COMMUNITY COUNSEL

December, 2002 A Publication of Wean & Malchow, P.A. Volume 6, Issue 12

news

As of 1/15/03 our new mailing and physical address will be:

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Our new local phone will be:

407-999-7780

Our Toll free Number will remain:

800-895-wean

Our new fax number will be:

407-999-law1

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.

Bad Checks and Community Associations Part 2

The second issue for the association is proof of the identity of the maker of the check. In order for the State Attorney's office to prosecute an action on a worthless check, the association will be required to prove who wrote the check. Proof of identity can be accomplished by writing the driver's license number or state identification number of the maker on the check. Unfortunately, assessment checks are typically mailed into the association or a management company. Hence, there is usually no opportunity for the association to make an identification of the maker of the check that would support a criminal conviction.

Fortunately, there is a procedure for payees receiving checks through the mail to make an identification which would support a criminal conviction. The association should have on file a document signed by the owner(s) which contains the owner(s) full name, residence address, home phone number, business phone number, place of employment, sex, date of birth, and height. All of this information should be obtained for each member writing checks to the association. If this information is not on file with the association, then the State Attorney's office will not prosecute a criminal action for uttering a worthless check. Simply stated, the association must be able to establish the identity of the person writing the check in accordance with the mandates of s.832.07, F.S. In the absence of evidence identifying the maker, the State Attorney's office will be unable and unwilling to prosecute the offender.

If the association has sent the statutory demand notice to the maker by certified mail, and the association is able to make a legally sufficient identification of the maker, then the State Attorney's office may prosecute the maker of the check. Each State Attorney's office has a package of materials and complaint forms to be filed out by the association. The complaint form, a copy of the statutory demand notice, and proof of identification must be delivered to the State Attorney's office in order to commence the investigation and prosecution for the crime of uttering a worthless check.

It is important to note that the association is **not** required to choose between seeking a criminal conviction or a civil judgment. The association may pursue collection of the check through a civil action and may independently refer the matter to the State Attorney for criminal prosecution.

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In summary, to pursue a criminal action against the maker of a worthless check, the association must be able to identify the maker of the check. This identification can be made by a form document which is maintained with the official records of the association. This form document must contain all of the information required by the statute for each person or member writing checks to the association. While this identification requirement may appear onerous, without it the State Attorney will be unable to prosecute the maker of a bad check. Therefore, if the association desires to pursue criminal charges against a member who utters a worthless check to the Association, the burden is on the association to create policies, forms and procedures to establish the identity of all persons or members who are delivering checks to the association.

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RECENT CASE SUMMARIES

In **Padrow vs. Knollwood Club Association, Inc.**, 27 FLW D2627A, (Fla. 4th DCA, 12/11/2002), Association brought an action against Owner seeking to foreclose on a claim for unpaid assessments. Owner filed an answer to the complaint and also asserted entitlement to attorney's fees pursuant to section 57.105, F.S., and "Fla. Ch. 718." About one year into the litigation, Owner sent a check to the Association for $2,000.00. The trial judge later denied Association's motion for summary judgment finding that all delinquent assessments had been paid by the $2,000.00 tender. Seven months later Association voluntarily dismissed its complaint without prejudice. Thereafter, Owner filed a motion to tax costs and attorney's fees, citing sections 57.105 and 768.79, F.S. At the hearing on the motion, Owner also raised sections 718.116 and 716.25, F.S., in his argument. The Association objected to Owner relying on these statutes and asserted that the generalized reference to "Fla. Ch. 718" in the answer was insufficient to preserve Owner's claim for attorney fees pursuant to the Florida Supreme Court holding in *Stockman vs. Downs*. After this hearing, Owner filed a supplemental memorandum which, for the first time, included a claim for attorney's fees under section 718.303, F.S. The trial judge denied Owner's claim for attorney fees. The Fourth District Court of Appeal affirmed the decision of the trial court. The appellate court held that under *Stockman* Owner failed to sufficiently plead his claim for attorney's fees under section 718.303, F.S., and failure to do so constituted a waiver of the claim. The reference in the answer to "Fla. Ch. 718" was insufficient to raise a claim for fees under section 718.303. If a party seeks fees under a statute, it must cite the specific statutory section to sufficiently plead its claim for attorney's fees.

In **Caufield vs. Cantele**, 27 FLW S1046 (Fla. 12/19/2002), Sellers entered into a contract with Buyers to sell a mobile home park. Closing on the sale occurred and title passed to the Buyers. Later, Buyers filed a complaint in the Circuit Court, alleging concealment of defects and fraudulent misrepresentations as to the condition of a sewer plant located on the property. Sellers filed a motion to dismiss claiming that the complaint alleged fraud and breach of contract in a single count. Sellers included in the motion to dismiss a general prayer for attorney's fees. After the Buyers' initial counsel withdrew from the case and new counsel failed to appear at a pretrial conference, Buyers voluntarily dismissed the complaint. After the voluntary dismissal, Sellers sought to recover their attorney's fees and costs incurred in defense of the action. The contract contained a provision which entitled the prevailing party to costs and attorney's fees in any litigation "arising out of" the contract. The trial court entered an order denying Seller's request for attorney's fees for two reasons. First, the trial court concluded that Sellers had failed to plead a definitive basis for attorney's fees, as required by the case of *Stockman vs. Downs*. Second, the trial court concluded that because the cause of action was for the tort of intentional misrepresentation, the litigation was not based on the contract and, thus, the litigation did not "arise out of" the contract. Sellers then sought review of the trial court's order through plenary appeal to the Fifth District Court of Appeal. The Fifth District Court of Appeal held that a judgment denying attorney's fees entered after a voluntary dismissal was properly reviewed by plenary appeal. The Court further held that Seller's general request for attorney's fees failed to meet the standard for claiming fees set forth by the Florida Supreme Court in the *Stockman* case. Lastly, the Court held that the Sellers were not entitled to attorney's fees under a prevailing-party provision in the contract with the Buyers. The Florida Supreme Court affirmed in part and reversed in part the decision of the Fifth District Court. While the Supreme Court agreed with the District Court that orders of trial court's denying an award of attorney's fees after a voluntary dismissal are to be reviewed through a plenary appeal and not through a petition for certiorari, the Supreme Court reversed the remaining holdings of the District Court. The Supreme Court clarified its holding in *Stockman vs. Downs* and held that *Stockman* does not require that a party specifically plead the basis for the entitlement to fees. In *Stockman*, the Supreme Court had stated that merely pleading a claim for attorney's fees is sufficient to notify the opposing party and allow it to consider the claim in its planning. In the instant case, the Supreme Court refused to extend the holding in *Stockman*. Thus, the Supreme Court held that the specific statutory or contractual basis for a claim for attorney's fees need **not** be specifically pled, and failure to plead the basis of such a claim will not result in a waiver of the claim. As to the final issue, the Florida Supreme Court held that claims of fraudulent misrepresentation concerning the subject matter of the contract do "arise out of" the contract. The existence of the contract and the subsequent misrepresentation in this case are inextricably intertwined, such that the tort complaint necessarily arose out of the underlying contract. As a result, the contractual provisions, including the prevailing party clause, should be given effect.

EDITOR'S NOTE: THE SECOND DECISION ACTS TO OVERRULE THE FIRST CASE. THESE CASES ILLUSTRATE WHAT ATTORNEYS SOMETIMES MUST GO THROUGH WHEN DETERMINING WHAT THE LAW IS !

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