Community Counsel

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Our Top 10 List

We are frequently asked the same questions over and over, so we have assembled our own top ten list of common questions and short answers. They are not in any particular order and are necessarily presented in summary fashion.

10. **What action can an association take when it becomes aware that a sexual offender or predator may live in the community?** The Association does not have the same immunity from suit as do law enforcement officials. Do not identify any particular person or property, but do notify your members that such a person may be in the community and advise them to make further inquiry of law enforcement.

What are your most common issues? Let us know and we'll cover them.

9. **Can we extend the lien on property by recording a new one to cover new charges?** No. A lien relates back to the first lien filed. If your association is a type that faces a deadline for acting on a lien (condo, co-op and some HOAs by their documents), the deadline can not be extended by later filed liens. Also, there is no need to re-record liens every time a new charge accrues, provided that law or the lien states that it secures later charges. Use an attorney to prepare or review your lien – they are very important documents.

8. **Should we foreclose our lien if there is an outstanding first mortgage on the property?** Yes, in nearly all cases. Taking this action may be necessary to force a resolution to the matter, even if that means the start of a mortgage foreclosure. Do not be afraid of having to pay the first mortgage – only those who sign the note are liable for it. Though a mortgage foreclosure will extinguish later liens, if your debt must be extinguished, it is better to get this over with as soon as possible so that you minimize any loss. For condos and coops there is still a possibility of a minor partial recovery from the foreclosing mortgagee.

7. **How do we get out of a bad contract?** The very best way is to not get into it in the first place, Check references carefully and have the proposed contract reviewed and re-drawn to protect you. The second best way is to include a provision that allows for cancellation after notice, preferably without "cause." Beyond that, if the other party is in material breach of the contract, i.e. there is an important, specific contractual obligation that has not been fulfilled, generally such a breach will excuse further performance by the other party. Of course, any contractually required notice provisions must be complied with and you may wind up litigating on the issue of a breach, so be sure that the contract has an attorney's fees provision as well.

Continued next month >>>>>>>

Recent Cases

- **Condo Act insulates owners from personal liability for personal injuries.**
- **"Repairs" are different from replacements, if you did not know that.**
- **Violation of noise ordinance allows association to seek injunction to abate a private nuisance.**

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 **Cooley vs. Pheasant Run at Rosemont Condominium Association, Inc.**, 26 Fla. L. Weekly D978 (Fla. 5th DCA April 12, 2001) Cooley brought an action for personal injuries he suffered while a guest on the common elements of the Condominium Association. In addition to the Association, Cooley joined the unit owners individually in the lawsuit. The trial court dismissed the unit owners individually on the basis that Florida Law does not support such an action against the unit owners. Instead, the action must be maintained solely against the Association. On appeal, Cooley argued that §718.119, Fla. Stat., permits an action directly against the individual unit owners for injuries which occur on the common elements of a condominium association. The Fifth District Court of Appeal was required to determine the legislative intent behind §718.119, Fla. Stat. In affirming the trial court, the Fifth District Court of Appeal held that, while not a model of clarity, §718.119, Fla. Stat., does not permit actions directly against the individual unit owners.

In **Bowen vs. Larry Gross Construction, Inc.**, 26 Fla. L. Weekly D710 (Fla. 5th DCA, March 9, 2001) Bowen brought an action against Larry Gross Construction for alleged defects in the construction of her new home. During the course of the proceedings, Bowen and Gross attended mediation. The parties reached a settlement at mediation which required Gross to "repair cracks in plaster." After the mediation, Bowen obtained a contractor's bid in the amount of $14,000.00 to repair the cracks in the plaster. However, after consulting with Gross the contractor reduced the cost to repair the cracks in the plaster to $945.00. The contractor explained that the initial bid was to totally *remove* and *replace* the drywall and re-plaster the home. The reduced bid was simply to *repair* the cracks. Bowen sought to set aside the mediation settlement agreement because of the parties inability to agree upon the meaning of the phrase "repair cracks in plaster." Bowen alleged that because the parties could not agree on the interpretation of the phrase "repair cracks in plaster," there could be no "meeting of the minds" and therefore the mediation settlement agreement was voidable due to the ambiguity. The trial court distinguished between repairs and replacements and held the owner was entitled only to "repair" the plaster by patching it to make it look new, rather than replacing the dry-wall and plaster. In affirming the trial court, the Fifth District Court of Appeal held that the parties chose the word "repair" and are therefore bound by the interpretation which the court placed on it.

In **Mizner Tower Condominium Association, Inc., V. Boca Marina, Ltd**., Circuit Court, 15th Judicial Circuit in and for Palm Beach County. Case No. CL 002339 AG. October 30, 2000. Kathleen J. Kroll, Judge. Association sued Developer for itself and on behalf of all owners to abate a private nuisance. It sought entry of an injunction to halt use of a newly constructed cooling tower at an additional phase of the condominium development. It alleged that fans inserted into the cooling tower would be excessively noisy. After suit was filed, the tower became operational and sound level measurements indicated that the sound level significantly exceeded what is permissible under a local zoning ordinance. In order to be granted temporary injunctive relief, Association had to prove (1) it would suffer irreparable harm unless the status quo is maintained; (2) it would have no adequate remedy at law; (3) it would have a clear legal right to the relief requested; and (4) a temporary injunction would serve the public interest. In granting the temporary injunction the circuit court ruled that irreparable harm is presumed when a violation of a local ordinance is shown, and that no adequate remedy at law is available in the case of excessive noise. A "clear legal right" arises when the Association shows a substantial likelihood of success on the merits, and the public interest is served by abating loud noise. The court entered an order requiring the noise to be reduced within sixty days.

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