COMMUNITY COUNSEL

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Recent Cases

- **Failure of an HOA to undertake pre-suit mediation makes the other party entitled to recover attorney's fees and costs of defending the premature suit.**
- **Owner can not overturn a lien foreclosure, as a letter expressing a desire to resolve case is not considered a pleading or paper in the case.**

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.

Fining – Yes or No? No!

One of the most frequent inquiries we receive in our practice involves fining. Associations that are looking for ways to exercise their enforcement options quickly and without great expense or risk find the idea of fining attractive. However, regardless of the type of community involved, the right to levy a fine first must be expressly stated in the community's governing documents. Unless so stated - or adopted by a proper documentary amendment (not a rule!) - the community has no right to fine. Assuming that there is valid documentary authority to use fining, we are often queried about how to set up a fining program.

While there are important procedures associated with the use of fining, including the need to give proper notice of meetings at which fines will be considered, and the obligation to give such notice to the persons who may be fined, as well as to create a so-called impartial committee to review the Board's action if a fine is levied, we rarely get as far as discussing how the notice should be given to the subject of the hearing (s), or cautioning clients about the make-up of the impartial committee and the limits on their power to approve or disapprove the Board's fine, without altering the fine.

Rather, our discussion usually centers, first, upon whether fining can accomplish what the Association desires – to provide quick, cheap and effective assistance in curing covenant and rule violations. Once the limitations of fining are discussed, most communities reluctantly tend to drop the idea of fining in favor of the use of pre-mediation (for HOAs) or arbitration (for condos and coops).

The problem, of course, is that rather than focusing the attention of the Association and the alleged violator on the violation(s) that needs to be corrected, the current fining system can create an entirely new set of controversies between the parties that operate to distract their attention from the underlying violation and focus it instead on collecting the fine.

If a fine is levied and goes unpaid, chances are the violations are also unabated. To collect the fine, the best way is to proceed is in small clams court, since the amount in controversy (limited to no more than $1,000.00) is within that court's jurisdictional limit. The problem is that the small claims court has no lawful jurisdiction over the violation, as its authority is limited to monetary disputes and it has no authority to order abatement of documentary violations. Thus, when a fine is levied and left unpaid, the Association either has to take its eye off the ball (i.e. curing the violation) and chase the relatively small amount of the fine, or operate on two fronts – to collect the unpaid fine in one court and to cure the violation in another forum. Rather than offering an easy method of correcting violations, fining can complicate the process.

Without the ability to lien to collect it, Fining is a Dead Letter Remedy.

Remember that notwithstanding any governing documentary language to the contrary, no fine may become an assessment subject to the lien foreclosure process. As a practical matter, once that helpful remedy was removed from the associations' arsenal, use of fining became, to our minds, a dead letter as a possible tool to achieve compliance.

WEAN & MALCHOW, P.A.
646 EAST COLONIAL DRIVE, ORLANDO, FLORIDA 32803
TEL: (407) 999-7780 FAX: (407) 999-LAW1
W-M@WMLO.COM

RECENT CASE SUMMARIES

In **Alhambra Homeowners Association, Inc., vs. Asad**, 31 Fla. L. Weekly D3118a (Fla. 4th DCA December 13, 2006), Association brought a covenant enforcement action against Owner seeking injunctive relief and damages. Association alleged that Owner violated the governing documents by painting the home a color not approved by Association. As a defense, Owner contended that Association had not complied with a statutory condition precedent to bringing suit, in that Association failed to notify the Florida Department of Business and Professional Regulation and request mandatory mediation before filing suit, in violation of Section 720.311, Florida Statutes. In its reply, Association alleged that Section 720.311, Florida Statute, was not applicable to the instant cause. Ultimately, Owner moved for summary judgment based on Association's failure to comply with Section 720.311, Florida Statute, for Association's failure to submit the claim for mandatory mediation. Two days before the motion hearing, Association filed a notice of voluntary dismissal without prejudice. After filing the dismissal, Association paid the costs mandated under Florida Rule of Civil Procedure 1.420(d). After the dismissal of the lawsuit, Association filed a petition for mandatory mediation with the Department. Ultimately, the mediation was unsuccessful. After conclusion of the mediation, Association filed a second lawsuit with the same allegations as the first lawsuit. Ultimately, Owner acceded to the demands of Association in the second lawsuit by paying $1,000 in fines and repainting the home. In the first lawsuit, Owner moved for attorney's fees under Section 720.305(1), Florida Statutes, which provides that the "prevailing party" in litigation between the association and a member ". . . . is entitled to recover reasonable attorney's fees and costs." The trial court ruled that Owner was entitled to reasonable attorney's fees as the prevailing parties and entered judgment for $8,146.00. The issue on appeal before the Fourth District Court of Appeal was whether Owner was the "prevailing party" under Section 720.305, Florida Statutes. The appellate court noted that under the general rule when a plaintiff voluntarily dismisses an action, the defendant is the "prevailing party" within the meaning of statutory or contractual provisions awarding attorney's fees to the prevailing party. In its written opinion, the court cited to the case of *Dolphin Towers Condominium Association, Inc., vs. Del Bene* in which the Second District Court of Appeal rejected the argument that the filing of the second lawsuit negated the association's right to recover fees for the first suit, observing that the ". . . . association incurred attorney's fees in asserting what proved to be a meritorious affirmative defense." The Fourth District Court of Appeal then applied the general rule consistent with *Dolphin Towers* and concluded that Owner was the prevailing party in the first suit. Owner correctly asserted the defense of a failure of a condition precedent. In the face of a likely adverse ruling on Owner's motion for summary judgment, Association opted for a voluntary dismissal without prejudice. The re-filing of the same suit after mediation does not alter Owner's right to recover prevailing party attorney's fees incurred in defense of the first suit. Therefore, the appellate court affirmed the decision of the trial court and affirmed the award of attorney's fees to Owner which fees were incurred in the first lawsuit.

In **Monzon vs. The Cove Homeowners Association, Inc.,** 13 Fla. L. Weekly Supp. 1159b (Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County, August 25, 2006) Owner sought to quash service of process, stay a writ of possession and vacate a default final judgment. Association initially filed a lawsuit to foreclose a lien for past due homeowners association payments on a single family home owned by Owner. Owner failed to respond to the complaint, and the clerk of court entered a default for Owner's failure to file or serve any paper as required by law. After entry of the default, a default final judgment was entered by the court. The home went to foreclosure sale on December 2, 2005. The successful bidder was ultimately issued a certificate of title on December 13, 2005. On January 3, 2006, the trial court entered an order denying Owner's motion to quash service of process, motion to stay writ of possession and vacate final judgment. On appeal, Owner contended that the trial court erred in not setting aside the default final judgment because she sent a written response and a check to the attorney for Association on August 5, 2005. In affirming the trial court, the Broward County Circuit Court (Appellate) noted that the letter sent by Owner did not inform Association of an intent to contest the claim. Instead, Owner stated that she was interested in resolving the matter. Therefore, Owner's letter did not qualify as a "paper" in accordance with the applicable rules of civil procedure.

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646 EAST COLONIAL DRIVE, ORLANDO, FLORIDA 32803
TEL: (407) 999-7780 FAX: (407) 999-LAW1
W-M@WMLO.COM