COMMUNITY COUNSEL

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RECENT CASES

- **Condominiums and Cooperatives need to act now to save the arbitration system.**
- **4th DCA commits its annual error on unbuilt unit assessments.**
- **Trial court fails to split baby in half and needs to determine who won what attorneys fees.**

THE INFORMATION GIVEN IS SUMMARY IN NATURE, FOR EDUCATIONAL PURPOSES. IT IS NOT INTENDED AS SPECIFIC OR DETAILED LEGAL ADVICE. ALWAYS SEEK INDEPENDENT LEGAL COUNSEL FOR ADVICE ON YOUR UNIQUE SITUATION.

It's Alive !!! It's Alive !!!

Since our last report to you on the suit by the for-profit Taxpayers for Fairness, Inc. ("TFF") against 850 Florida community associations seeking to recover for alleged underpayments of Documentary Taxes on foreclosure transactions there is more news to report to you.

First, on January 10, 2001 the Judge hearing the matter, acting on his own initiative, dismissed the entire lawsuit. In a three page order the Court determined that the complaint in the case failed to state a cause of action. The Court assigned four separate legal bases for reaching this conclusion, including the failure to allege specific facts as to each Defendant that if proved, would create a violation by that Defendant. The Court also indicated that the complaint failed to show that there are common issues of fact or law that would make the case amenable to handling as a class action. The Court, as is customary in civil cases, gave the Plaintiff twenty (20) days to try again, but mandated that it provide each named Defendant with a copy of the Court's order.

THE AMENDED COMPLAINT APPEARS TO HAVE THE SAME FAULTS AS THE COMPLAINT DISMISSED BY THE COURT.

Second, to the mild surprise of some, the Plaintiffs accepted the challenge, preparing an amended complaint and mailing it to all 850 defendants at several dollars a mailing apiece.

Our review of the newly arrived amended complaint reveals the somewhat telling allegation that TFF is without information that would allow it to determine the amount of underpayment in each case, but that it expects to get this information through the discovery process. That is precisely the problem each Defendant association would itself face, had it done as TFF alleges that it should have – because the correct current balance of each senior lien is not available under federal privacy laws without the consent of the debtor in each instance.

The amended complaint appears to still have the same weaknesses highlighted in the Court's order. While it is also evident that the Plaintiff has tried to address the Court's problems, as well as arguments contained in motions to dismiss already filed but not yet heard, and in the complaint of the Department of Revenue in its separate lawsuit trying to attack TFF's action. For these reasons we expect that this is not the last dismissal that the Plaintiff will face. We will keep you advised as developments warrant.

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RECENT CASE SUMMARIES

NOTE: We issue an important call-to-arms addressed to all condominium and cooperative associations and all concerned owners. Governor Bush, in a misguided and uninformed effort to save a projected $.40 of every $4.00 per unit annual fee, is proposing to scrap the Arbitration Section of the Division, which is by far its most professional arm and its best vehicle for giving reasoned and uniform answers to many of the troubling issues commonly faced by associations. In our judgment this is a major mistake that will have social costs far in excess of the meager savings proposed. The suggestion that local volunteer and small claims court mediators and private groups like the American Arbitration Association are equipped to handle the volume and content of arbitable issues is ludicrous and shows how uniformed upper management is about what the arbitrators do. The Governor and new DBPR Secretary argue that most petitions to the Section are dismissed for lack of jurisdiction and that this proves that the Section is useless. This logic is certainly flawed. If anything it shows that there is a need to consider expanding the Section's jurisdiction. Instead, it appears that the State is gearing up for a return to the past, with another rounds of punitive money-making fines while minor cases between associations and residents clogging court dockets waiting for guidance. We strongly urge you to contact your legislative representatives and the Governor in writing and indicate that this move is counterproductive.

In **Schooner Oaks Limited Co., vs. Schooner Oaks Condominium Association, Inc.,** 26 Fla. L. Weekly D92 (Fla. 4th DCA 12/27/2000) Condominium Association brought a lien foreclosure action against the Developer of a phase condominium. Association sought to foreclose its lien against unbuilt units owned by Developer. In response to the foreclosure action, the Developer filed a counterclaim seeking declaratory relief against Association to determine whether the Developer was obligated to pay assessments on unbuilt units. The trial court granted Association's motion for summary judgment foreclosing its claim of lien on the unbuilt units. In reversing the trial court, the Fourth District Court of Appeal held that the evidence was conflicting allowed different reasonable inferences to be drawn from the language of the Declaration of Condominium. Specifically, the Court of Appeal reasoned that the language of the Declaration relating to the addition of phases supported an inference that a "unit" was created immediately upon the addition of the phase to the condominium. Conversely, the Fourth District reasoned that the provisions of the Declaration relating to defining the unit boundaries and to an owner's maintenance responsibilities for the unit supported an inference that a unit must actually be constructed before it exists. As such, the Court held that the entry of summary judgment was improper because of the existence of material issues of fact needing trial.

In **Dow vs. McKinley**, 26 Fla. L. Weekly D277 (Fla. 5th DCA 1/19/2001) McKinley was a contractor hired by the Dows to construct their single family residence. After a dispute arose regarding McKinley's performance under the construction contract, the Dows refused payment to McKinley. McKinley sought to foreclose his mechanic's lien in the amount of $56,096.87 which sum was allegedly the balance due under the contract. The Dows countersued for, among other causes of action, breach of contract for McKinley's failure to properly construct many aspects of the house. The trial court found in favor of McKinley on his action for foreclosure of the mechanic's lien. The trial court also held in favor of the Dows on their action for breach of contract. A net judgment of foreclosure was entered in favor of McKinley in the amount of $16,026.98. The trial court further determined that McKinley was the prevailing party and awarded attorneys fees in the amount of $62,125.00. In reversing the trial court the Fifth District Court of Appeal held that the trial court erred by not reducing the attorney fee award based on the extent of the success achieved by the Dows on their counterclaim for breach of contract. The District Court remanded the case to the trial court for a determination of whether the attorney fee should be reduced based upon the success of the Dows on their counterclaim.

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