COMMUNITY COUNSEL

January, 2009 | A Publication of Wean & Malchow, P.A. | Volume 13, Issue 1

Recent Cases

- **The Division gets soundly spanked for acting like obsessive Capt. Ahab in pursuing a $5,000 fine against a condo association.**
- **Florida Appeals court allows unit owner suit against management company to go forward to determine whether the manager breached a contract with the unit owner and caused damage by failing to trim a tree adjacent to the owner's unit.**

Need Foreclosure Relief? Look to Rentals.

Recently this law firm spoke to over 250 people on the subject of lien and mortgage foreclosures.

Aside from explaining the lien and mortgage foreclosure process, we tried to come up with various strategies that associations could use to either minimize foreclosures or to provide an alternate source of funds which associations could use to satisfy their outstanding debts. Much excitement and many questions centered around the issue of rental property, so herewith is some background on how rental properties may help cash-starved communities.

The Florida Condominium Act already provides that communities whose documents give them the right to approve rentals may deny owners that right if the owner is delinquent in assessments. Thus, the threat of denial may be enough to prompt a delinquent owner to pay up.

Rental Income is a potential source of funds to be used to make up for unpaid assessments .

If a unit is already rented, the Act also permits a condo association to seek to sequester rental income in a lien foreclosure action. In such a case, the tenant is made a party to the case and after a hearing the court may order the rent to be paid into the court's registry, or to a receiver. When enough rent has accumulated to pay the outstanding debt, including the court's 10% fee, the court can be asked to disburse the money to the association and dismiss the case.

The same result may be accomplished by both condos and HOAs with some carefully drafted amendments and the cooperation of the members. For example, an amendment that simply assigns rental income to the association when a member becomes delinquent would allow the Association to make a demand for the rent even prior to filing a lien foreclosure suit, and it is at least arguable that such an amendment does not restrict "… unit owners' rights relating to the rental of units …." under Section 718.110(13), Fla. Stat, since it does not impact any owner's right to rent. (This means that the amendment, if adopted, would apply to all owners, whether or not they voted for the amendment.)

Similarly, an amendment that purports to terminate a existing rental if the unit or lot owner becomes delinquent (while probably working an illegal forfeiture on the innocent tenant) at least gives the association the ability to demand payment of rent from the tenant as a quid pro quo for waiving the automatic termination.

While HOAs generally do not get involved with screening and approving rentals, similar amendments that merely require that rented properties be registered with the Association, and that the name and address of the renter be disclosed, would permit the HOA to likewise demand rent if the documents provide for an assignment of the rent upon an owner's default in payment of assessments. Remember that tenants will generally cooperate with an association that is offering to allow them to remain in possession.

Of course, if an association acquires title to a property via the lien foreclosure process, it has the ability to rent the property and keep the rent for as long as it owns the property.

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RECENT CASE SUMMARIES

In **Eden Isles Condominium Association, Inc., vs. Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums and Mobile Homes**, 34 Fla. L. Weekly D163a (Fla. 3rd DCA January 14, 2009) Association appealed an administrative decision of Division to cease and desist from any further violations of Chapter 718, Fla. Stat. Division also imposed an administrative penalty of $5,000. Association comprises seven identical, four-story buildings, containing fifty-two units in each building. All units are laid out according to one of three different floor plans. The buildings are differentiated by a letter from A through G. Building G was the last building to be built. For years, Association received complaints regarding the inequity of the assessment structure, specifically, the fact that equally sized units were required to pay differing assessment amounts. In 2004, Association held a meeting to address the inequities in assessments. At the meeting, the Board attempted to establish greater fairness by requiring that all similarly situated unit owners be assessed equally for common expenses. They used the percentages assigned to the newest structure, Building G, which percentage more accurately correlated to the size of each unit. This resulted in approximately half the unit owners paying more and about half paying less. For example, Unit 100 in Building A paid $2.31 more per month, while Unit 101 in Building A paid $3.31 less. Thus, the Board felt that for the year 2005, Association would be assessing similarly situated unit owners equally. However, an earlier amendment to the Declaration clearly established a schedule of percentages for each building that resulted in similarly situated owners paying a disproportionate share of the common expenses. A unit owner filed a complaint with the Division alleging that Association failed to assess unit owners for common expenses pursuant to Association's governing documents, as amended. In response, beginning in 2006, the Board reverted back to the original assessment percentages. It also offered a refund to owners if they had overpaid their individual assessments, but no one requested the return of any difference in payment. The Division, however, refused to accept "yes" for an answer and proceeded undeterred with its investigation and, on February 3, 2006, issued a Notice to Show Cause to Association to refute the charge that in 2005 it assessed unit owners for common expenses at rates which differed from those set out in the Declaration. An administrative law judge conducted a two-day trial at which not a single complainant appeared. In a detailed 19 page order, the administrative judge concluded that, because the imposition of a fine was punitive in nature, the Division had the burden of proving the violation by clear and convincing evidence. The judge found that the Declaration amendment was ambiguous and recommended that the Division rescind its Notice to Show Cause and forgive the fine. With the ". . . . obstinacy of Captain Ahab in search of Moby Dick . . . ." the Division filed numerous exceptions to the judge's conclusion. On appeal to the Third District Court of Appeal, the appellate court noted that the Division lacked authority to both interpret the condominium documents and thereafter enforce its interpretation. As such, the appellate court reversed and remanded the case to reinstate the original decision of the administrative law judge.

In **Desimone vs. Clearview Oaks Management, Inc.**, 16 Fla. L. Weekly Supp. 126a (Fla. 6th Judicial Circuit (Appellate), August 12, 2008) Owner brought an action against her condominium Management Company for breach of contract. Specifically, Owner alleged that Management breached their written contract by its failure to adequately trim or maintain a tree adjacent to Owner's condominium unit. In its Final Summary Judgment, the trial court determined that there are three elements of a breach of contract, to-wit: (1) a valid contract; (2) a material breach; and (3) damages. The trial court further found that Management's failure to trim the tree in accordance with Owner's wishes or her arborist's recommendations did not cause damage to Owner. As such, the trial court determined as a matter of law that Owner could not prove the necessary elements for breach of contract because Owner had suffered no damages. However, in her prayer for relief Owner sought either damages or an order requiring management to properly maintain the tree. On appeal, the appellate court determined that Florida Law appears to provide that nominal damages may be awarded when the loss caused by the breach is too difficult to ascertain. As such, the appellate panel reversed entry of summary judgment to permit the case to go forward on Owner's claim for damages and/or an order to maintain the tree.

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