COMMUNITY COUNSEL

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RECENT CASES

- **question of fact exists warranting trial in foreclosure case where condo accelerated assessments when only $.78 was due**
- **Collateral Estoppel prevents a party from re-litigating an issue already decided in another case with the same parties**

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.

TIME TO REVIEW HURRICANE SHUTTERS

Many condominiums in Florida are targets. They sit on the coast and are very tall. They might as well have "bull's-eyes" painted on them (though that would certainly require membership approval). Recent history makes this an opportune time to review the provisions of Sections 718.113(5) and 718.115(1)(e), Fla. Stat. These provisions address use of hurricane shutters and laminated glass.

The obvious purpose of these improvements is to protect the condominium property from wind and water damage during severe weather. For this purpose every condominium in Florida has been ***required***, since the early 1990's to adopt a rule specifying the make, model and color of a shutter which the members may install over the openings in their units. Despite the mandatory nature of this longstanding requirement, many condominiums have done neither the background investigation of the marketplace nor the rulemaking mandated by law. Any community that is still lagging had best proceed with all deliberate speed or face possible claims for breach of fiduciary duty – claims that may not be covered by insurance in the event the damages claimed are to property or person. Beyond this, however, based largely on experience with Hurricane Andrew, it was realized that a building-wide system of shutters is only as good as the weakest link, as buildings with many good shutter systems were severely damaged by wind and water intruding into uncovered windows. Once intrusion occurred the air pressure then blew outwards, destroying the protection offered by the closed shutters.

This is why pertinent statutes were amended to allow the members, by a majority vote, to approve having the association install, operate, repair and maintain a shutter system on a building-wide basis as a common expense. Owners who have installed systems are allowed a credit against the cost of installation, though that credit is subject to the board's evaluation of the existing equipment.

CONDOMINIUMS ARE REQUIRED TO HAVE A SHUTTER SPECIFICATION AND SHOULD VOTE ON ASSOCIATION OVERSIGHT AND OPERATION.

Given the potential for law suits and the liability that can arise by failure of the board to act, it seems a easy and very common sense idea for ***every*** condominium board to put the option to a membership vote. Such a vote, if successful, will allow the Association to better protect the condominium property to benefit all owners. On the other hand, if such a vote is not approved, then the members/owners will be hard-pressed to bring suit against the board for failure to protect the building when the owners themselves have elected not to do so. So by all means, condos should get that question before your members at the earliest possible moment!

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RECENT CASE SUMMARIES

In **McKenna vs. Camino Real Village Association, Inc.**, 29 Fla. L. Weekly D1681 (Fla. 4th DCA, July 21, 2004) Association brought suit against Unit Owner to foreclose a claim of lien for unpaid assessments. Unit Owner denied owing the amounts claimed due by Association. Furthermore, Unit Owner alleged that Association failed to give the Unit Owner proper notice of the delinquency, as required by the governing documents of Association. The record showed that on August 29, 2002, Association sent Unit Owner a letter stating that she owed money for past due assessments, interest, late fees and attorneys' fees and costs. The letter also included a copy of a claim of lien which Association intended to file. Ultimately, the claim of lien was recorded on August 30, 2002. The claim of lien indicated that Unit Owner was indebted to Association in the amount of $0.78 for July and $503.82 for a special assessment due August 1 and in the amount of $229.89 for the regular monthly assessment for August. Additionally, pursuant to the claim of lien, Association accelerated assessments due through the end of the year. Association's declaration provided that in the ". . . . event that any unit owner shall be more than thirty (30) days delinquent in the payment of any assessment. . . ." then after seven (7) days notice to the owner the association could accelerate the assessments." Unit Owner alleged in her affirmative defense that she did not owe the amounts due under the claim of lien and that Association failed to comply with the procedural requirements set out in the declaration. The trial court granted Association's motion for summary judgment over the affirmative defenses raised by Unit Owner. In reversing the trial court, the Fourth District Court of Appeal noted that on August 29, 2004, when Association sent its first demand letter to Unit Owner, Unit Owner was only delinquent in the amount of $0.78 because the August assessments were not more than thirty (30) days delinquent. Association used the alleged delinquent assessments for August as the basis for accelerating the balance of assessments for the remainder of the year. Therefore, the only delinquent assessments which could have formed the basis for the acceleration were the July delinquency of $0.78. Therefore, in reversing the trial court the appellate court held that there was an issue of fact related to whether Association followed its governing documents and provided proper notice of the assessments owed by Unit Owner as well as whether Association properly accelerated the assessments due.

In **Hill vs. Palm Beach Polo and Country Club Property Owners Association, Inc.**, 29 Fla. L. Weekly D1775 (Fla. 4th DCA, August 4, 2004), Owner brought suit against Association seeking to recover litigation expenses pursuant to Association's bylaws. In 1996, Owner had brought suit against Developer and Association seeking equitable and legal relief. After numerous appeals, one count of the complaint remained viable. Thereafter, Owner filed a declaratory judgment action against Association's insurance carrier to determine whether his litigation expenses were a covered loss under Association's insurance policy. After a two-day trial, the court determined that Owner had acted in his capacity as an individual owner and member, and not as a director in the underlying litigation. As such, Owner was not entitled to coverage under the policy. In the present case, Owner sought to recover his litigation expenses; this time pursuant to Association's bylaws. The bylaws provide that every director and every officer of Association shall be indemnified by Association against any and all expenses and liabilities, including counsel fees, reasonably incurred by or imposed upon him/her in connection with any proceeding or any settlement of any proceeding to which they may be a party. Association argued that because the court determined in the first lawsuit that Owner was acting in his individual capacity as an owner and member, then Owner is barred by the doctrine of "collateral estoppel" from re-litigating the issue in the present case. The trial court held that it would be illogical and inconsistent to now decide Owner acted in his capacity as a director when the court previously decided he acted as a property owner and member. Therefore, the trial court granted Association's motion for summary judgment. On appeal, the Fourth District Court of Appeal affirmed and held that the dispositive issue, the capacity in which Owner acted in the underlying issue, is the same. Owner had a full and fair opportunity to litigate this issue in the first case and he lost. Therefore, Owner is precluded from re-litigating this same issue in another case.

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