Clerk of Court, recording documents

Number: INFORMAL

Date: April 01, 2010

Ms. L. Denise Coffman
Legal Counsel, Palm Beach County Clerk
Post Office Box 229
West Palm Beach, Florida 33402

Dear Ms. Coffman:

On behalf of the Palm Beach County Clerk, you ask whether certain documents must be recorded in the Official Records of the county.

You state that the individual requesting that the documents in question be recorded believes that one or more of the documents constitute an "agreement by default" and therefore fall within the meaning of section 28.222(3)(a), Florida Statutes. That subsection provides that the clerk of the circuit court shall record the following kinds of instruments presented for recording, upon payment of the service charges prescribed by law:

"Deeds, leases, bills of sale, agreements, mortgages, notices or claims of lien, notices of levy, tax warrants, tax executions, and other instruments relating to the ownership, transfer, or encumbrance of or claims against real or personal property or any interest in it; extensions, assignments, releases, cancellations, or satisfactions of mortgages and liens; and powers of attorney relating to any of the instruments."

This office on several occasions has stated that the clerk of court may not accept for recording in the official records any document which the law does not authorize or require him or her to record.[1] However, as noted in Attorney General Opinion 05-17, this office cannot make the factual determinations as to whether a particular document may be recorded; rather it is the duty of the clerk of court to make such a determination.[2]

In an effort to be of some assistance, however, I would note that words of common usage, when used in a statute, should be construed in their plain and ordinary sense.[3] The term "agreement" is generally defined as a mutual understanding between two or more persons about their relative rights and duties or a manifestation of mutual assent by two or more persons.[4] Moreover, the courts of this state have recognized that the creation of a contract requires that there be mutual assent to a certain and definite proposition[5] or, as commonly referred to, a meeting of the minds.[6] As discussed in American Jurisprudence 2d, "[m]utual assent, which is essential to the formation of a binding contract, must be manifested by each party to the other; uncommunicated assent does not create a contract. . . . In other words, the apparent mutual assent of the parties must be gathered from their outward expressions and acts, and not from their unexpressed intentions."[7] Moreover, as stated in the comment on the Restatement (Second) of Contracts,

"a. Acceptance by silence is exceptional. Ordinarily an offeror does not have power to cause the silence of the offeree to operate as acceptance. See Comment b to § 53. The usual requirement of notification is stated in § 54 on acceptance by performance and § 56 on acceptance by promise. The mere receipt of an unsolicited offer does not impair the offeree's freedom of action or inaction or impose on him any duty to speak. The exceptional cases where silence is acceptance fall into two main classes: those where the offeree silently takes offered benefits, and those where one party relies on the other party's manifestation of intention that silence may operate as acceptance. Even in those cases the contract may be unenforceable under the Statute of Frauds."[8]

While this office cannot state that the documents necessarily reflect a mutual assent by the parties to the terms expressed therein, as noted above, the determination as to whether a particular document may be recorded is one that the clerk of court must make. I hope, however, that the above informal comments may be of assistance.

Sincerely,

Joslyn Wilson
Assistant Attorney General

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[1] *See, e.g.,* Ops. Att'y Gen. Fla. 01-01 (2001), 92-24 (1992), 90-69 (1990).

[2] As noted in Attorney General Opinion 05-17, in the event an individual claims that the clerk has failed to carry out his or her ministerial duty to record a document, the aggrieved individual may seek a mandamus order compelling the clerk to act.

[3] *See, e.g., Sieniarecki v. State*, 756 So. 2d 68 (Fla. 2000) (in absence of a statutory definition, words of common usage are construed in their plain and ordinary sense and, if necessary, the plain and ordinary meaning of the word can be ascertained by reference to a dictionary); *Rollins v. Pizzarelli*, 761 So. 2d 294 (Fla. 2000); Ops. Att'y Gen. Fla. 93-47 (1993) (in construing statute which is clear and unambiguous, the plain meaning of statute must first be considered); 93-2 (1993) (since it is presumed that the Legislature knows the meaning of the words it uses and to convey its intent by the use of specific terms, courts must apply the plain meaning of those words if they are unambiguous).

[4] Black's Law Dictionary p. 74 (8th ed. 2004). *And see* 11 Fla. Jur. 2d *Contracts* s. 1, citing Williston on Contracts s. 1:3 (4th ed.).

[5] *See, e.g., ABC Liquors, Inc. v. Centimark Corporation*, 967 So. 2d 1053 (Fla. 5th DCA 2007); *Bankers Trust Co. v. Basciano*, 960 So. 2d 773 (Fla. 5th DCA 2007), *review denied*, 973 So. 2d 1119 (Fla. 2007); *Acosta v. District Board of Trustees of Miami-Dade Community College*, 905 So. 2d 226 (Fla. 3d DCA 2005). *And see Nu-Vision, LLC v. Corporate Convenience, Inc.*, 965 So. 2d 232 (Fla. 5th DCA 2007) (where it appears that the parties are continuing to negotiate as

to essential terms of an agreement, there can be no meeting of the minds as required for formation of a contract).

[6] *See, e.g., Glosser v. Vasquez*, 898 So. 2d 1179 (Fla. 3d DCA 2005).

[7] 17A Am. Jur. 2d *Contracts*s. 33.

[8] Restatement (Second) of Contracts s. 69 (1981).