Community Counsel

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Doc Tax Suit Dismissal II– TFF Gambles

As we have reported in past, the suit filed by the for-profit corporation "Taxpayers for Fairness, Inc." (TFF) against 850 community associations in Florida was dismissed by the Circuit Court Judge hearing the case in Tallahassee. The initial complaint was dismissed without prejudice and TFF subsequently filed an amended complaint which sounded very much like the original. As expected, on February 14, 2001, the trial court, again acting on its own initiative, dismissed the amended complaint for reasons similar to the original.

The court criticized the conclusory allegations of intentional underpayment and stated that as to each of the 850 defendants, the plaintiff needs to allege facts stating (1) what the correct amount of taxes should have been, (2) what facts will show there was a submission of a false statement of the tax obligation, and (3) what constitutes the correct amount of the outstanding liens on which the tax is supposed to be paid. Also, the court noted that the failure to allege that each lien remained outstanding after title was acquired by each defendant, constitutes a failure to state a claim, since no tax would be due on any lien that was dissolved by foreclosure of the particular lien. Finally, the court again questioned whether the common facts or law applicable to each case is sufficient to warrant joining all defendants in a single action. Again, the plaintiff was given 20 days to re-file, and to serve each defendant in the case with a copy of the order.

Rather than immediately trying again, TFF chose a different tact. It filed a motion to recuse the trial court judge, alleging bias by Judge Smith against TFF.

TFF's Motion for Recusal was a gamble, asking a new judge to change the current order of dismissal.

This appeared to be a ploy to avoid the effect of the court's order. By asking another judge to assume responsibility for the case, TFF hoped that a new judge would review the current order and act differently. In effect its motion to recuse was a de facto appeal.

The gamble was unsuccessful, though. On February 28, 2001 the court denied the motion as legally insufficient. Prior adverse rulings alone do not create facts showing a reasonable fear of an unfair trial. Stay tuned. Further developments

Recent Cases

- Appeals court applies restrictive covenant on one property against an adjacent parcel not covered by the restriction.
- Dog owner ordered to remove dog and to pay her condo association a $1000 fine after lying about location of the dog.

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.

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RECENT CASE SUMMARIES

In **Eckerd Corporation vs. Corners Group, Inc.,** 26 Fla. L. Weekly D168 (Fla. 5th DCA 12/29/2000) Eckerd sought injunctive relief to prevent Corners from constructing a competing Walgreens Pharmacy. At issue in the case was the interpretation of a restrictive covenant which stated that "no part of the property shall be used as a pharmacy or drug store or for the sale or offer for sale of any pharmaceutical products requiring the services of a registered pharmacist, for a period of fifty (50) years from April 7, 1997, and this restriction shall run with the land." Corners bought the parcel of property which was subject to the restrictive covenant. Corners also bought the parcel of property adjacent to the restricted parcel. There were no restrictions on the adjacent parcel. Corners intended to construct the Walgreens building on the non-restricted parcel, and to utilize the restricted parcel solely for parking spaces to service the Walgreens Pharmacy. The trial court ruled against Eckerds and held that the restrictive covenant does not prevent the construction of parking spaces which would service the unrestricted adjacent parcel. The Fifth District Court of Appeal reversed the trial court. The Court of Appeal acknowledged that covenants running with the land must be strictly construed in favor of the free and unrestricted use of real property. However, the Court also observed that a restriction should never be construed in a manner which would defeat the plain and obvious purpose and intent of the restriction. The District Court found that the proposed Walgreens could not be built without the use of the restricted parcel for parking. As such, the restricted parcel was an integral part of the proposed pharmacy. Therefore, the appellate Court reversed the trial court and granted the entry of a permanent injunction against the construction of the proposed Walgreens.

In **Desoto Park Condominium Association, Inc., vs. Fehervary**, Case No.: 00-1180 (Draper, Arbitrator 9/18/00), the Association filed an arbitration action seeking the removal the Fehervary's Dalmatian dog. Prior to the filing of the arbitration action, the Association's grievance committee held a hearing for the purpose of considering whether to levy a fine against Fehervary for her violation of the pet restriction. The grievance committee voted to levy a fine of $25.00 per day for each day that the dog continued to remain in Fehervary's unit. On May 2, Fehervary delivered a letter to the Association's counsel which stated that she did not have the dog anymore. However, on June 1, the dog bit another resident at the Association. In the police report, Fehervary admitted that she owned the dog and the dog was kept in her unit. Thereafter, on July 10, Fehervary permanently removed the dog and advised the arbitrator of the removal. The arbitrator stated that in an ordinary case, the permanent removal of the dog would have rendered the case moot, and therefore dismissal of the case would ordinarily have resulted. In the instant case, however, Fehervary knowingly and willfully violated the pet restriction. Furthermore, Fehervary had previously made false representations regarding the removal of the dog from her unit. Based upon these circumstances, the arbitrator rule that injunctive relief prohibiting Fehervary from returning the dog to the unit and/or further violating the pet restriction was an appropriate remedy to be awarded to the Association. Additionally, the arbitrator found that the amount of the fine, if levied from January 12 (the date of the grievance committee voted to levy the fine), until July 10 (the date the dog was permanently removed), would exceed the $1,000.00 maximum fine as provided by the Florida Statutes. However, because the Declaration capped the fine at a maximum of $1,000.00, then the fine could not and did not exceed that the statutory maximum amount of a fine. As such, the arbitrator granted the relief requested by the Association and ordered the permanent removal of the dog from Fehervary's unit and further ordered Fehervary to pay to the Association the sum of $1,000.00 within forty-five (45) days from the date of the summary final order.

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