Community Counsel

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RECENT CASES

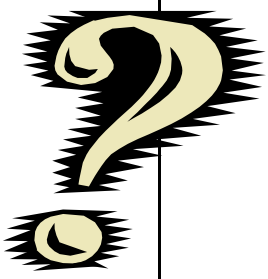
- 5th DCA adheres to longstanding principal that condo maintenance may include alterations.
- Two prior dismissals of foreclosure action did not preclude a third.
- Saleman sued for representations that induced sales but which were false.

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.

More of Our Top 10 List

We continue our top-ten list of common questions and short answers. The first four were addressed last month. They are not in any particular order and are necessarily addressed in summary fashion.

6. **How much is this lawsuit going to cost us?** The amount of attorney's fees involved in litigation is usually a function of the amount of time spent on a case. The problem with trying to estimate fees in advance is that no single party to litigation (and there may be several parties) is in a position to control how the litigation progresses, but instead each party reacts to what the others have done and how the court handles the case. Therefore, trying to estimate litigation fees in advance is like trying to guess the score a sporting event before it is played: at best only a "usual" range can be "guestimated."



TELL US YOUR MOST COMMON QUESTIONS AND WE WILL ANSWER THEM.

5. **We didn't enforce a restriction in the past. Can we ever do so again?** Yes, but first you have to rehabilitate the authority to enforce the particular restriction in question. This is done by giving notice to the members of the intent to start enforcement again. When given, the Association can commence enforcement for all violations of that type that occur after a valid notice has been given. Earlier violations that have been ignored are said to be "grandfathered."

4. **The Board is messing up and I want to sue them. Will you sue them for me?** Believe it or not, most actions taken by a Board are not subject to successful challenge because "the business judgment rule" protects discretionary decisions, even if they turn out to be wrong. Because the courts do not function as Monday-morning quarterbacks a better solution is to recall some or all of an errant Board. This is a political - as opposed to a legal – solution and can be faster, cheaper and give more satisfactory results. Be careful, however, because the process has many procedural hurdles to be jumped and the failure to substantially comply with them can invalidate the will of a majority of the community.

3. **Can I be made to pay twice for construction work?** Yes! This is the way the law protects workers and product suppliers in construction projects, because they do not contract with the property owner directly. To ensure that everyone up and down the chain gets paid for what they contribute, the burden is initially placed on the owner to give public notice of who he is, so that each contributing party can make its role known to the owner. The owner should then make sure that each party gets paid by requiring execution of a partial or final release of lien rights as the project progresses. Failure to follow this procedure results in the owner bearing the burden of having to pay twice under threat of having a lien foreclosed on the property being improved.

Continued next month >>>>>

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RECENT CASE SUMMARIES

In **Reuter vs. Courtyards of the Grove Condominium Association, Inc.,** 26 Fla. L. Weekly D1294 (Fla. 5th DCA 5/16/2001) the Fifth District Court of Appeal unanimously upheld the ruling of the trial court permitting the Board of Directors to perform maintenance of the common elements notwithstanding the fact that such maintenance might constitute alterations or improvements. The Fifth District Court of Appeal adopted the prior holdings of the Second District Court of Appeal. In quoting from these prior decisions, the Fifth District Court of Appeal adopted the position that "simply because necessary work for maintenance may also constitute alterations or improvements does not nullify a condominium board's authority and duty to maintain the condominium common elements.

In **Olympia Mortgage Corp v. Pugh**, 26 Fla. L. Weekly D780a (Fla. 4th DCA 12/27/2000), Olympia filed two successive mortgage foreclosure actions against the Pugh. Both actions were based on the same promissory note and in each Olympia elected to accelerate payment of the entire amount due on the note and mortgage. In the each case Olympia alleged a different default date. For various reasons Olympia voluntarily dismissed each of the cases. When it filed a third action, Pugh defended based upon the "two dismissal rule" of civil procedure which provides that a dismissal operates as an adjudication on the merits when served by a plaintiff who has once dismissed in any court an action based on or including the same claim. The trial court agreed and ruled that Olympia had forfeited its claim for monies due between the earliest date alleged for a default and the last suit. On appeal the Pughs argued that because Olympia had accelerated the full balance due in each case, the earlier cases involved the same issues as the new case. The Fourth District Court of Appeals disagreed, and held that there were factual differences between all of the cases, including whether a default occurred on the different dates alleged in each case, and so the "two dismissal rule" did not apply.

In **Mejia v. Jurich**, 26 Fla. L. Weekly D975a (Fla. 3rd DCA, April 11, 2001), the Third District Court of Appeals consolidated three appeals by buyers in the same Lennar community against Jurich, the salesperson, for alleged fraudulent inducement to purchase homes through three misrepresentations made separately to each buyer. In each case the trial court had dismissed the case, finding that the alleged misstatements were non-actionable sales "puffing." The statements at issue related to (1) Lennar's policy of not reducing the asking price of its homes, (2) removal of existing railroad tracks and a crossing, and (3) the homes would comply with existing the zoning classification of the property. Jurich defended by claiming that the representations were sales talk, were oral representations subsumed into the later written contract and were barred by the economic loss rule. As to the latter defenses, the appellate court found that fraudulent statements made to induce a contract are exceptions to the rules barring actions based on oral representations and the economic loss rule. On the former defense, statements of opinion or of future conduct may be actionable when made by one having superior knowledge of the subject and if the plaintiff can show that said person knew or should have known from facts in his or her possession that the statement was false, or that such future conduct would not occur. With such proof the opinion may be treated as a statement of fact. The case was reversed and the suits re-instated.

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