COMMUNITY COUNSEL

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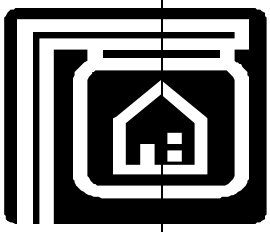
RECENT CASES

- **Once owner in a dispute with condo Association sells its unit, arbitration is not appropriate, and a law suit may be brought based on the dispute.**
- **Award of attorney's fees can not cover prior proceedings in other courts when those courts did not award 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.

Completing A Seller's Disclosure Law

For years Florida law has had a disclosure law that required sellers of residential property in Florida to disclose to buyers certain fact concerning any community association having authority over the property, including disclosing that the property is in a community association and that the association may levy assessments and lien and foreclose for non-payment. The problem with this law, found at Section 689.26, Fla.Stat. is that it was incomplete. It failed to contain an essential element that any statute needs to be effective. The missing element is known in legal parlance as a remedy. The absence of a penalty for failing to give the disclosure meant that sellers and their brokers could not count on suffering any certain consequences for ignoring the statute. That changed in 2003 when the statute was rewritten by SB. 1220.



Sellers not complying face a strong remedy available to all buyers.

The new amendment changes the text of the existing required disclosure, though the changes are not dramatic. What is a dramatic change, however, is a new, separate disclosure that must be included in ***every*** contract for the sale of residential property in Florida except condominium, cooperative, time share and mobile homes park property. Both mandatory and voluntary homeowner associations are covered by the statute. The new disclosure states:

IF THE DISCLOSURE SUMMARY REQUIRED BY SECTION 689.26, FLORIDA STATUTES, HAS NOT BEEN PROVIDED TO THE PROSPECTIVE PURCHASER BEFORE EXECUTING THIS CONTRACT FOR SALE, THIS CONTRACT IS VOIDABLE BY BUYER BY DELIVERING TO SELLER OR SELLER'S AGENT WRITTEN NOTICE OF THE BUYER'S INTENTION TO CANCEL WITHIN 3 DAYS AFTER RECEIPT OF THE DISCLOSURE SUMMARY OR PRIOR TO CLOSING, WHICHEVER OCCURS FIRST. ANY PURPORTED WAIVER OF THIS VOIDABILITY RIGHT HAS NO EFFECT. BUYER'S RIGHT TO VOID THIS CONTRACT SHALL TERMINATE AT CLOSING.

Any contract that does not comply with this requirement is "...voidable at the option of the purchaser prior to closing."

Note that the last quote does not refer to the 3 day cancellation period mentioned in the disclosure. This means that until closing there is no time limit on the exercise of the right of cancellation, unless and until the disclosure is provided. Compliance triggers a three day remorse period. Absent compliance, the right to cancel remains within the buyer's power to exercise right up until "the closing," though at what point in the closing process the right terminates is unclear.

Potentially, a buyer who is aware of the seller's failure to provide a disclosure could come to the closing table wielding a very strong last minute negotiating strategy that could make a seller renegotiate the entire sale price downward at the closing table.

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RECENT CASE SUMMARIES

In **National Ventures, Inc., et al., v. Water Glades 300 Condominium Association, Inc.**, 28 Fla. Law Weekly D1375a, (Fla. 4th DCA June 11, 2003). In 1978 Corporate Owner bought a unit to be used as a vacation facility for company executives. The declaration of condominium provided that where a unit is owned by a corporate entity, the corporate entity must designate in writing the permitted occupants of the unit and the period of time that the designated occupants shall occupy the unit. The executives and their families used the condominium for fifteen years without incident. In November 1993 the Corporate Owner sent its yearly reservation list for the 1993-1994 season. The president of the Association wrote back to Corporate Owner advising that Association had amended the rules. The amendment provided that "unit owners are limited to having overnight guests, other than immediate family members, in the unit in the owner's absence for a cumulative total of thirty (30) days during any calendar year." Association's president requested that Corporate Owner revise its reservation list to comply with the amended rules. Corporate Owner objected to the amendment, as the amendment applied to all Corporate Owners. Corporate Owner explained that, because a corporation can be physically present only through its "owners" or executives, then the Corporate Owner's representatives (i.e., its executives) would be excluded as "non-owner" guests and thus prevented from using the condominium for eleven months of the year. When Association indicated that it would not exempt any Corporate Owner from the new rule to accommodate its executives, Corporate Owner filed suit. In its second amended complaint, Corporate Owner alleged causes of action for "ultra vires" acts and breach of fiduciary duty, unjust enrichment, fraud, conversion, interference with business relations, constructive ejectment and for breach of contract. Soon after filing the second amended complaint Corporate Owner sold the unit. Association argued that some of these causes of action were required to be arbitrated pursuant to §718.1255, Fla. Stat. After the filing of the arbitration action by the former Corporate Owner, Association moved to dismiss the arbitration action because the corporation no longer owned a unit. The arbitration action was dismissed by the Department because the corporation was no longer a unit owner. Thereafter, back in the trial court Association moved to dismiss the second amended complaint due to the failure of the corporation to file a petition for trial de novo within thirty (30) days after dismissal of the arbitration action. The trial court dismissed the second amended complaint for failure of the corporation to request a trial de novo within thirty days. The Fourth District Court of Appeal reversed the trial court's dismissal of the second amended complaint. The appellate court noted that the dismissal of the arbitration action was proper due to the fact that the corporation was not a unit owner at the time the arbitration action was filed. Therefore, §718.1255, Fla. Stat., was not applicable to the action between the corporation and the association. Since this statue did not apply, then this same statute's provisions related to the filing of a trial de novo also did not apply.

In **Norland v. Villages at Country Creek Master Association, Inc.,** 28 Fla. L. Weekly D1547 (Fla. 2nd DCA July 2, 2003), Owner appealed an award of attorney's fees and costs entered in favor of Association. Owner brought suit against Association and several of its board members alleging that the board of directors failed to comply with the provisions of the Florida Statutes governing homeowners associations. The provisions of the Florida Statutes governing homeowners associations provide that the prevailing party in any litigation shall be awarded its reasonable attorneys' fees and costs. The trial court held that Association became the prevailing party when Owner's lawsuit was dismissed for lack of prosecution. Thereafter, the trial court awarded to Association all of its attorney's fees incurred in the entire action, including attorney's fees incurred on previous appeals to the Second District Court of Appeal and to the Florida Supreme Court. The Second District Court of Appeal affirmed the award of attorney's fees to Association for fees incurred before the trial court. However, the appellate court reversed that portion of the attorney's fee award which awarded fees incurred by Association on the prior appeals to the Second District Court of Appeal and to the Florida Supreme Court. As the appellate court noted, neither of the courts in the prior appellate actions entered an order awarding Association the fees and costs incurred in those appeals. As such, the Second District Court of Appeal held that the trial court was without authority to award Association its attorneys' fees and costs incurred in the prior appeals.

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