

COMMUNITY COUNSEL

December, 2008

A Publication of Wean & Malchow, P.A.

Volume 12, Issue 12

Recent Cases

- ◆ **The assertion of last minute ratification by Board approval of hardwood floors in upstairs condo unit is not a valid defense if not properly in pleadings before the trial court.**
- ◆ **Court ducks issue of whether 2007 version of HOA Act gave HOA priority over 1st mortgage holders, when the decision on priority was sought before the foreclosure sale, so Mortgagee was not yet the lot owner.**

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.

MORE ON CONDOMINIUM INSURANCE

Most unit owners and condominium associations are now well aware of the recent changes in Section 718.111(11), Fla. Stat. A lot of criticism has swirled around the statute and many "stakeholders" are putting forth proposals to revise the statute again, despite the fact that it didn't come into full operation until January 1, 2009.

One area receiving a lot of public criticism is the requirement, found in Section 718.111(g)(2), Fla. Stat., that mandates compulsory unit insurance and gives associations a way to enforce that requirement. Particularly in light of the current severe economic downturn, a mandate that all owners carry insurance on their units is seen as – at best – piling on beleaguered consumers, and – at worst – an unwarranted gift to the insurance industry. In response to public complaints, opportunistic legislators are readying their red pencils to delete this requirement from the statute.

We wish to suggest that this pandering to public outcry without careful reflection or a clear understanding of the reasons for adoption of Section 718.111(g)(2), will do a substantial injustice to many people who will be most vulnerable and unable to absorb potentially substantial losses.

The theory behind the passage of subsection (g) (2) was the recognition that a typical condominium is a blend of properties, some owned by individual unit owners or residents and some owned collectively by all owners, but all contributing to the integrity of the structure. In the event of a catastrophic loss, the goal of the law should be ensure that sufficient resources exist to restore the structure to a habitable shell.

In the past, specifically under the 2003 version of the statute, unit owners were responsible for insuring all portions of the air conditioning systems service their units, regardless of where located. With only a vague and inarticulate statement about the need for owners to actually carry policies to cover their insurance obligations, in the event of a loss, an owner without insurance probably would be unable to pay for restoration of the air conditioning system. In that event, the other owners would have to pay for the uninsured systems or face the risk that their units



could not be occupied or might later be damaged from mold or mildew. Clearly the value of adjacent units is negatively impacted when uninhabitable units are nearby.

Mandatory Unit Owner Insurance Policies are necessary to protect the other owners from loss.

Thus, the current law is realistic by recognizing that when people own property in close quarters to others and have separate mechanical, electrical or utility systems integrated into the structure as a whole, each owner should be required to meet a certain level of responsibility to their neighbors.

That is why unit owners are required to carry both casualty and liability insurance.

Water leaks and overflows from upstairs to downstairs units are the single most common source of damage to units. In the absence of unit owner liability insurance, the downstairs owner and/or the association (i.e. the other innocent unit owners) will pay for the sins of the irresponsible uninsured unit owner. That is neither fair nor good public policy. While mandated insurance may seem harsh, removing this requirement will protect the irresponsible owner at the expense of innocent persons.

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 **Price vs. Mirco Coric, et al.**, 33 Fla. L. Wkly D2878a (Fla. 2nd DCA, 12/19/2008) Downstairs unit owner brought suit against Upstairs unit owner over the installation of hardwood flooring in the upstairs condominium unit. For 28 years Downstairs unit owner owned and lived in a unit on the first floor of the condominium. In 2005, Upstairs unit owners purchased the unit directly above Downstairs unit owner. Shortly thereafter, Upstairs unit owner installed hardwood flooring throughout the unit. Downstairs unit owner claims that the flooring has resulted in a substantial increase in noise from the upstairs unit. The declaration of condominium requires all units above the ground floor to have wall-to-wall carpet installed over high quality padding in all areas except for kitchens, bathrooms, and laundries. If an owner above the first floor wishes to install any hard-surface flooring, the owner must install the flooring over a sound-absorbent underlayment and must obtain written approval of the condominium's board of directors before the installation. If an installation is made without the approval of the board, the board "may" require the unit owner to cover all such hard-surface flooring with carpeting, or require the removal of such hard-surface flooring at the expense of the offending unit owner. In July of 2006 Downstairs unit owner filed a short complaint for injunctive relief seeking to enforce the provisions of the declaration. Upstairs unit owner filed an equally brief answer claiming that they had "complied with the applicable condominium documents and rules by obtaining consent and/or approval from the Board of Directors. . . ." The association was not joined as a party to the lawsuit. The evidence at trial revealed that the Upstairs unit owner had consulted with the association president prior to the installation. However, the Upstairs unit owner never obtained the written approval from the entire board of directors prior to installing the hardwood flooring. Thus, the evidence deduced at trial showed that the Upstairs unit owner was in violation of the declaration. However, Upstairs unit owner also claimed that to have been given retroactive consent and approval by the board of directors just a week before the trial. The trial court granted judgment in favor of the Upstairs unit owner on this defense of "subsequent" ratification. On appeal to the Fourth District Court of Appeal however, the appellate court determined that this defense was not properly pled in the answer and affirmative defenses. As such, the appellate court reversed the trial court and held that the trial court abused its discretion in allowing the presentation at trial of a defense not encompassed within the pleadings.

In **LR5A-JV, LP vs. Little House, LLC and Matanzas Shores Owners Association, Inc., et al.**, 34 Fla. L. Wkly D4b (Fla. 5 DCA, 12/24/2008) Mortgage Holder brought a foreclosure action to foreclose property subject to Association's declaration of covenants and restrictions. Association was named as a defendant in the foreclosure action. On April 20, 2006, Association filed assessment liens on the property secured by the mortgage. On May 27, 2007, Mortgage Holder filed the mortgage foreclosure action seeking to foreclose the mortgage and to gain priority over Association's liens. Mortgage Holder moved for and was ultimately granted a summary judgment of foreclosure. After this judgment was entered, both Association and Mortgage Holder filed post-judgment motions. Association asserted that section 720.3085, Fla. Stat., which became effective on July 1, 2007, granted its liens priority over that of Mortgage Holder. Mortgage Holder sought clarification and requested that the trial court specifically address the applicability of section 720.3085. The trial court's order of clarification indicated that the final judgment was predicated upon the plain language of Section 720.3085 and Association had to seek its remedy "from and through the parcel owners, not in the foreclosure action." On appeal to the Fifth District Court of Appeal, Association argued that Section 720.3085 grants it lien priority over other liens because it holds the current and previous parcel owners jointly and severally liable for unpaid assessments. However, the appellate court held that Association's argument was deficient because there is no record evidence that Mortgage Holder purchased the property at a public sale. Consequently, Section 720.3085, Fla. Stat., is inapplicable because Mortgage Holder was not the parcel owner, it is still merely a creditor. Furthermore, there is nothing in the plain language of Section 720.3085 that can reasonably be construed to give Association's lien priority over the mortgage. Therefore, the appellate court affirmed the trial court and held that the trial court correctly recognized that Mortgage Holder is not the parcel owner and the Association may not seek relief in the foreclosure action.