

COMMUNITY COUNSEL

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Recent Cases

- ♦ **It was not appropriate to dismiss suit for declaratory relief if the plaintiff is entitled to a declaration of her rights, even if she has little chance of prevailing.**
- ♦ **Where relief in a case will impact the appurtenant rights of other unit owners, they are necessary parties to the lawsuit.**

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.

YOU BE THE JUDGE

In the thirteen plus years that we have published this monthly newsletter we have refrained from posing open-ended questions. But in the current economy we feel that the following issue is both intriguing and relevant enough to pose the question without necessarily answering it definitively. Under current law it is equally relevant to condominiums and homeowner associations. The facts are all too common ...

Consider a residence owned by persons who are delinquent on both the mortgage and assessment payments. Both the lender and the association commence foreclosure proceedings. The association acquires title to the residence via lien a foreclosure action during the pendency of the mortgage foreclosure action, but takes no action to rent the property to make back its lost money. The lender later completes its own foreclosure and a third party buys the residence at the lender's foreclosure sale. The third party now denies liability for any back assessments, reasoning that the association, as the prior owner, is jointly and severally liable with the third party for all back assessments.

If true, does this mean that any time the association acquires title to a delinquent property it loses the right to recover back assessments from third parties who purchase the property at a lender's foreclosure sale (and that it also loses the right to recover limited amounts from the lender when it buys at its own sale)? If so, then why would the association ever want to acquire title to its own units, absent the present ability to rent the unit for a profit? Oddly,

the facts are common but the answer is not.

There is ample case law on the subject of the doctrine of "merger," but it is unclear whether this doctrine is controlling on these facts. "Merger" is said to occur when a lienholder acquires title to the property on which it has its lien: the lien and the ownership are said to merge, extinguishing the lien. Current legal doctrine holds

that lesser and greater interest in property only merge if it was the intent of the parties to work a merger. However, in this situation that is no contractual arrangement between an association and a party buying the property at a lender's foreclosure, so there

can be no determination of the parties' mutual intentions. In addition, the doctrine of merger doesn't address the issue directly, since upon the recording of a certificate of title, the law vests ownership of property in the person or entity named on

the certificate. Thus, regardless of the status of its lien on the residence, the association does indeed become an owner once its certificate of title is recorded. The statutes do indeed make prior owners jointly and severally liable for assessments with new owners, so does ownership by the association cut off its right to collect assessments from later owners? What do you think?

Neither the Condo Act nor the HOA statute specifically address this situation, making it is a good subject for a legislative fix.



Does ownership by an association prevent assessment recovery from later owners

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RECENT CASE SUMMARIES

In **Murphy vs. Bay Colony Property Owners Association, Inc.**, 34 Fla. L. Weekly D1467a (Fla. 2nd DCA July 22, 2009) Owner filed suit for declaratory judgment against Association. In 2003, Owner's predecessor in title entered into a settlement agreement with Association that permitted him to construct a dock on the property. The agreement, which was expressly made binding upon the parties' successors and assigns, placed restrictions on the construction of the dock and was to run with the land. The agreement restricted the construction of any boat lifts on the dock without Association's approval. Owner, after his purchase of the property, sought to change the lift mechanism of the dock. Owner submitted a formal request to Association to approve the new boat lift, but Association denied the request. Owner thereafter filed a complaint for declaratory relief against Association and demanded a declaration of her rights under the terms of the agreement. Association moved to dismiss the complaint, arguing that the agreement unambiguously gave it the power to approve or deny Owner's request without the requirement of following any procedure or standards in making its decision. After conducting a hearing, the trial court granted Association's motion and dismissed Owner's action with prejudice on the basis that it failed to state a cause of action. On appeal, Owner argued that her complaint for declaratory relief should not have been dismissed. The Second District Court of Appeal noted that a complaint for declaratory judgment should not be dismissed if the plaintiff established the existence of a justiciable controversy cognizable under the Declaratory Judgment Act. The court further noted that the test for the sufficiency of a complaint for declaratory judgment is not whether the plaintiff will succeed in obtaining the decree she seeks favoring her position, but whether she is entitled to a declaration of rights at all. In this case, the appellate court found that Owner properly alleged that she was uncertain as to her rights under the agreement because she believed her plan to add the boat lift complied with all of the agreement's restrictions and requirements. Owner also alleged that Association's actions were arbitrary and capricious. Thus, the appellate court found that Owner had stated a cause of action for declaratory judgment and reversed the ruling of the trial court and ordered further proceedings.

In **Stevens, et al., vs. Tarpon Bay Moorings Homeowners Association, Inc.**, 34 Fla. L. Weekly D1432a (Fla. 4th DCA July 15, 2009) two Owners in a community of related homes sued Association and the court was asked to decide whether the Owners had a right to space on a community dock. The community is comprised of three buildings having 22 townhomes in all. Two buildings face a canal, one a river. The community's original site plan provided 8 dock spaces on the river and 14 on the canal. The developer built river docks having 13 dock spaces, the ownership of which was open to all members of the community, regardless of their unit's building. The developer never built the canal docks. Later, 14 of the 14 canal owners built a canal dock. After that, Owners bought units in the building on the canal. They solicited Association's approval to add to the canal dock space so that each would be able to share in using the dock. Ultimately a majority of Association members voted to add 220 feet of dock space and agreed that space on the canal dock would be divided among only those participating owners in the 2 buildings who contributed to the cost. The effect of this was to foreclose Owners from any rights to canal dock space. The dock addition was then built and space assigned as the participating owners had agreed. Owners sued only the Association and sought an injunction to give them a right to dock space. Owners also sought money damages for the diminution in the value of their units without the dock space. Before trial, Association moved to dismiss the action for failure to join the other owners in the community on the grounds that they were persons whose presence in the suit was necessary for any just adjudication. The motion was denied and the trial went forward only against Association. In the final judgment, the court ruled that each of the 22 unit owners should have had an opportunity to participate in the dock expansion. Thus, each owner had a right to purchase 10 feet of canal dock space. On appeal, Association argued that reversal was required because Owners failed to join the other owners as parties. It argued that no relief in favor of Owners could possibly be granted without affecting the interests of the other owners. The District Court agreed and reversed, noting that no ruling could be made which would not affect the interests of the other owners in the community and ordered that all owners be joined as parties to the lawsuit.

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