COMMUNITY COUNSEL

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RECENT CASES

- **Developer suit against Manager for bad budget that caused Developer to pay more under assessment guarantee dismissed.**
- **Easement Preserved when buyer failed to check facts suggested by examination of documents in the public records.**

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2005 Legislative Wrap Up

In 1815 the volcano Tambora erupted in the Far East. As a direct result of this eruption, the climate changed world-wide, and thereafter New England farmers referred to 1816 as the year without a summer.

In 2004 changes were made to both the HOA and Condo Acts, largely at the behest of anti-association forces (though the scope and language of these changes were leavened by cooler, more reasonable and better informed minds). However, as a direct result of these changes, no significant association legislation was enacted in Florida's 2005 legislative session, though not for lack of proposals.

2005 of was a year of little action because of what occurred in 2004, including a focus on hurricane issues.

On the fanatical side, bills were put forth that would have extended state regulation of condos to HOAs, would have prohibited waiver of condominium reserves, and would have set a floor of $2500.00, below which associations could not commence lien foreclosure actions.

On the pro-community side, proposals were put forth that would have created emergency powers for associations faced with bona fide emergencies, would have removed the new pre-suit mediation system from state administration, and would have addressed some of the confusion now existing in the condominium insurance arena. The extreme proposals were left on the committee floors, while sound proposals passed the House by a wide margin but died on the Senate floor in a last minute rush of storm-related business.

What did pass:

HB 291 – makes developers accountable for developer-controlled board actions and requires condo construction claims be certified by one of several licensed professionals.

SB 1486 – allows condo associations to select either annual or per storm deductibles for windstorm coverage. This represents a change from what was adopted in an earlier special session in 2005, made after the insurance industry complained about the cost of annual premiums.

What passed but was vetoed – SB 1520 would have created "travel clubs" that would have circumvented most real estate regulations and covenants and allowed short term occupancy in many stable communities. The bill was vetoed by the Governor on June 3, 2005.

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RECENT CASE SUMMARIES

In **Biscayne Investment Group, Ltd., vs. Guarantee Management Services, Inc.**, 30 Fla. L. Weekly D1207 (Fla. 3rd DCA 5/11/2005), Developer brought suit against Management Company alleging four causes of action, including breach of contract, fraudulent inducement, equitable subrogation, and negligence. Developer was the developer of the Knightsbridge Condominium. The condominium association entered into a contract with Management Company for management services. Developer brought suit against Management Company alleging that it failed to properly collect assessments from the condominium unit owners and as a result, Developer was required to pay excess funds to cover the budget shortfall under Developer's guarantee of assessments. The trial court dismissed with prejudice all four counts of Developer's complaint. On appeal to the Third District Court of Appeal, the court affirmed the trial court as to counts one, two, and three. However, the court reversed the trial court as to count four. Specifically, with respect to count one for breach of contract, the appellate court noted that the management contract was executed between the Management Company and the condominium association. Developer alleged that it was an intended third party beneficiary to this contract because Developer, as the de facto board of directors, caused the condominium association to enter into the management contract. Developer also alleged that the management contract was executed to resolve potential litigation between Developer and several unit owners. The court dismissed this count because in order to be an intended third party beneficiary of the contract, there must be a clear or manifest intent of the contracting parties that the contract primarily and directly benefited Developer. Since Developer was not a party to the management contract and was nowhere mentioned in the contract, Developer was not and could not be a third party beneficiary to the contract. As such, the count for breach of contract was dismissed. Likewise, the count for fraudulent inducement was also dismissed because Developer failed to specifically allege any misrepresentations of material fact. At most, Developer alleged a mere promise not performed, which by itself cannot form the predicate for actionable fraud. Similarly, the third count for equitable subrogation was also dismissed. The appellate court noted that one of the allegations which must support a claim for equitable subrogation is that the subrogee paid a debt for which it was not primarily liable. In this case however, Developer was primarily liable for the debt under Developer's guarantee of assessments. Lastly, with respect to the count for negligence, the trial court dismissed this count on the ground that such a claim was barred by the economic loss rule. However, as the appellate court noted, the Florida Supreme Court recently clarified and expressly limited the application of the economic loss rule to two different circumstances; to wit: 1) when the parties are in contractual privity and one party seeks to recover damages in tort for matters arising under the contract and 2) when there is a defect in a product that causes damage to the product but causes no personal injury or damage to other property. Therefore, the appellate court held that the economic loss rule was inapplicable to the facts of the instant case. However, on remand the court directed that the trial court should determine, as a matter of law, whether any cognizable duty existed that would support Developer's negligence claim against Management Company.

In **Prime West, Inc. and Prime West Condominium Association, Inc., vs. Camargo**, 30 Fla. L. Weekly D1216 (Fla. 3rd DCA May 11, 2005), Association appealed an order requiring the removal of a fence which blocked Owner of adjacent property from ingress and egress to a nearby road. Association was built on lot 5 of an unrecorded plat of land. The sale of lot 5 also included a 50-foot wide easement from lot 5 over lots 6, 7, 8, for the purpose ingress and egress to N.W. 108th Avenue. This 50-foot wide easement was commonly referred to as N.W. 16th Street. Owner owned lot 6 and used N.W. 16th Street for the purpose of ingress and egress to reach N.W. 108th Avenue. Association installed a fence blocking this right of ingress and egress. Owner brought suit to enforce his easement rights over and to N.W. 16th Street. The trial court ruled in favor of Owner and required the removal of the fence blocking Owner's access to N.W. 16th Street. The trial court also ruled that N.W. 16th Street was a public road and could not be blocked. On appeal, the Third District Court of Appeal affirmed in part and reversed in part. The appellate court noted that the rule in Florida is that a purchaser of real property takes title subject to constructive notice of all facts which can be determined from the public records, and also of such other facts suggested by the record if an inquiry thereof is duly prosecuted. Therefore, association had a duty to determine from the facts whether or not the owner of lot 6 also used N.W. 16th Street for ingress and egress to reach N.W. 108th Avenue. As such, the appellate court affirmed the decision of the trial court and ordered the removal of the fence. However, the appellate court reversed the trial court's finding that N.W. 16th Street had been dedicated to the public because no such claim for relief had been pled by the parties.

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