred because Barnett's buyer, Hickory Point, filed bankruptcy 18 days after the sale. (R.572). Liens for rent and distress for rent are avoidable in bankruptcy. 11 U.S.C. section 545 (3), (4). Had Barnett not transferred the License to Hickory Point, Flanigan could have enforced its landlord lien directly against Barnett by way of a distress writ pursuant to Section 83.13, Florida Statutes.

Flanigan acknowledges that had it instituted distress proceedings to enforce its landlord's lien against the Liquor License while it was in the hands of Barnett, it would not have been entitled to more than the rent due at the time. The amount of rent which would have been due Flanigan at such time can only be a matter of conjecture as it can never be determined with certainty. However, it is certain that while Flanigan struggled to locate a new lessee, rent continued to accrue so that by October, 1985 Level III owed Flanigan an amount exceeding the fair market value of the License. (R.131). Additionally, Flanigan paid an equivalent sum to Hyman Lake, the landlord under the prime lease. (R.131). Barnett's liability should not be limited by its own tortious conduct. Therefore, Flanigan should recover from Barnett the sum of $110,000.00, the fair market value of the License, plus statutory pre-judgment interest from July 14, 1984, the date Barnett wrongfully

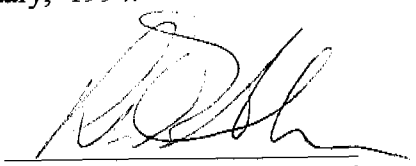
appropriated the License. Pre-judgment interest is allowed where the claim is liquidated. Town of Long Boat Key v. Carle Widell & Son, 362 So.2d 719 (2d DCA 1978).

CONCLUSION

Barnett failed to establish each and every element of estoppel by clear and satisfactory evidence. Furthermore, section 818.01 can be harmonized with section 679.504(3) thereby providing Flanigan with a basis for recovery against Barnett. Therefore, the judgment of the appellate court should be reversed and this cause remanded to the trial court with instructions to enter judgment in favor of Flanigan in the amount of $110,000.00, plus pre-judgment interest from July 14, 1984.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States regular mail to TUCKER H. BYRD, ESQUIRE, Post Office Box 1391, Orlando, Florida 32802-1391, on this 24th day of January, 1994.



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