

FR/BAR CONTRACTS

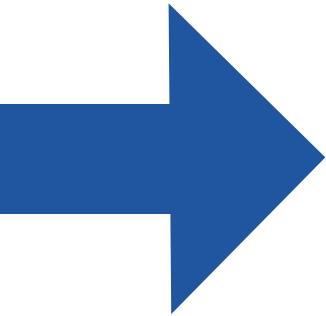
Reconsidering the differences between the "AS IS" Contract and the Standard Contract in the wake of *Diaz v. Kosch*



NISHAD II KHAN P.L.
REAL ESTATE AND BUSINESS LAW

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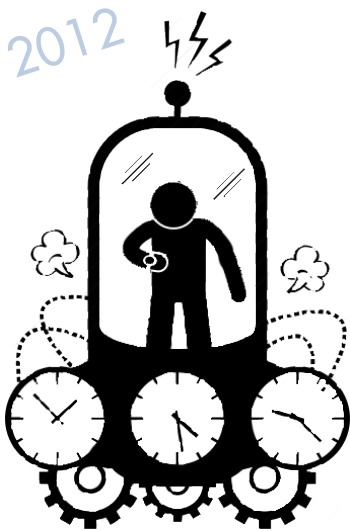
FLORIDA Real Estate Attorneys and Real Estate Licensees have found guidance in a 2018 landmark case, **Diaz v. Kosch**, coming out of Florida's Third District Court of Appeal.



After six years of litigation arising from a \$2,850,000.00 residential real estate contract, the Third District Court delivered its noteworthy opinion interpreting the "AS IS" Residential Contract for Sale and Purchase that was drafted, jointly, by the Florida Realtors® and the Florida Bar.

6 YEARS OF LITIGATION ↑ "AS IS" RESIDENTIAL CONTRACT

HOW IT BEGAN...

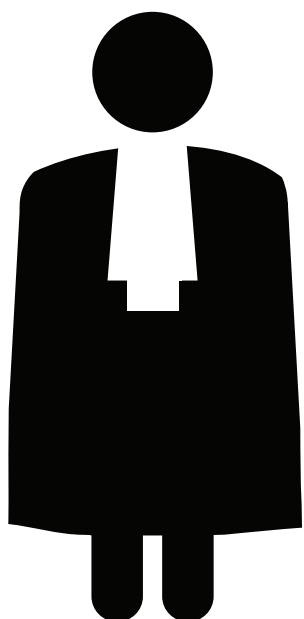


The case developed in 2012 when Buyers and Sellers entered into an "**AS IS**" **Contract** for the purchase of a home. As part of the terms to the Contract, the Buyers delivered an initial deposit to the escrow agent.

The day before the expiration of the inspection period, the Buyers notified their broker that they were concerned that their inspection of the property did not coincide with the property's permitting history. On the tenth and final day of the inspection period, while simultaneously threatening legal action against the Sellers, the Buyers delivered a second deposit, specifying that the second deposit was a conditional tender that was subject to the Buyers' invocation of Section 12(c) of the Contract.¹

The Buyers subsequently **terminated the Contract**; however, the termination notice did not claim a Sellers' breach nor did it claim the Buyers' inability to procure financing. Instead, the Buyers' termination notice cited the Sellers' failure to comply with Section 12(c) of the Contract. The Buyers later filed suit against the Sellers seeking various claims and the Sellers counterclaimed for Buyers' default of the Contract.

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After four years of litigation, the trial court entered summary judgment **in favor of the Sellers**, finding that the Buyers did not exercise their right to terminate as prescribed in the Contract and the Third District Court of Appeal affirmed the trial court's decision.

In arriving at its decision, the Appellate Court undertook a strict interpretation of the "AS IS" Contract. Noting that the Contract delineates "a path to closing the transaction", the Court held that the Buyers' second deposit constituted a waiver of the Buyers' right to terminate the Contract, and the Buyers' termination triggered the Sellers' right to retain the deposits.²

The Court further points out that under the provisions of the "AS IS" Contract, the Buyers had three options, either to:

- (1)** deliver notice of cancellation prior to the expiration of the Inspection Period, entitling the Buyer to a return of the deposits;
- (2)** allow the Inspection Period to expire, whereby the Buyers would be deemed to have accepted the condition of the property and the Buyers would be required to make the second deposit as required by Section 2(b) of the Contract;³ or
- (3)** modify the Contract, by written agreement, extending the cancellation period.⁴



The Buyers' attempt to circumvent these options, by delivering the second deposit as a conditional tender, essentially backfired when the Appellate Court held that Section 2(b) does not allow the "conditional tender" that "Buyers attempted to create".⁵

COURT IN FAVOR OF SELLERS CONDITIONAL TENDER BACKFIRES

Moreover, the Court notes the Sellers complied with their duties under Section 12(c) and even mentions the \$32,000.00 expense the Sellers generously incurred in doing so.⁶ Further holding for the Sellers, the Court ultimately states the Sellers were entitled to retain the deposits by virtue of Buyers terminating the Contract in the absence of a Seller breach or a Buyer inability to procure financing.⁷

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This Appellate Court's decision has captured the attention of Real Estate Attorneys and Real Estate Agents statewide, and has prompted a reconsideration of the FR/BAR contracts.

It is worth noting, the Florida Realtors® and the Florida Bar have deservedly received much praise by the Appellate Court in this case for their joint work in drafting the FR/BAR contracts.

WHAT DO I NEED TO KNOW?

The standard terms and fill-in provisions of these contracts outline the necessary steps to a smooth closing on any residential real estate transaction, which helps to facilitate the process for home buyers and sellers without the need for a legal background.

With this in mind, it is important to consider the differences between the "AS IS" contract and the standard contract before executing a contract in order to secure protections or limit obligations and to ensure that the right contract is used to address each party's particular needs.



Section 11

Parties in real estate transactions often **jump the gun**, signing "AS IS" contracts under the assumption that the buyer is required to take the property, as is, without much responsibility on the seller's part. While this is partly true,⁸ both the "AS IS" and the standard contain a maintenance requirement for the seller. Section 11 in both contracts require that the seller maintain the property so that the property remains in the condition it existed in as of the effective date of the contract, ordinary wear and tear and Casualty Loss excepted.

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Sections 12(a) and 12(b)(ii)

In contrast, one of the key differences between the two contracts is the inspection period. Section 12(a) of the “AS IS” contract grants 15 days, if not otherwise specified, to conduct an inspection of the property.

During this inspection period, the buyer has complete discretion to terminate the contract without losing the deposit provided that the buyer delivers written notice of termination to the seller prior to the expiration of the inspection period. If a buyer **does not** timely terminate the contract, the buyer accepts the property in the physical condition it is in.

Similarly, Section 12(a) of the standard contract also provides 15 days, if not otherwise specified, to conduct “General”, “WDO”, and “Permit” inspections. If a buyer does not timely terminate the contract, the buyer shall have waived the seller’s obligation to repair, treat or remedy any matters that are set forth in Section 12(b)(ii) of the contract.



Sections 12(c) and 12(d)

Another significant difference between the two contracts is the process for curing permitting issues.



Section 12(c) of the “AS IS” contract requires the seller to assist the buyer in resolving permitting issues; this includes delivering any plans, documents, or information in seller’s possession to buyer, and signing any necessary documents for buyer to conduct inspections and obtain estimates in resolving the permitting issues. The “AS IS” contract makes it clear, however, that a seller is **not required to expend any money** in doing so.

While Section 12(d) of the standard contract requires the seller to deliver any plans, documents, or information in seller’s possession to the buyer, it also requires the seller to obtain and close any permits, up to the permit limit, no later than five days prior to closing date.

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IN OTHER WORDS,
if permits, WDO, and repairs
are a priority, a buyer will find
more protections in the
standard contract.

On the other hand, if **limited
seller obligation** and absolute
buyer **discretion to terminate**
the contract upon inspection
are priorities, then the
“AS IS” contract may
be more suitable.



Bear in mind that for the “AS IS” Contract, it is critical for a buyer to
exercise the right to terminate **before the inspection period expires.**
As Diaz v. Kosch has made clear, a buyer should beware that the tender
of a second deposit, if required by the contract, before the expiration of
the inspection period, may be considered a waiver of the buyer’s right
to terminate the contract.

**In the Diaz case, had the Buyers been aware of this, it would have saved them their
own attorneys’ fees as well as a judgment forfeiting the deposits totaling \$285,000.00
and the obligation to pay the Sellers’ attorneys’ fees in the amount of \$850,000.00.**

¹ Section 12(c) requires the sellers to assist buyers by providing necessary documents and information in seller’s possession which are the subject of open or needed permits.
² Diaz v. Kosch, Case Nos. 3D17-1498 & 3D17-1621, 2018 WL 2945390, at *6 (Fla. 3rd DCA 2018).
³ Id.
⁴ Id. at *7.
⁵ Id. at *7.
⁶ Id. at *7.
⁷ Id. at *9.
⁸ Even where parties enter into an “AS IS” contract, a seller has a legal obligation to disclose to the buyer known latent, material defects that are not readily observable. Johnson v. Davis, 480 So. 2d 625 (Fla. 1985).

ABOUT THE AUTHORS



Michelle Hinden, Esq. is a Board Certified Real Estate Law Attorney at the firm of Nishad Khan P.L., where she leads the transactional legal team and manages complex real estate and business matters. Her expertise includes handling Complex Title Insurance Transactions in Residential and Commercial Real Estate, representing Clients in the Acquisition and Disposition of Real Estate Assets, and conducting extensive work in Business and Corporate Law Matters.

Attorney Hinden is a Member of the Real Property, Probate and Trust Law Section of the Florida Bar, and also serves on the Florida Bar Committee for Real Estate Board Certification.



Flor Leiva is a Law Clerk at the firm of Nishad Khan, P.L. in Orlando and a third year student at Barry Law, serving on the Executive Moot Court Honors Board and competing in national Moot Court competitions. She received her bachelors degree from Florida State University in December of 2015 and is expected to graduate with her Juris Doctorate in May 2019.



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Questions?

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