COMMUNITY COUNSEL

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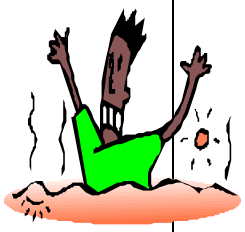
HOW FAR WILL COURTS GO TO HELP ASSOCIATIONS?

This month we discuss a hot topic. In hard economic times like these there has been a lot of popular press about assistance the courts have given to communities trying to make ends meet in the face of large numbers of non-paying members and lenders who delay taking title to property for years.



As a result there has been much (unjustified) excitement over court actions such as the appointment of blanket receivers. Laymen have so misunderstood the rationale behind these cases that some have openly talked about using the courts and receivers to enter into the units of delinquent owners and to forcibly rent the owner's unit, regardless of whether the owner consents to this action. Such action would constitute a criminal trespass, and also would amount to an unconstitutional taking of private property. It just won't happen.

Are courts helping community associations?

On the other hand, in a Seminole County Circuit court case from August, 2009, the trial judge, saying that "extraordinary times call for extraordinary measures," ordered non-paying owners in a condominium to remit the rent being collected to a receiver under threat of contempt of court. So just how far will the courts go to assist associations?

Not too far, apparently. Aside from using strong words in their orders, no court has gone beyond what is already provided for by statute. Section 718.116, Fla. Stat., provides in part:

If the unit is rented or leased during the pendency of the foreclosure action, the association is entitled to the appointment of a receiver to collect the rent. The expenses of the receiver shall be paid by the party which does not prevail in the foreclosure action.

Then there is the very recent case of U.S. Bank Natl. Assn. v. Tadmore, 3D09-1389 (Fla.App. 3 Dist. 12-2-2009), in which the 3rd District Court of Appeal reversed a trial court order requiring a foreclosing lender to either complete its sale within 30 days or start paying assessments to a condo association. In this case the mortgage foreclosure action was filed in February, 2008, and the association moved a year later to compel the sale under threat of having to pay assessments. Despite having equitable powers, the appellate court held that any attempt to do equity cannot require a party to do what they are not obligated to do by law. Hence, because under Section 718.116, Fla. Stat., a foreclosing lender does not become liable for assessments until after they acquire title, it is not possible, even in the name of equity, to make them pay assessments prior to acquiring title. The court quoted a prior decision:

[C]ourts of equity have [no] right or power under the law of Florida to issue such order it considers to be in the best interest of 'social justice' at the particular moment without regard to established law.

Recent Cases

- **It was unconstitutional to apply a statutory change retroactively to change the voting rights of commercial owners in a mixed use condominium, even when the statute said it was intended to apply retroactively.**
- **Condo Association held to be a successor to the developer for purpose of making a claim on the developer's payment & performance bond.**

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RECENT CASE SUMMARIES

In **Cohn vs. The Grand Condominium Association, Inc., et al.,** 34 Fla. L. Weekly D2302a (Fla. 3rd DCA, November 12, 2009) Owner appealed a summary judgment granted in favor of Association finding that subsection 718.404(2), Fla. Stat., was unconstitutional as applied to Association. Association was created in 1986. Association is a mixed use condominium consisting of 810 residential units, 141 retail units, and 259 commercial units. The commercial units are a DoubleTree Hotel. The retail units are shops on the first two floors of the condominium. Owner was a residential unit owner. In 1986 when the condominium was created, there was no specific statute regulating mixed-use condominiums. The articles of incorporation and the bylaws of Association provided for a board of directors consisting of seven members. Two members are elected by the residential unit owners, two are elected by the commercial unit owners, and two are elected by the retail unit owners. These six directors then select a seventh member. Association was turned over from the developer in 1993. In 1995 the legislature enacted section 718.404, Fla. Stat., entitled Mixed-Use Condominiums. Section 718.404(2), Fla. Stat., stated that "where the number of residential units in the condominium equals or exceeds 50 % of the total units operated by the association, owners of the residential units shall be entitled to vote for a majority of the seats on the board of administration." The statute was silent on the issue of retroactivity. In 2007 the legislature amended subsection (2) by adding: "This subsection shall apply retroactively as a remedial measure." Owner requested that the voting arrangements be changed at Association to give a majority of the board membership to the residential unit owners in accordance with the statute. Association filed an action for declaratory judgment seeking, among other relief, a finding that as applied to Association subsection 718.404(2), Fla. Stat., was unconstitutional. The trial court held that the statute as applied to Association was in fact unconstitutional. On appeal to the Third District Court of Appeal, the appellate court noted that voting arrangements in a condominium are of great importance, and the change imposed by the statute operates as a substantial impairment of the existing contractual relationship between the owners of private units and the owners of the commercial units. After careful consideration, the appellate court agreed with the trial court and found that the new statute, adopted after the creation of Association, impaired the contractual rights existing when Association was created, and was therefore unconstitutional.

In **The Marseilles Condominium Owners Association, Inc., vs. Travelers Casualty and Surety Company of America**, 34 Fla. L. Weekly D2241b (Fla. 1st DCA, October 30, 2009) Association appealed a final summary judgment entered in favor of Insurance Company in Association's action on performance bonds issued by Insurance Company in connection with the construction of the condominium controlled and operated by Association. The bonds, which guarantee the performance of the construction general contractor, expressly preclude an action by any "entity other than the Owner or its heirs, executors, administrators or successors." The named "Owner" under the bonds was the developer of the condominium project. In 2002 developer entered into a construction contract with builder for the construction of two seven-story condominium buildings with connecting common elements. Insurance Company issued two performance bonds for the construction of the project guaranteeing builder's performance of the construction contract. Builder failed to perform and ultimately, developer entered into a contract with another general contractor to complete the project. During construction, disputes arose between developer and builder. Builder filed suit against developer, and developer filed a third-party action against Insurance Company. Ultimately, developer settled with Insurance Company for $1.575 million. Association was wholly unaware of this settlement and was not a party to the action. Thereafter, Association filed suit against developer for construction defects and against Insurance Company on the performance bonds. Insurance Company answered the complaint and filed a motion for summary judgment arguing that the language of the bonds precluded an action by any entity other than developer or its successor. The trial court granted summary judgment in favor of Insurance Company. On appeal to the First District Court of Appeal, the appellate court reversed the trial court and found that, under the unique circumstances of this case, Association was the "successor" to developer and therefore entitled to sue on the bonds.

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