COMMUNITY COUNSEL

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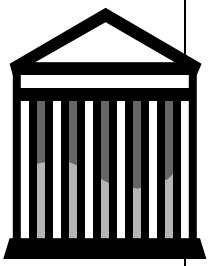
Roll-out of the 2007 Statutory Changes Pt. 1

Like a new model year for vehicles, electronics, software and other products incorporating planned obsolescence, lawmakers have finished "development" of several community association bills, and it is time to start the annual review of the "new and improved" legal product.



SB 1844 (Ring) has been adopted and signed by the Governor and became effective on July 1, 2007. It governs collection of assessments in HOAs and, while adopting some helpful provisions from the Condominium Act (such as joint liability of prior and current owners for unpaid assessments, and late fees plus interest at 18% on delinquent payments), it also adds many other procedural hurdles that are designed to give a delinquent owner time and one last chance to pay the indebtedness, while keeping legal fees low.

New S. 720.3085, Fla. Stat. is a trade-off of some good for more delay in HOA collections.

The trade-off is a lengthening of the time needed to collect assessments and the possibility that associations will get stuck with legal bills that cannot be recovered from the owner. A new Section 720.3085, Fla. Stat. requires a new 45 day certified mail notice to the owner prior to recording a claim of lien. In addition, a suit to foreclose can not be brought until after 45 days notice of the Association's intent to foreclose. It is unclear from the statute whether two separate notices are required, but prudence is probably the best course, and therefore it would be wise to understand that a minimum of 90 days will pass after a proper first notice before a suit to collect delinquent assessments can be commenced.

In addition, once a suit is served, an owner who is not also the subject to a mortgage or tax lien foreclosure may stop the proceedings at any time prior to entry of a judgment by tendering what is termed a "qualifying offer." Such an offer must be in writing and must offer to pay all amounts secured by the lien plus interest within 60 days of the date of the offer. It is unclear whether the offer must include payment of the Association's late fees and attorney's fees in the absence of an express documentary provision making those charges a part of the amounts covered by the Association's lien.

Once a qualifying offer is made, the litigation is stayed for the time period of the offer, and during the stay no additional attorneys fees incurred during the stay period may be added to the amount due. Of course, if the statutory requirements for the offer are not met, then no stay of proceedings can occur, and it is reasonable to expect a flood of hearings to evaluate the sufficiency of these offers. Should owners prevail in those hearings their cost will not be recoverable for the Association.

If the qualifying offer is breached, the association is entitled to obtain a judgment for the amount of the offer plus any fees incurred after the stay ends.

Recent Cases

- Federal Court lets suit proceed for alleged familial status discrimination by imposing occupancy limits on units in condominium.
- Association's assessment for self-help repairs and for side walk repairs upheld on appeal.

FIRM NEWS

We welcome attorney Eileen O'Malley to the firm. Eileen was admitted to the Florida Bar in 2005.

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RECENT CASE SUMMARIES

In **Housing Opportunities Project for Excellence Inc. v. Key Colony No. 4 Condominium Association Inc**., No. 06-20129-CIV-MARTINEZ-BANDSTRA, U.S.D.C., So. Dist. Fla., Jan. 10, 2007, in 2001, Association announced it would enforce an occupancy restriction limiting the number of occupants in each apartment to four people on all new rentals and purchases of property in the building. Owners purchased their unit in building four in July, 2005, and in December, 2005, they inquired about moving into their unit. Owners spoke with Association's property manager, Carol Pasch, to verify that Owners could begin making plans to move into the unit because they were aware of the occupancy restriction. Owner's wife had given birth to another child after they purchased the unit, increasing the number of persons who would inhabit the unit to five. Owners claimed that Association's manager assured them that they could move into their unit. However, on January 17, 2006, Association sent them a letter informing them that they could not move into their unit, citing the occupancy restriction. Owners alleged that Association's enforcement of the occupancy restriction and its enforcement of a number of other regulations, including those regulating use of the pool, club and beach, actively discriminated against families with children. Owners maintained that this constituted familial status discrimination, which is a violation of the Federal Fair Housing Act and the Florida Fair Housing Act. Owners were joined by several other property owners in suing Association, board members, and the property manager for familial status discrimination. They based their case on theories of disparate treatment, disparate impact, and unlawful retaliation under federal and Florida laws. Association and the other defendants asked the court to dismiss the case for several reasons, the most important of which was that Owners failed to state a claim upon which relief could be granted. In determining whether the case should be dismissed, the court first analyzed the disparate treatment claim. In order to state a claim for disparate treatment, Owners must allege that similarly situated unit owners were treated differently than they were based on their familial status, which the court defined as, "one or more children (under 18 years of age) living with a parent or legal guardian." In this case, Owners alleged that they were members of a protected class because of their familial status and that they were discriminated against by the enforcement of unreasonably low occupancy limitations without any basis in law. They alleged that Association enforced rules and regulations solely to discriminate against families with children. They maintained that such restrictions constitute discrimination by making unavailable or denying a dwelling to any person because of their familial status and by enacting overly restrictive occupancy standards and rules that target activities with children with the intent to limit the number of families with children in the community. The court determined that these allegations qualified as a short and plain statement of a disparate treatment claim, and therefore, and did not dismiss the disparate treatment claim. Next, the court considered the disparate impact claim. In order to state a claim for disparate impact, Owners must allege "that a specific policy caused a significant disparate effect on a protected group." Owners alleged in their complaint that Association's promulgation of the restrictive occupancy rules and the publication of those rules had discouraging effects on families with children who choose not to live in housing that does not permit more than two children. The court found that this argument was sufficient as a short and plain statement of disparate impact and did not dismiss this claim either. Finally, the court considered whether Owners were being retaliated against for exercising their rights under the Act. In order to state a cause of action for retaliation under the Act, a plaintiff must allege (1) that he or she engaged in protected activity, (2) that he or she suffered adverse actions, and (3) that the adverse action was causally related to the protected activity. Owners contended that Association chose to enforce the occupancy limitation for the first time on them, as purchasers of a condominium, when such rules were previously enforced only on renters. Thus, the argument was that Association refused Owners' family the right to live in their unit in retaliation for a prior lawsuit brought by Owners' predecessor in title. The court was not persuaded by this claim. Owners' argued that their predecessor in title engaged in protected activity but then Association retaliated against other individuals, namely Owners, for their predecessor's actions. According to the court, this did not fit the definition of retaliation under the federal statute that protects the exercise of rights under the Act. Therefore, the court dismissed Owners' claim for retaliation. Since the court did not dismiss Owners' disparate treatment or disparate impact claims, they were allowed to proceed in court on the merits of these claims.

In **Thomas vs. Vision I Homeowners Association, Inc.**, 32 Fla. L. Weekly D1276b (Fla. 4th DCA May 16, 2007), Association brought an action against Owner for non-payment of assessments, as well as failure to pay for roofing repairs. Association levied assessments against Owners for payment of a loan it had taken out to pay for sidewalk repairs and improvements and had paid for Owner's roof repairs when he did not pay the contractor. Owner argued at trial that Association did not follow the governing documents with regard to acquiring the loan for repairs and improvements and with regard to levying assessments to pay for these expenses. The trial court determined that the assessments levied by Association, both for improvements and for payment of the loans, were valid. On appeal, the Fourth District Court determined that there was substantial and competent evidence to support the findings of the trial court and affirmed the judgment upon the finding that Association properly followed the governing documents in taking the contested actions.

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