COMMUNITY COUNSEL

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RECENT CASES

- **Whether Manager could be sued for negligence in performance of a landscape contract by subrogated insurer, or whether it was a named insured, needs to be determined at trial .**
- **Just how do incompetent people like this get appointed as judges?**

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.

Construction Contracts: An Ounce of Prevention

It has been almost a year since Central Florida was hit by three hurricanes and it seems like we are still cleaning up the mess left behind. Many associations are involved in major renovation projects. Unfortunately, from our perspective, the mess we are finding is not always caused by natural forces but by imprudent decisions made by associations without conferring with their legal counsel.

If an association must contractually commit a five-, six- or seven-figure sum to a contractor for a major repair or renovation project, it is prudent to spend a modest sum for an attorney to at least review that contract, if not write the contract to protect the association's interest.

If the association simply accepts the contractor's form of contract, the association is likely to end up with one of two kinds of contracts: one that is highly biased in favor of the contractor or one that is sloppily written and full of ambiguities. Neither bodes well.

There are several areas that an association should allow its attorney to address before signing a major construction contract, including:

It is prudent to spend a modest sum for an Attorney to review or prepare a contract.

- The schedule for performance and whether there is protection against unreasonable delay by the contractor.
- Whether the warranties are adequate and appropriate (or even exist).
- Whether the payment schedule provides reasonable leverage to ensure the contractor performs properly.
- Mechanisms to comply with the construction lien laws and ensure the association does not have to pay suppliers and subcontractors after it has fully paid the contractor.
- The types and coverage amounts of insurance that the contractor is to provide.
- The contractor's responsibility to supervise the work.
- The contractor's responsibility for clean up and to allow access during construction.
- Whether the contractor is providing indemnification to the association for accidents and other liability arising from the work.
- Whether there are controls over contract changes and the contractor's ability to assign of the work to others.
- Whether the association can recover its attorney fees and costs if litigation with the contractor becomes necessary.

In addition to preparing or at least reviewing the contract, the association's attorney should also provide assistance regarding compliance with the construction lien law. An essential legal document in this regard is the Notice of Commencement, which is governed by the Florida Statutes and must contain certain essential elements to be valid and effective. All contracts over $2,500 should have a Notice of Commencement signed by the association, properly notarized and timely recorded in the public records. A certified copy of the notice should be posted at the job site in a conspicuous location prior to the start of construction.

The primary purpose of the Notice of Commencement is to inform subcontractors and suppliers where to send notices regarding construction claims and liens. If the association receives a Notice to Owner from any entity, it should obtain lien releases from the general contractor signed by this entity before making progress or final payments. However, the contract needs to be drafted properly to ensure the association has this right.

Upon completion, the association should receive a final affidavit and lien release from the general contractor and all subs and suppliers before making final payment.

The foregoing is a simplified overview of what can seem a very complex process to someone not very experienced with it. Associations that involve their attorney at the front end of this process may not avoid all legal problems with their construction project, but they will have significantly greater chance of doing so.

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RECENT CASE SUMMARIES

In **Regis Insurance Company vs. Miami Management, Inc.**, 30 Fla. L. Wkly D1438a (Fla. 4th DCA 6/8/ 2005) Insurance Company appealed the dismissal with prejudice of its fourth amended complaint against Management Company. Insurance Company sought indemnification or contribution from Management Company based upon the settlement of a wrongful death action in which Insurance Company's insured, a homeowners' association, was sued for negligence. The facts giving rise to this dispute between Insurance Company and Management Company are relatively simple. A driver died in an automobile accident after another driver lost control of his vehicle while driving through a puddle of standing water. The driver crossed the median and collided head on with the deceased driver. The relatives of the deceased driver brought suit against the other driver, as well as the association, Management Company and others, alleging negligent construction and maintenance of the association's median and the irrigation system which caused water to accumulate on the roadway, creating a hazardous condition, and further alleging that the roadway itself was negligently constructed, designed, and maintained. Insurance Company settled the underlying suit with the deceased driver's family and in this action sought a monetary payment from the Management Company, alleging that it negligently maintained the irrigation system that caused the accident. Management Company defends on the ground that it was an additional insured on association's policy and therefore Insurance Company could not seek recovery against the it. The insurance policy included a provision which contained a provision that "persons insured" included any ". . . . person (other than an employee of the named insured) or organization while acting as a real estate manager for the named insured." In this case, there were two contracts between Management Company and the homeowners' association. One contract was for management services. The other contract was a lawn services maintenance contract whereby Management Company also was to perform lawn services, detail work, irrigation, and fountain services. This lawn services maintenance contract required Management Company to maintain the irrigation and median where the accident occurred. The Fourth District Court of Appeal noted that a motion to dismiss tests whether a plaintiff has stated a cause of action. In reviewing the motion to dismiss, the trial court should not look beyond the four corners of the complaint, must accept all facts in the complaint as true, and must draw all reasonable inferences in favor of the plaintiff. In this case, Insurance Company argued that Management Company was not acting as a real estate manager at the time it committed the conduct which is alleged to have given rise to its liability. Instead, any liability attributed to Management Company was the result of the negligent performance of the lawn services contract. The resolution of this question involves mixed questions of law and fact. Because there were mixed questions of law and fact, it was not appropriate for the trial court to have resolved this issue on a motion to dismiss. As such, the appellate court reversed and remanded the cause for further proceedings in the trial court.

In **Siegel vs. Boca Chase Property Owners Association, Inc.**, 30 Fla. L. Weekly D1395d (Fla. 4th DCA 6/1/2005) Association brought an action against Owner to foreclose a claim of lien for unpaid assessments. In this case, the final order being appealed by Owner was the third "final" judgment entered by the trial court. A non-jury trial was held on March 5, 2004. At the conclusion of that trial, the court invited both sides to submit proposed final judgments. On March 15, 2004, the trial court signed the proposed final judgment submitted by Owner and entered an order denying the foreclosure. The next day, the trial court signed the proposed order submitted by Association and entered an order granting the foreclosure. Association moved for clarification of the two conflicting final judgments. The trial court vacated both judgments and set the matter for rehearing. At the conclusion of this non-evidentiary hearing, which was held on April 12, 2004, Association offered a proposed final judgment, but the trial judge did not take the proposed judgment and stated that he would take the matter under advisement. The trial court gave no indications of its leanings in the case at the conclusion of the hearing. On May 3, 2004, after a little more than three weeks had passed, Association sent an unsolicited proposed final judgment to both the trial court and Owner's counsel. The trial court signed the proposed final judgment three days later on May 6, 2004. Since the judgment was entered, the trial judge retired. After reviewing the evidence, the Fourth District Court of Appeal reversed and remanded the case for a new trial. The appellate court held that the trial court erred in signing a proposed final judgment submitted by Association, which was not requested by the trial court and signed only three days after Association's simultaneous certificate of service of the proposed final judgment to both the trial court and Owner's legal counsel. The result was that Owner had virtually no opportunity to file a meaningful response to Association's proposed judgment.

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