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ARE THERE REALLY NEW FORECLOSURE STRATEGIES??

Newspapers, particularly those from South Florida, recently seem to publish at least one article a month touting some revolutionary new strategy that a clever lawyer has devised to help associations deal with foreclosures. Perhaps in a flash of true (marketing) genius these strategies are being given names like "reverse foreclosure," "blanket receiverships" and – most recently – "the mortgage terminator." With all due respect to both the newspapers looking to simplify concepts for their readers, to readers hoping for assistance and to law firms desiring to look like true innovators, none of these situations really presents anything new under the sun.

As with all foreclosure cases, the results in these cases are largely driven by the facts presented. For example, while there is no legal concept that operates to void a valid mortgage lien that is under thirty years of age, if the property that is subject to the lien is so diminished in condition and value as to essentially be worthless, a lender may be willing to voluntarily release the property to the association rather than assume liability for repairs and ongoing assessments. That is what happened in at least one case involving the so-called mortgage terminator. Yet every day, all across the state and country, lenders are making similar decisions and voluntarily releasing liens in extreme cases for little or no money. But such actions are entirely a function of extreme and unique facts rather than the use of some innovative legal strategy, except perhaps to name the case like some episode out of the Perry Mason series.

In the case of blanket receiverships, which have been available for years, but which have only recently become needed, contrary to popular reportage and understanding, an association does NOT have a right to take abandoned units, lease them and keep the rent. It is very fundamental law that no one may use another's property to profit without the consent of the property owner, a nicety that people seem willing to overlook in their desire for help. Thus, some of the concepts that are popularly assumed about these cases are essentially fictions.

In the reverse foreclosure case, an association that had already acquired title to a unit was permitted to deed its interest in the unit to the lender. That this should be allowed is neither new or surprising. Each plaintiff to litigation has a duty to move the case along and each defendant has a right to admit the case against it. Thus, when a mortgagee fails to prosecute its case and the association/owner is willing to admit that the lender is entitled to win because of its superior lien, the courts have the power to enter appropriate orders, essentially awarding the lender what it was seeking. So this tactic really represents nothing more than reliance on established concepts and court's rules about the efficient administration of the judicial system.

One wonders, however, whether the use of labels that inaccurately describe the real reasons for the outcome of these cases improperly operates to mislead a public that is in need of good news in hard times.

Recent Cases

- **5th DCA establishes an implied warranty of habitability by Developer on subdivision infrastructure if such improvements impact the habitability of the home.**
- **Developer's interpretation of its documents rejected as not the plain meaning of its terms and developer was not entitled to retain parking spaces of commercial units conveyed to Association.**

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.

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RECENT CASE SUMMARIES

In **Lakeview Reserve Homeowners Association, et al., vs. Maronda Homes, Inc., et al.,** 35 FLW D2413a (Fla. 5th DCA, 10/29/2010) Association sued Developer for breach of the common law implied warranties of fitness and merchantability, also referred to as the "warranty of habitablity," for defects in the roadways, drainage systems, retention ponds and underground pipes in a residential subdivision. Developer developed a residential subdivision in Orange County, Florida, and incorporated Association to serve as the homeowners association of that subdivision. In developing the subdivision, Developer performed certain site work, including construction of the stormwater drainage system and private roadways. During construction, Developer retained control of Association. Ultimately, Developer transferred all control of the subdivision to the individual lot owners and Association. Association filed a complaint against Developer for breach of the implied warranties of fitness and merchantability based on latent defects in the subdivision's common areas. Specifically, Association claimed that the roadways, retention ponds, underground pipes, and drainage systems throughout the subdivision were defectively constructed. Developer filed a motion for summary judgment, arguing that the common law implied warranties of fitness and merchantability do not extend to the construction and design of the private roadways, drainage systems, retention ponds and underground pipes, or any other common areas in the subdivision, because these structures do not immediately support the residences. The trial court agreed and entered summary judgment in favor of Developer. On review, the Fifth District Court of Appeal reviewed the history of implied warranties. For centuries, caveat emptor, i.e. "let the buyer beware," was generally the rule of law. This served well at a time when parties were thought to usually be on equal footing and neither had a significant advantage in discerning potential defects to goods sold in the marketplace. This theory was particularly persistent in land sales, where a buyer could, and wisely should, inspect the land to ensure it was suitable for the buyer's intended use. As mass production of goods became more complicated and more common, courts began to impose liability on manufacturers and sellers, who were in a superior position to know of, or discover, defects than were the consumers. This movement away from caveat emptor is due in large part to today's complex development climate and the fact that buyers are no longer on an equal playing field. In rendering its decision, this appellate court rejected a decision of the Fourth District Court of Appeal that found that roads and drainage do not immediately support the residences. In reversing the trial court, the appellate court announced a test that is both elegant and simple: in the absence of the service, is the home inhabitable, that is, is it an improvement providing a service essential to the habitability of the home? If it is, then the implied warranties apply.

In **First Equitable Realty III, Ltd., vs. Grandview Palace Condominium Association, Inc.,** 35 FLW D2389a (Fla. 3rd DCA, 10/27/2010) a dispute arose between Developer and Association over a portion of an amended declaration of condominium dealing with certain "commercial units." At the discretion of Developer, these units could be (1) developed into retail or other commercial uses and "transferred, conveyed, leased or disposed of without the consent of the Association," or (2) converted in "limited common element parking area," or (3) conveyed to Association, in which event Association "shall be obliged to accept same." Under the second of these options, "the parking spaces located within the boundaries of the [converted] commercial spaces would be assigned to developer." Under the third option, the conveyance of a commercial unit to Association carried with it the transfer to Association of the common expense and common elements relating to the unit, and "dues previously paid for unbuilt commercial units or portions thereof which do not exist at the time of conveyance will be returned" to Developer. Shortly before turnover, Developer executed a warranty deed, later recorded, conveying three of the commercial units to Association. The deed transferred title "free of all encumbrances except those accruing subsequent to December 31, 2007." When the commercial units were conveyed, Developer reimbursed itself $38,000 in prior maintenance payments attributable to these units. However, Developer asserted that it retained a contingent right under the amendment to the declaration to be assigned any parking spaces "within the boundaries of the commercial spaces" in the event Association were to later convert the three commercial units into parking spaces. Association denied such right. The trial court ruled in favor of Association, finding no retained right in Developer. On appeal to the Third District Court of Appeal, the appellate court affirmed the trial court's ruling.

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