

# COMMUNITY COUNSEL

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## RECENT CASES

- ◆ **SUIT AGAINST INDIVIDUAL CONDO DIRECTORS DISMISSED BECAUSE OF ABSENCE OF ALLEGATION THAT THEY RECEIVED AN IMPERMISSIBLE PERSONAL BENEFIT BY SELF-DEALING.**
- ◆ **AWARD OF PREVAILING PARTY ATTORNEY'S FEES WAS NOT YET PROPER IN A CASE WHERE CONDO ARBITRATION WAS REQUIRED BUT THAT CASE HAD NOT YET CONCLUDED.**

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## FLA SUPREME COURT ORDERS FORECLOSURE MEDIATION

In November we asked the question, "How far will courts go to help associations?" In December, the Florida Supreme Court weighed in on the subject by issuing an administrative order mandating mediation on almost all mortgage foreclosure cases. However, the order is vague and uncertain on some issues and leaves so much to the discretion of individual judicial jurisdictions that it is unclear that anyone will get much relief from the order.

On December 28, 2009, the Court entered an order, the complete text of which can be found at <http://www.floridasupremecourt.org/clerk/adminorders/2009/AOSC09-54.pdf>. The order is a follow-up on the March, 2009 report of the Court's Foreclosure Task Force, and its emphasis is on increasing communication and joint problem-solving efforts between mortgage holders and homeowners.

It does this by framing a "model order" requiring "all residential mortgage foreclosure actions filed against homestead property involving loans that originated under federal truth in lending regulations" to participate in mandatory mediation no later than 120 days after a mortgage foreclosure suit is filed.

There are a number of problems, both legal and practical with the Court's order. First, by using a model order, the Court leaves it up to each chief administrative judge of each judicial circuit, to modify and implement a program model on, but not necessarily identical to what the Supreme Court envisions. Some circuits are acting faster than others.

Second, the process is unlikely to result in anything but delay, because while the mediators handling the cases will have fees capped at \$750, paid over installments, they are being asked to re-write transactions that are largely regulated by federal law, meaning that due to the complexity of the task to be performed is unlikely to occur under the system and process the court envisions.

The court is also unclear as to which lenders are covered by the order. The language refers to "holders in due course of a mortgage obligation." However, many entities that have the right to enforce mortgages do not meet the legal definition of a "holder in due course."

What is clear is that community association lien foreclosures are NOT subject to the mandatory mediation requirement.

The Court also spoke approvingly of increased reliance on the provisions of Sections 702.065 and 702.10, Fla. Stat.,

as a means of accelerating the conclusion of foreclosures on abandoned properties, but the model order makes no further reference to how these provisions, both of which largely rely on action by the foreclosing lender, should be used, especially when the lenders *do not necessarily desire* to obtain title at the earliest possible time.

In short, the Supreme Court order makes it all the more important for community associations to act quickly to obtain title to properties that can be used to derive rental income.



### THE SUPREME COURT ORDER WILL FURTHER DELAY MORTGAGE FORECLOSURES

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## RECENT CASE SUMMARIES

In **Raphael vs. Silverman, et al.**, 34 Fla. L. Weekly D 2438b (Fla. 4<sup>th</sup> DCA 11/25/09), Owners brought suit against the individual Directors for breach of fiduciary duty. Association is a condominium project comprised of three buildings. The north and south buildings sit perpendicular to the water, and the west building, where Owners live, sits between them, facing the water. Originally, privacy dividers with a basket-weave design separated the balconies of the units. In the summer of 2006, the Board installed new *transparent* dividers. When the Board refused to permit Owners to modify their dividers to restore their privacy, Owners filed suit against the Association and the individual members of the Board, alleging a breach of fiduciary duty to Owners and seeking damages arising out of Owners' inability to sell their units and loss of value. The individual Directors filed a motion to dismiss citing Florida law which provides that condominium association directors are immune from liability in their individual capacity absent fraud, criminal activity, or self-dealing/unjust enrichment. In response, Owners amended their complaint, adding that "[t]he individual Defendants derived an impermissible personal benefit from their decision to allow this unauthorized material alteration to the common elements, as they improved their indirect ocean view from their respective units, which had previously been obstructed by the privacy dividers as originally constructed." The individual Directors again moved to dismiss the complaint and the trial court dismissed the second amended complaint. On appeal to the Fourth District Court of Appeal, the appellate court noted that the derivation of an improper "personal benefit" is an exception to the individual directors' usual immunity. However, Florida Courts have consistently interpreted the statutory term "personal benefit" as requiring some form of "self-dealing" on the part of the director before individual liability may be imposed. In the instant case, the alleged "personal benefit" was derived simply because the Directors owned units within the condominium project and were thereby also able to enjoy the alterations or improvements to the common areas. Accordingly, the appellate court found that the bare assertion that the individual Directors derived a "personal benefit" was unsupported by any proper allegation of ultimate fact that establishes self-dealing. Therefore, based upon the allegations as they stand, the appellate court affirmed the ruling of the trial court dismissing the complaint. However, the appellate court remanded the case again to permit Owners one final opportunity to amend the complaint.

In **Nine Island Avenue Condominium Association, Inc., vs. Siegel**, 34 Fla. L. Weekly D2501a (Fla. 3<sup>rd</sup> DCA, December 2, 2009), Association was the entity responsible for maintaining the common elements of the condominium. Association hired contractor to perform structural concrete restoration repairs to the exterior of the condominium building. In order to make the repairs, the contractor required access to the owners' unit, which Owner refused to permit. On February 5, 2008, Association filed a verified petition for non-binding arbitration, pursuant to Section 718.1255, Florida Statutes (2008) with the Florida Department of Business and Professional Regulation. Along with the petition, Association also filed a motion for temporary injunction and/or to stay/abate seeking either a temporary injunction to allow access to the unit, or an order abating the arbitration in order to allow Association to seek injunctive relief in a court of competent jurisdiction. The arbitrator subsequently entered an order holding the arbitration in abeyance so that Association "may seek injunctive relief in court." Association then filed a petition for temporary injunctive relief in the trial court. After an evidentiary hearing, the trial court denied the petition finding that Association did not establish that the work needed to be done on an emergency basis, and that it failed to prove that it did not have an adequate remedy available to it in the pending arbitration proceeding. Owner thereafter filed a motion for entry of judgment awarding attorney's fees and costs as the prevailing party pursuant to both section 718.303, Fla. Stat., and the Declaration of Condominium. After a hearing, the trial court granted Owner's motion for attorneys' fees in the amount of \$18,234.00. Association appealed the trial court's ruling to the Third District Court of Appeal. On appeal, Association argued that the trial court erred in awarding prevailing party fees to Owner at this stage in the proceeding. Specifically, Association argued that because the matter is still pending in arbitration, there has yet to be a final determination of the merits of the case sufficient to justify an award of prevailing party attorney fees. On appeal, the appellate court noted that when a trial court enters a preliminary injunction, it is an interlocutory order, and "... there can be no prevailing party for the purpose of awarding attorney's fees until there is an end to the litigation." As such, the appellate court reversed the order of the trial court, and found that because there was no final determination on the merits, no prevailing party exists and no attorney's fees award was yet proper.

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