COMMUNITY COUNSEL

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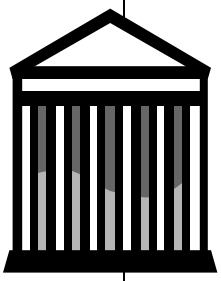
Recent Cases

- **Statutory warranties on condominium units under Sec. 718.203, Fla. Stat. include the air conditioning system, notwithstanding language that appears to exclude AC systems serving one unit.**
- **Court reads right of all condo owners to *run* for the board to include the right to *serve*, even when documents prevent multiple co-owners of the same unit from serving at the same time.**

Roll-out of the 2007 Statutory Changes Pt. 3

We continue our review of SB. 902, effective July 1, 2007. The new statute:

7. changes Section 720.305, Fla. Stat. to exempt a member who prevails in litigation with an HOA from paying a portion of the HOA's attorneys fees, unless the member fails to participate in pre-suit mediation.



8. changes Section 720.306(1)(c), Fla. Stat. to clarify that associations (such as master and subassociations) that merge do not thereby impair the voting rights of their members. Often a developer's original conception of community organization turns out to be wrong and useless sub-associations need to be merged in to a master association or consolidated with other sub-associations for more economical and efficient operations. Also permits a majority of the members of an HOA to adopt the methodology used by condominiums to conduct their elections.

9. changes Section 720.307(3), Fla. Stat. to require developers to conduct a turnover audit as part of the transition of the community to members control.

SB 902 is the big community association bill for 2007.

10. changes Section 720.308, Fla. Stat. to establish guidelines for developers to guarantee the level of assessments during the period that the developer controls the association.

11. changes Section 720.311, Fla. Stat. These changes address Governor Bush's concerns with the pre-suit mediation process by using language to indicate its mandatory nature and by imposing a penalty for failure to mediate in the form of a prohibition on recovery of attorneys fee to any party who does not participate. In addition it:

A. removes the understaffed department from playing their current, purely clerical role in the process of pre-suit mediation of HOA disputes. At present the statute calls for the department to receive requests for mediation, to notify the other side of the request, and to assign a mediator. The department has one person assigned to handle these tasks and that person is falling behind, with over 600 requests received in the past year. The solution is to create a private system that bypasses the department's involvement entirely, saving money and making the system more efficient. A statutory form notice is given by one party to another along with the names of five (5) qualified mediators. The other party then responds, selecting one of the mediators or waiving the right to mediate.

B. clarifies what constitutes a "dispute" that must be mediated before suit, by eliminating assessment collection and collection of other financial obligations, and enforcement of a previously mediated settlement agreement from the definition.

C. addresses constitutional concerns of access to the courts by creating an emergency right to access the courts, such as exists in the Condominium Act's alternate dispute resolution provisions.

D. addresses the practical problem of how the mediators get paid for their services. Experience to date indicates that many mediators are declining to accept HOA cases since they often do not get paid.

E. makes more qualified mediators available by permitting the mediator to be certified to handle cases brought in either county or circuit courts, and eases the longer term ramifications of mediating by providing that mediated settlements are not precedent in future proceedings.

F. makes clear that disputes that go unsettled are still subject to prevailing party attorney's fees, as already provided in Section 720.305(1), Fla. Stat., except that persons failing or refusing to participate in the pre-suit mediation process cannot recover attorneys fees, even if they prevail.

MORE NEXT MONTH >>>>>>>>>>>>>>>>>>>

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RECENT CASE SUMMARIES

In **Porto Vita, Ltd., et al., vs. Bellini, et al.,** 32 Fla. L. Weekly D1875a (Fla. 3rd DCA August 8, 2007) Developer appealed from a judgment entered in favor of Owner after a jury trial. Developer was the owner/developer of the South Tower of Porto Vita, a residential condominium complex, in Aventura, Florida. Owner contracted with Developer to purchase a luxury penthouse unit from Developer. Both prior to and at the closing, Owner complained of problems with the unit's air conditioning system. These problems included leakage, dust accumulation, abnormal noise, and uneven air flow temperatures. An inspection revealed that the problems were caused by several deficiencies in the installation of the system, such as the use of concealed space as part of the duct system; locating the air handling unit in a closet; unprotected fibrous glass ductwork in the mechanical room; inadequate drain pans under the air-conditioning unit and the hot water heater; no return ductwork; failure to seal the mechanical rooms and plenums; substandard air filtration module; failure to install balancing dampers; and insufficient ventilation rate. Owner filed the lawsuit against Developer asserting three theories of liability; breach of statutory implied warranty of fitness and merchantability under Section 718.203, Florida Statute, breach of contract, and violation of the Florida Building Code. The case was ultimately tried before a jury on the warranty claim and the breach of contract claim. The jury returned a verdict in favor of Owner on the warranty claim in the amount of $31,918. The jury further found in favor of Developer on the breach of contract claim. Developer's primary argument on appeal was that the trial court erred in entering judgment in favor of Owner because the alleged defects are outside the scope of Section 781.203, Florida Statutes, which sets forth Developer's statutorily implied warranties. In particular, Developer contended that the claim is barred by the language of subsection (1)(e) which excludes ". . . . mechanical elements serving only one unit." The statute classifies the type of property involved, assigning to each a different warranty period. The classifications are: (a) the unit; (b) the personal property transferred with each unit; (c) all other improvements for the use of the unit owners; (d) all other personal property for the use of the unit owners; (e) the roof and structural components, and mechanical, electrical and plumbing elements serving a building (rather than a single unit; and (f) all other property conveyed with a unit. The appellate court noted that subsections (a), (b) and (f) are primarily concerned with the residential unit itself while (c), (d), and (e) pertain to the common elements of the condominium complex. Developer argued that subsection (e) should control because it specifically excludes ". . . . mechanical elements serving only one unit." However, the appellate court noted that clear objective of the statute is to cover the complete unit and all common elements. Developer's warranties extend to personal property transferred with the unit. It would therefore be absurd to conclude that the legislature purposely intended to exclude from the warranties such an integral part of a luxury penthouse condominium as is a central air conditioning system. Based upon the foregoing, the appellate court affirmed the judgment entered in favor of Owner and against Developer.

In **Lakewood Village Condominium Association, Inc., vs. Beracha**, 14 Fla. L. Weekly Supp. 880a (Circuit Court of the 17th Judicial Circuit in and for Broward County, Florida June 26, 2007), Owner and her husband owned a single condominium unit is Association. Both Owner and her husband timely filed notices of their intent to be a candidate for the board of directors. After receipt of both notices of intent to be candidates, the three members of the board of administration amended the bylaws to state that notwithstanding ". . . . *anything to the contrary herein, there shall only be one (1) director serving from any one (1) unit at any time. In the event that more than one (1) owner of a unit is elected to the Board at the same time, one of those owners, preferably the one who received the lower number of votes, if that is ascertainable, shall be deemed to have resigned, effective immediately. The Board shall then appoint to fill the remaining vacancy, as elsewhere provided herein."* At the election, both Owner and her husband were elected to the board. Association filed the instant action for declaratory judgment to determine the validity of the amendment and to determine whether Owner could continue to serve on the board (Owner's husband was permitted to remain on the board because he received more votes). The court noted that in accordance with Section 718.112, Fla. Stat., all unit owners, except convicted felons who have not had their rights restored, are entitled to run for the board of directors. It follows then that a statutory eligibility to run for the board of directors of a condominium association implicates an eligibility to thereafter serve on that board once elected. The intent of the legislature would be thwarted by an interpretation that the legislature only wanted to open eligibility to candidacy, but not board membership. Therefore, the court found that the amendment to the bylaws was in conflict with the requirements of the Florida Statutes and was therefore invalid. The court found that Owner was validly elected to the board and could immediately assume her position.

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