COMMUNITY COUNSEL

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RECENT CASES

- **Mobile Homeowners Association had no standing to seek interpretation of mediated rent increase agreement as a matter of common interest because it did not effect all or most of the homeowners.**
- **Builder's Risk Insurance Policy is first party property insurance, not third party liability insurance.**

Condo Developers Win Another Bad Decision

Courts will go to absurd ends to reach a result felt to be equitable. In recent years the courts have been troubled by developers who, through a combination of bad planning and ignorance of the law, put themselves in a position to incur significant liability for condominium assessments on developer owned units. In 1997 we reported on the case of Ris Inv. v. Dep., Bus. & Prof. Reg., 695 So.2d 357 (Fla.App. 4 Dist. 1997), which strained to excuse a developer from paying assessment when he ignored his legal options, created 160 condominium units at once, and then realized the magnitude of the financial burden he faced.

In a newly reported decision the 2nd District Court of Appeals bailed out another developer of 80 single phase condo units, excusing the developer from failing to avoid or minimize liability for assessments on developer units through the use of the phased development option and the taking of annual votes to waive or reduce reserve funding. The court also showed that it miscomprehends how condominiums operate.

The Court Excused a Developer from Paying Reserves on Phantom Units

The case, Tara Manatee v. Fairway Gardens at Tara, 28 Fla.L.Weekly D2155 (Fla.App. 2 Dist. 9/12/2003), involved a developer's obligation to pay, as part of the developer's guarantee of the level of assessments, the reserves attributable to the existing but unbuilt ("phantom" units). The decision, by attempting to distinguish reserves that are "incurred" and those which are not, completely ignores the long term nature and purpose of reserves as embodied in Florida's Condominium Act and misapplies the concept of "estimated useful life" to units rather that to common elements, as required by the Act.

The court permitted the developer to frame the issues in this fashion:

…. whether maintenance reserves for unbuilt units are an "incurred" common expense for which the Developer is liable under the developer guarantee provision.

The Court ruled: "We conclude that the requirement to fund reserves for deferred maintenance is not triggered by the recording of a declaration of condominium. …. based on the wording of this statute, a developer is not required to fund deferred maintenance reserves for unbuilt units….**The useful life of a unit** in terms of maintenance does not commence until it is built because unbuilt units do not deteriorate and accrue maintenance needs. Furthermore, the provisions of section 718.112(2)(f)(2) whereby a developer may **vote to waive or reduce the funding of reserves must be read to apply only to reserves that are required to be funded**. We find no requirement to fund maintenance reserves for unbuilt units and, therefore, no waiver was necessary. (Emphasis supplied)

A very, very poor decision , indeed.

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RECENT CASE SUMMARIES

In **Malco Industries, Inc., vs. Featherock Homeowners Association, Inc.**, 28 Fla. L. Weekly D2031 (Fla. 2nd DCA August 29, 2003), Association brought an action for declaratory judgment on behalf of all homeowners occupying rental spaces against mobile home Park Owner. Residents of the mobile home park own their homes and lease lots from the Park Owner. Each rental is governed by an annual lease agreement which begins on January 1 and ends on December 31. As such, the landlord - tenant relationship is governed by Chapter 723, Florida Statutes. For the year 2001, Park Owner increased the lot rental in the mobile home park and sent the homeowners a statutory notice of the increase. Many of the owners objected to the increase. The dispute was resolved through a mediation proceeding conducted pursuant to §723.038, Fla. Stat. The homeowners were represented by a five-member committee that was designated by a majority of the homeowners in accordance with §723.037(4)(a), Fla. Stat. The committee and the Park Owner executed a mediation agreement on January 3, 2001, in which the parties agreed upon the amount that lot rent would increase for existing homeowners each year for 2001, 2002, and 2003. The settlement agreement further provided that the rent limitations ". . . . are personal to existing residents and may not be assumed by resale purchasers except as provided in §723.059(3), Fla. Stat." This statute permits the purchaser of a mobile home to assume the remainder of the term of any rental agreement then in effect between the Park Owners and the home seller. Park Owner argued before the trial court that the mediation agreement specifically exempted resale home purchasers from the benefits of the mediation agreement except as to the resale purchaser's statutory right to assume the remainder of the seller's rental agreement until its year end on December 31. Park Owner also argued that Association lacked standing to bring the action because Association did not comply with the statutory prerequisite by obtaining consent from a majority of the affected homeowners, as required by §723.037, Fla. Stat. Association argued that the mediation agreement was itself a rental agreement and that resale home purchasers were permitted to assume the rent limitations for the remainder of the three-year period. Association further argued that as a duly formed mobile home association it had standing to institute actions in its name on behalf of all homeowners concerning matters of common concern. The trial court rejected the Park Owner's standing argument. The trial court held that this action was a matter of common interest. Therefore, the trial court entered judgment in favor of Association. The Second District Court of Appeal agreed that this matter was not governed by §723.037, Fla. Stat., because the instant action was not a challenge to the increase in the amount for lot rentals. Instead, this was an action for declaratory judgment to interpret a mediation settlement agreement by which the parties had previously resolved the lot rental amount. However, the appellate court reversed the trial court and ordered judgment in favor of Park Owner, due to the appellate court's finding that this action was not a matter of common concern. Specifically, the appellate court held that this was a matter of limited concern to the park and only affected owners who intended to sell their homes during the relevant three-year period. Furthermore, to the extent that potential purchasers might have been affected, these potential buyers cannot be represented by Association.

In consolidated appeals of **U.S. Fire Insurance Company vs. Sovran Construction Company, Inc.**, and **U.S. Fire Insurance Company vs. Jade East Towers Developers**, 28 Fla. L. Weekly D1895 (Fla. 1st DCA August 12, 2003), Condominium Association obtained a judgment against Contractor and Developer for damages resulting from construction defects and deficiencies in the condominium. Contractor and Developer filed separate third party claims against Insurance Company based upon Contractor's and Developer's builder's risk insurance policy. The trial court ruled that the risk insurance policy which was effective during construction of the condominium project must indemnify Association for the claimed construction defects and deficiencies. The trial court specifically ruled that this ". . . . court finds that the policy must cover, and does cover, the losses claimed against Sovran by the plaintiff in this case." The First District Court of appeal reversed the trial court based upon a recent Florida Supreme Court decision. The Florida Supreme Court recently ruled that a builder's risk policy is not a liability policy. The Court further stated that ". . . . builder's risk insurance is a type of property insurance coverage, not liability insurance or warranty coverage. The purpose of this type of insurance is to provide protection for fortuitous loss sustained during the construction of the building." The First District Court of Appeal reversed the trial court and held that a builder's risk policy is a first-party contract and does not indemnify a third-party, such as a condominium association, for faulty workmanship.

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