COMMUNITY COUNSEL

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THE 2008 HARVEST OF NEW LAWS - PART V

We conclude our summary of the 2008 changes to community association law with this discussion of SB 2016:

One of the issues continuously facing condominium associations has to do with meeting constantly changing fire safety regulations. In particular, associations want to know if they are (or will be) required to install a sprinkler system and/or monitored fire alarm system. Section 718.112(2)(l) Fla. Stat., originally adopted in 2003, states that notwithstanding any other statute, regulation or code provision, if two-thirds of the voting interests in a condominium association vote to "opt-out" of retro-fitting the property with a sprinkler system or "other engineered life safety system," the association can forego installation of the equipment. The provision is limited to buildings less than 75 feet in height. Because the statute does not define what an "other engineered life safety system" includes, litigation at the local level has ensued over whether "monitored fire alarm systems" fall within the definition. Recently, a consensus seems to be forming that fire alarm systems fall within this definition and may be omitted upon a proper vote.

In 2008 there is much confusion, and only a few good ideas are included in about a dozen new laws.

Effective July 1, 2008, significant changes were made to Chapter 509, Fla. Stat. regulating Florida's public lodging and food service industries. One of the major changes was an expanded definition of what constitutes a "public lodging establishment" under Section 509.013(4)(a), Fla. Stat. More importantly, because Chapter 509 contains fire safety standards separate from Chapter 633, Florida's Fire Prevention and Control Act, questions have arisen whether the Section 718.112(2)(l) "opt-out" provision is still viable for associations falling under Chapter 509. Also, the requirements for licensing of public lodging establishments can be burdensome. To begin with, Section 509.241, Fla. Stat. requires each "public lodging establishment" to obtain a license from the division. It is a second degree misdemeanor to operate without a license.

Now a "**public lodging establishment**" can be either a "**transient**" public lodging establishment – with unit(s) rented to guests more than three times in a calendar year for periods of less than 30 days, or held out as available for rent for such time period; or they can be a "**nontransient**" public lodging establishment – with unit(s) rented to guests for periods of at least 30 days, or held out as available for rent for such period of time. Excluded from the definition are units in a condominium rented for periods of at least 30 days and not held out for rent for less than 1 month, *so long as there are no more than four units within the complex available for rent*. See Section 509.013(4)(a), Fla. Stat. for the precise definition. This definition dramatically expands what facilities may now be subject to 509's regulations. A "condominium association", as defined in s. 718.103, which does not own any units classified as resort condominiums under s. 509.242(1)(c) does not have to obtain a license. However, it is unclear whether a facility that does not have to obtain a license still has to meet the other statutory requirements in Chapter 509, such as fire safety retrofitting. Moreover, the DBPR has yet to adopt a policy or guideline on this issue. All associations with units available for rent should consult qualified counsel to be sure they are in compliance with the current law.

Errata

- **Last month we reported that a condominium must send notice of intent to lien. That notice must be sent 30 days prior to recording a lien, not 45, as originally stated.**

Recent Cases

- **First lien foreclosure extinguishes condo association's lien.**
- **Summary judgment not available in lien foreclosure when issue existed as to when payment was received in relation to when lien was filed.**

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RECENT CASE SUMMARIES

In **First Commerce Finance Corporation vs. Rainbow Bridge Properties, LLC**, 15 Fla. L. Weekly Supp. 582a (Fla. 17h Judicial Circuit (Appellate) February 28, 2008) Mortgagee filed a foreclosure action of its purchase money first mortgage lien. Association was named as a party in the first mortgage foreclosure and filed an answer admitting that its lien was junior and inferior to the first mortgage being foreclosed. At the foreclosure sale, Mortgagee purchased the condominium unit for $49,000. A few days later, Association foreclosed on the same unit for unpaid condominium assessments. Mortgagee was never named in that foreclosure action and no notice of the foreclosure sale was provided. Rainbow Bridge purchased the property at the second foreclosure sale for $4,900. At that point in time, both Mortgagee and Rainbow Bridge held certificates of title for the same property. When Mortgagee attempted to pay the delinquent assessments, it learned for the first time of Association's foreclosure action and the second sale of the unit. Mortgagee filed a motion to vacate Association's sale and the trial court denied the motion. On appeal, the court noted that the law is well settled that foreclosure of a senior mortgage extinguishes the liens of any junior mortgagees included in the final judgment whose rights were determined in that action. Since the Mortgagee, who held a senior lien, joined Association in its foreclosure action, the foreclosure terminated Association's interest in the property. Therefore, once the Mortgagee foreclosed on its mortgage, Association no longer had the right to foreclose on its assessment lien. Association was obligated to raise its lien claim in the action brought by Mortgagee to foreclose, and, by failing to raise the claim, Association waived its claim. Accordingly, the decision of the trial court was reversed and the second foreclosure sale was set aside.

In **Hollywood Towers Condominium Association, Inc., vs. Hampton**, 33 Fla. L. Weekly D2555c (Fla. 4th DCA October 29, 2008) Association brought suit to foreclose a lien on Owner's unit for unpaid assessments. On September 9, 2005, Owner delivered a check for $1,960.00 to Association, which reflected the amount she owed for a special assessment on her condominium unit. Due to an accounting error, Owner's bank account was debited only $19.60. On April 17, 2006, Association notified Owner that she owed the balance of her unpaid assessment, late fees, and attorney's fees incurred in the collection process. The same day, Association filed a claim of lien on Owner's condominium unit. On May 3, 2006, Association amended a pending, unrelated complaint against Owner to include a claim for foreclosure of the lien. The next day, Association notified Owner that it had just received the balance of her special assessment. Nevertheless, Association did not dismiss its foreclosure claim, nor did it discharge the lien on Owner's condominium unit. As a result, Owner counterclaimed for slander of title and removal of the lien. Owner moved for summary judgment on Association's foreclosure claim and on her counterclaims. Owner asserted that her bank corrected the accounting error and debited the additional $1,940.40 from her account on January 11, 2006. Therefore, Association received the full amount of her special assessment more than three months before it filed the lien on her condominium unit, making the lien and subsequent foreclosure action invalid. In response, Association argued that it did not receive the additional funds from Owner's bank until May 1, 2006, after it had filed the lien on Owner's condominium unit. In support of its position, Association filed an affidavit of the president stating that Owner was indebted to Association in the amount of $1,940.40 as of April 21, 2006. The trial court granted Owner's motion for summary judgment and Association appealed. The Fourth District Court of Appeal noted that summary judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. The moving party has the burden to show the absence of any material issue of fact and the court must draw every inference in favor of the non-moving party. Owner, as the moving party, failed to meet this burden. The primary factual issue in this case was whether Association filed the claim of lien on Owner's unit before or after it received the additional funds from Owner's bank. This factual dispute is material because it determines the validity of Association's lien, and in turn, the validity of Association's foreclosure action. Accordingly, the appellate court reversed the summary judgment entered by the trial court and remanded the case for further proceedings.

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