COMMUNITY COUNSEL

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RECENT CASES

- **Condo Arbitrator's decision on merits is not conclusive evidence of the facts in a trial de novo.**
- **43 days is too late to file where deadline is 30 days. Duh!**
- **Buyer who bounced check not entitled to rescind sales contract.**

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.

Mediation and Confidentiality in HOAs

As HOAs begin the mandatory pre-suit mediation process, it is important that boards and managers become familiar with the statutory confidentiality provisions that apply to mediation. These sentences come from Section 720.311(2)(a), Fla. Stat. (2005):

. . . Mediation proceedings must be conducted in accordance with the applicable Florida Rules of Civil Procedure, and these proceedings are privileged and confidential to the same extent as court-ordered mediation. An arbitrator or judge may not consider any information or evidence arising from the mediation proceeding except in a proceeding to impose sanctions for failure to attend a mediation session. Persons who are not parties to the dispute may not attend the mediation conference without the consent of all parties, except for counsel for the parties and a corporate representative designated by the association. When mediation is attended by a quorum of the board, such mediation is not a board meeting for purposes of notice and participation set forth in s. 720.303. . .

Mediation is Confidential. Discussions occurring at mediation may not be disclosed.

The meaning of the last part of this provision is more obvious than the first. A quorum of the board is permitted to attend the mediation without it resulting in a board meeting. This means the members do not have to be notified of the mediation even though the full board will be attending. Also, the members are not allowed to attend unless they are on the board, unless they are the members in violation to whom the mediation is directed (these members are called the "respondents"), or unless all persons involved in the mediation consent to the members' attendance. In addition to the board, the association's counsel, the association's manager, the respondent, counsel for the respondent and the mediator are also allowed to attend the mediation.

Although the statute permits the entire board to attend the mediation, this may not always be the best strategy, especially where the board has a large number of directors. If the board shows any disunity or disagreement, the mediator, the respondents and the respondents' counsel are likely to zoom in on this disunity, to the ultimate disadvantage of the association. It is better strategy for the board to approve one person to attend the mediation with full settlement authority.

Subject to a few specific exceptions, **the confidentiality statute prohibits the participants from discussing what happened at mediation with persons who did not attend the mediation**. However, the confidentiality statute does not apply to the written settlement agreement reached at mediation. The written settlement agreement therefore can become part of the association's official records and constitutes the board's report to the members on what happened at the mediation. In this regard, the association should never agree to the settlement agreement including a confidentiality provision making the agreement itself confidential, since this may run afoul of the official records portions of Chapter 720, Fla. Stat.

The officers, directors and managers must understand that they need to keep to themselves the oral discussions and what otherwise happens at a mediation conference. Section 44.406(1), Florida Statutes (2005) provides that a mediation participant who knowingly and willfully discloses a mediation communication may be subject to an injunction, damages, attorney fees, the mediator fees and costs incurred by the opposing party at the mediation, and the attorney fees and costs incurred in the legal proceeding to enforce the confidentiality statute.

Condominium associations do not have the benefit of an equivalent to Section 720.311(2)(a), Florida Statues (2005) which potentially makes things more complicated. We will address mediation and confidentiality for condominium associations in a subsequent issue.

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RECENT CASE SUMMARIES

In **Davis vs. Condominium Association of Plaza Towers South, Inc.** 30 Fla. L. Weekly D1635 (Fla. 4th DCA June 29, 2005), Owner filed a request for trial de novo following an arbitration action against Association, involving an air conditioner installed by Owner. Association petitioned for arbitration to force Owner to remove the air conditioner. The arbitrator ruled in favor of Association and Owner timely filed a petition for trial de novo. After the filing of the petition for trial de novo, Association moved for summary judgment. At the hearing, Association acknowledged that there were conflicting affidavits on material issues of fact. However, Association contended that the arbitrator resolved these factual issues against Owner. The trial court granted summary judgment in favor of Association. In reversing the trial court, the Fourth District Court of Appeal noted that the decision of the arbitrator was admissible in the circuit trial de novo action. However, Association was unable to produce any authority which would permit the circuit court to grant summary judgment where there were material issues of fact. Indeed, the appellate court held that if the trial court were allowed to do this, the statutory right to a trial de novo would be meaningless in most cases.

In **Landmark at Hillsboro Condominium Association, Inc., vs. Candelora**, 30 Fla. L. Weekly D1909(a) (Fla. 4th DCA August 10, 2005), Owner alleged four causes of action against Association. Association moved to dismiss the complaint, which motion was ultimately granted by the trial court. Association filed its motion for fees against Owner forty-three (43) days after the trial court entered its order of dismissal and forty-six days after Owner filed an amended complaint dropping all four counts against Association. The trial court denied Association's motion for fees for being untimely. On appeal, the Fourth District Court of Appeal noted that Rule 1.525, Florida Rules of Civil Procedure, required that any party seeking a judgment taxing costs, attorneys' fees, or both shall serve a motion within 30 days after filing of the judgment, including judgment of dismissal. The appellate court affirmed the judgment of the trial court and denied Association's motion for fees because Association's motion was not timely filed in accordance with the governing rule of civil procedure.

In **Riedlinger vs. Rousset**, 30 Fla. L. Weekly D 1962a (Fla. 2nd DCA August 19, 2005), Seller brought an action against Buyer for worthless checks Buyer allegedly tendered pursuant to a condominium sales contract. Seller contracted with Buyer to sell a condominium unit in Coral Gables. Pursuant to the contract, Buyer was to pay three nonrefundable deposits totaling $19,000 within forty days of signing the contract. Buyer paid seller $500 cash and then wrote checks totaling $18,500 for the remainder of the deposit. When Seller attempted to cash the checks, they were all dishonored by the bank. Seller sued Buyer for liquidated damages for breach of the sales contract as well as for treble damages for the worthless checks. Buyers defense was that Seller failed to set out certain mandatory disclosures in the sales contract as required of a "developer" under the Florida Condominium Act and therefore the contract was voidable at Buyer's option. Specifically, Buyer alleged that Seller was the president of a development corporation that deeded to him four units of an eight-unit condominium. Significantly, Buyer admitted the allegations of the worthless check count but relied on her recission defense. After a bench trial, the trial court entered judgment against Seller. On appeal, the Second District Court of Appeal reversed the trial court. The undisputed facts reveal that Seller was not a developer and therefore Buyer was not entitled to void the contract. Under the Florida Condominium Act, a developer is subject to strict disclosure requirements. The failure of the developer to comply with these strict disclosure requirements permits a buyer to void the contract and entitles the buyer to a refund of any deposits. A developer is any person ". . . . who creates a condominium or offers condominium parcels for sale or lease in the ordinary course of business." The Florida Administrative Code provides that selling or leasing in the ordinary course of business means offering within one year more than seven units in a seventy-unit condominium or more than five units in a condominium of less than seventy units. The Code further provides that a person may also sell or lease in the ordinary course of business by participating in a "common promotional plan" that offers more than seven units in one year. In this case, Buyer's pleadings evidenced that Seller personally sold only four units of an eight-unit condominium development. As such, the appellate court held that Seller was not a "developer" under the Florida Condominium Act and therefore Buyer was not entitled to void the contract.

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