

# COMMUNITY COUNSEL

October, 2007

A Publication of Wean & Malchow, P.A.

Volume 11, Issue 10

## Recent Cases

- ♦ **Court invalidates a mortgage where the obligation it secured had matured and came due more than five years earlier. As such the lien holder no longer had an enforceable interest in the land that was the collateral for the loan.**
- ♦ **Courts are obligated to allow plaintiffs to try to amend their complaints to state a claim unless it is clear that there is no way a claim could be stated.**

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.

## FCC Changes Rules on Exclusivity of Services

On October 31, 2007, the FCC's website contains a press release announcing a potentially profound change in its policies, reversing a prior position taken by the FCC in 2003. The new ruling determines that the public is best served - as a matter of public policy - if cable and similar contracts entered into by franchised telecommunications companies are invalidated to the extent that they grant a single company the exclusive right to provide video services to multi family dwellings.

In 2003 the FCC had ruled that multifamily housing, including those operated by condominium and cooperative associations benefited from such exclusive contracts because they could negotiate lower rates and better products. So what has changed? Although the new ruling is grounded on issues of market competition, apparently the decision was driven by the increasing number of telephone companies with the ability and desire to compete with cable company franchisees to provide television video products. It appears that these companies will be the immediate beneficiaries of the rule change, if and when it goes into effect.

Since the text of the ruling hasn't yet been announced, it is not entirely certain whether this will cover condominiums and cooperatives as well as apartment buildings, although it appears likely that they will be included. In addition, it is not clear whether all exclusive rights will be included. For example, many cable

contacts have already stopped reserving the right to provide exclusive services, instead achieving the same result by requiring that they be granted exclusive easements over and through the subject property to install equipment and to use the existing equipment running through the property. The press release announcing the forthcoming rule does not address this issue.

There is enough at stake here that legal challenges to the rule change could delay or reverse the rule change. Such challenges probably will follow the issuance of the full ruling.

In addition, the FCC also announced its intention to engage in additional rulemaking, including whether the same change in policy should apply to smaller, private cable providers.

Several issues remain unresolved at this time. One is whether a landlord or community association can voluntarily exclude other providers from the premises, or competing service providers can compel access.

Another issue not discussed is why the same anti-competitive rationale underpinning the new ruling should not apply to single family dwellings operating under exclusive franchises.

So far, the bulk and marketing aspects of existing contracts have not been addressed, though they also may be the subject of further rulemaking and decisions.



**The scope of the FCC's rule change will be clarified when its full decision is Published.**

WEAN & MALCHOW, P.A.

646 EAST COLONIAL DRIVE, ORLANDO, FLORIDA 32803

TEL: (407) 999-7780

FAX: (407) 999-LAW1

E-MAIL: W-M@WMLO.COM

WWW.WMLO.COM

## RECENT CASE SUMMARIES

In **Razak vs. The Marina Club of Tampa Homeowners Association, Inc.**, 32 Fla. L. Weekly D2421a (Fla. 2<sup>nd</sup> DCA, October 10, 2007) Association brought suit to quiet title to real property owned by Razak. In 1982, developer started the project called "The Marina Club." As part of the declaration of covenants, developer agreed to convey to association fee simple title to the common areas free and clear of all liens on or before December 31, 1992. Prior to that date and due to financial difficulties, developer conveyed its interests in the property to a wholly owned subsidiary of the bank that was providing the financing. In 1989, when the bank became insolvent, Resolution Trust Corporation ("RTC") was named as the bank's receiver. Through foreclosure proceedings, RTC became the owner of the unsold units and the common areas of the project. In January of 1993, RTC sold the project, including the common areas, to Razak's brother, Mohammed Husein Bhadelia. Razak loaned Bhadelia the \$1,075,000 purchase price of the project. This loan was evidenced by a promissory note that specified a five-year maturity date. As security for this promissory note, Bhadelia executed a mortgage on the project in favor of Razak. In 2002, Association filed a declaratory action against Bhadelia in an attempt to quiet title to the common areas in the name of Association. In 2003, Bhadelia filed a complaint against Association in federal court, seeking, among other types of relief, to quiet title to all of the property obtained from RTC in his name. Upon being ordered to mediation by the federal court, the parties reached a resolution of the claim. Bhadelia was to convey title to the contested property to Association free and clear of all liens in exchange for \$675,000. The federal district court entered a final judgment based on the terms of the settlement agreement. The final judgment contained language that specifically quieted title to the common areas in the name of Association. Bhadelia appealed this judgment, which was eventually affirmed by the Eleventh Circuit Court of Appeals. After the federal decision was announced, but before the mandate was issued, Bhadelia conveyed title to the property to Razak by a deed in lieu of foreclosure. Association filed a motion in the federal court to hold Bhadelia and Razak in contempt of court. The federal court granted sanctions in favor of Association and against Bhadelia, but refused to hold Razak, a non-party to the lawsuit, in contempt. Association then amended its complaint in the state courts to include a claim for quiet title against Razak. The issue before the circuit court was whether Razak held a valid lien against the subject property. Razak raised affirmative defenses, including a claim that he held a valid lien on the subject property. The trial court entered summary final judgment in favor of Association and quieting title to the common areas in the name of Association. The trial court concluded that Razak's lien expired by operation of law five years after the maturity date shown on the face of the promissory note. Since the note was issued in 1993, and specified a five year maturity date, the note expired by operation of law in 2003. Therefore, Razak held no valid lien on the property at the time Bhadelia transferred the property in lieu of foreclosure in 2005. Based upon the foregoing, the Second District Court of Appeal affirmed the judgment of the trial court quieting title to the common areas in the name of Association free and clear of all liens and encumbrances.

In **Strader vs. Carpenters Crest Owners Association, Inc.**, 32 Fla. L. Weekly D2466b (Fla. 2<sup>nd</sup> DCA, October 17, 2007) Owner challenged a trial court order dismissing his counterclaim against Association. Association sought foreclosure and money damages against Virginia Hillerich for her failure to pay Association fees due on her property. Owner was included as a defendant because he was believed to hold an interest in the property. Owner filed a counterclaim asserting that Association owed him \$128,212.36 in attorneys' fees arising out of Association duty to indemnify him for actions he took in another proceeding in his role as an officer or director of Association. The trial court dismissed Owner's counterclaim with prejudice. On appeal to the Second District Court of Appeal, the court noted that generally a trial court must allow a litigant the opportunity to amend a complaint before dismissing its suit with prejudice unless it is clear that the pleading cannot be amended so as to state a cause of action. Because it was not clear that Owner could not amend his pleading so as to state a cause of action, the trial court erred in dismissing the counterclaim with prejudice. As such, the appellate court reversed the trial court and permitted Owner to amend his counterclaim.