COMMUNITY COUNSEL

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Recent Cases

- **Court rules for unit owner who sued association for failure to maintain separate payments records for each unit.**
- **Patient who treats himself has a fool for a client – Association's board acting pro se misses obvious defense in suit by owner for failing to produce records for in-**

WHAT DID I SAY, WHAT DID I SAY?!

Maybe it's a sign of the times, but two recent court decisions highlight the growing problem of suits over allegedly defamatory comments in community associations. Though the problem isn't entirely new, it seems to be getting more attention, both from potential litigants and the courts.

In a recent Florida circuit court decision, the court ruled against a roofing consultant who sued a lot owner over comments the owner had written in two letters, one to his board and one to all owners. The court found the existence of a qualified privilege that protects such communications. In order to claim the privilege the defendant has to show that the statements were made in (1) good faith, (2) by a speaker who either has a duty to speak or an interest in the subject (3) to a listener or reader who has a corresponding interest or duty (4) on a proper occasion, and (5) published in a proper manner.

The court found that the owner had a financial interest in the project, and published his letters during the project to the limited audience of other association members. Good faith will be presumed if the other four elements are present, unless the claimant can show evidence of bad faith or malice in sending the letters. The fact the statements made are not true is not evidence of malice, and only evidence that the speaker's primary motive was to harm the subject will suffice.

In our society wide-open speech is still the norm

In another case originating from California, an owner (who was also an attorney) sued the association's attorney for allegedly defaming the owner in letters after the owner was denied the right to build a larger house than was permitted under the community's documents. In one letter the association attorney accused the owner of hiding his profession and in another he accused him of spending time harassing the board.

The association also claimed that the defamation action amounted to a S.L.A.P.P. suit, that is a "strategic lawsuit against public participation." Under California law such suits are prohibited if they are brought to chill the exercise of a person's rights to petition for redress or to exercise free speech rights under the U.S. or California constitution in connection with a public issue. This claim failed, with the appeals court holding that the owner's defamation suit was not designed to discourage discourse on matters of public interest.

On the underlying claim of defamation, the court ruled against the owner, distinguishing non-actionable "rhetorical hyperbole, epithets, and figurative statements" from actionable defamation, although the court also questioned the judgment and wisdom exercised by the association's attorney when writing his letters.

The moral of these two cases is that so long as a speaker or writer limits his/her remarks to subjects of common interest, targets the remarks only to those who share that same interest, and makes them at a time when the issue is "in play," it will be very difficult for the subject of the remarks to successfully claim defamation.

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RECENT CASE SUMMARIES

In **Hobbs vs. Grenelefe Association of Condominium Owners No. 1, Inc., et al.,** 31 Fla. L. Weekly D2242c (Fla. 2nd DCA August 25, 2006), Owners brought suit against Association alleging, among other claims, that Association failed to comply with the requirements of Section 718.111(12)(a)(11)(b), Florida Statutes. Specifically, Owners alleged that Association failed to properly maintain accounting records "for each unit" as required by law. Section 718.111(12) sets forth requirements concerning the maintenance of the official records of condominium associations. Among the required records are: "A current account and monthly, bimonthly, or quarterly statement of the account *for each unit* designating the name of the unit owner, the due date and amount of each assessment, the amount paid upon the account, and the balance due." Section 718.303 provides, among other things, that a unit owner may bring an action for injunctive relief for failure to comply with the requirements of Chapter 718. A large number of units in the Association are owned by a single corporate entity. Association did not maintain an individual account for each unit owned by this single corporate entity. However, Association did maintain a summary for all units owned by the single corporate entity which would show what was invoiced to and paid on account of all of this single entity's units. Association and its directors took the position that although Association did "not maintain an individual account for each unit," the summary accounting records were sufficient to comply with the requirements of the Florida Statutes. The trial court accepted this argument and ruled in favor of Association. On appeal however, the Second District Court of Appeal noted that Association's position is inconsistent with the plain language of the statute which requires that account information be maintained "for each unit" designating the name of the unit owner, the due date and amount of each assessment, the amount paid upon the account, and the balance due. Association admittedly did not maintain such account information for the individual units owned by the single corporate entity, and Association's practice of utilizing summary accounting records does not comply with the statutory mandate for the maintenance of records "for each unit." The fact that information with respect to the status of individual units might be deduced from the summary accounting records does not establish that the statutory requirements were satisfied. The statutory requirements are designed to ensure that condominium associations maintain readily understood and accessible accounting records with respect to individual condominium units. Association argued that the decision of the trial court should be upheld because "no harm occurred as a result of how the accounting records were kept." However, as noted by the appellate court, a violation of the requirements of chapter 718 is itself a harm for which section 718.303 authorizes injunctive relief. Accordingly the appellate court reversed the trial court's dismissal of Owner's complaint.

In **Ayoub vs. The Lakes of Inverrary Condominiums, Inc.,** 13 Fla. L. Weekly Supp. 907a (County Court, 17th Judicial Circuit in and for Broward County, Florida, June 15, 2006) Owner alleged that she had made proper requests for copies of condominium association records pursuant to Section 718.111(12)(c), Florida Statutes and that Association failed to timely respond to these requests. The evidence established that Owner made four written requests to Association over the course of a two-month period. Association did not respond until receiving the final letter. Association claimed that it did not receive the first three letters. However, Owner's evidence established by a preponderance of the evidence that she mailed a correctly-addressed request, with correct postage affixed, to Association's record address. Requests number two and three were sent with delivery confirmation requested, and the United States Post Office confirmed delivery. None of the requests were returned to owner as not deliverable. As such the trial court found Association's claims that it did not receive the requests were not credible. The trial court awarded owner a total of $500.00 statutory damages and $100.00 in costs, for a total judgment of $600.00.

Note: We separately note that this matter was a "dispute" subject to mandatory *pre-suit* arbitration pursuant to Section 718.1255, Florida Statutes. However, in that the association represented itself *pro se* (without counsel) through its directors, this defense was apparently never raised. As such, the directors may have breached their fiduciary duty to the association by failing to hire legal counsel and by failing to timely raise proper objections to the trial court's jurisdiction.

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