COMMUNITY COUNSEL

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HURTING HOAS GET SLAMMED BY NEW COURT DECISION

NOTE: We will publish part 2 of our article on community associations and mortgage foreclosure strategy next month. This month we cover a major new decision, published just last week.

In **Coral Lakes Community Association, Inc., v. Busey Bank, N.A.; et al**, 35 Fla. L. Weekly D431a (2nd DCA 2/19/2010), Florida's Second District Court of Appeals ruled that holders of first mortgages written before the 2007 adoption of Section 720.3085, Fla. Stat. have no liability for the unpaid assessment amounts imposed by that statute (currently the lesser of 12 months of assessments or 1% of the original amount of the mortgage).

The court relied on documentary language which is found in all HOA documents drafted prior to 2007. That language encourages mortgage financing in communities by exempting the holders of superior liens (i.e. those written and recorded before the association's lien is recorded) from liability for later accruing assessments. The absence of any statement in HOA documents imposing even limited monetary liability is for an obvious reason: no statute imposed such liability until 2007. Thus nearly every HOA statewide will have similar blanket exemption language, and nearly every HOA will risk losing even this limited amount of revenue because of the Coral Lakes decision. This result is particularly unjust when an HOA expends money to preserve the bank's collateral during the interminable foreclosure process.

The decision also relies on constitutional principles that prevent the application of new statutes like Section 720.3085, Fla. Stat. to existing transactions. The court held that application of the statute amounts to an unconstitutional retroactive impairment of the existing mortgage contract. The court stated that "…**the statute would operate to severely, permanently, and immediately change the parties' economic relationship retroactively**..." This rather dramatic language may be attributable to the fact the in its first year of existence, Section 720.3085, Fla. Stat. contained no limit on the amount for which a lender could be liable. It is hard to imagine applying the same overheated language used by the court to the current statutory limits.

What now for Florida HOAs? It is possible that the Coral Lakes case will not stand. Recent mortgage foreclosure rules promulgated by the Florida Supreme Court seem to assume the very liability by lenders that the Coral Lakes court says can not be legally imposed.

Another problem – of at least a temporary nature – that was ignored by the court is the apparent conflict between this decision and an earlier case from the Fifth District Court of Appeals in a case cited by the Coral Lakes court. In Coral Lakes the decision that lenders aren't liable to HOAs for back assessments was made in a mortgage foreclosure case. Yet in LR5A-JV, LP v. Little House, LLC, 998 So. 2d 1173 (Fla. 5th DCA 2008), the court ruled that such a decision could not be made in the mortgage foreclosure case, and had to wait until such time as the HOA attempted to collect the assessments from the lender, saying, "**We decline to address whether section 720.3085 can be retroactively applied because this issue is not yet ripe for adjudication**." Thus, in the Fifth District there may be a basis for arguing that the Florida Supreme Court's required language for foreclosure judgments must still be included in all judgements. The required language says:

On filing the certificate of sale ... all persons claiming under or against defendant(s) ... shall be foreclosed of all estate or claim in the property, *except as to claims or rights under chapter 718 or chapter 720, Florida Statutes, if any*… (Emphasis supplied)

Until the smoke clears, HOAs have a big problem, and they will need to be more aggressive in taking timely action to recover assessments from the owners who first incurred the debt.

RECENT CASES

- LOCAL ASSOCIATION IS SUBJECT TO FAIR HOUSING ACT AND CAN BE LIABLE FOR ACTIONS OF ITS MANAGER IN DISCOURAGING MINORITY RENTERS.
- SUMMARY JUDGEMENT ON THE EXISTENCE OF AN IMPLIED EASEMENT TO USE A BOAT RAMP NOT APPROPRIATE WHERE FACTUAL ISSUE REMAINED AS TO HOW USE HAD BEEN OCCURRING.

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 **Moore vs. The Club at Orlando Condominium Association, Inc.**, Case No.: 6:09-cv-274-Orl-31KRS, U.S. Dist. Ct., Middle District of Florida, November 19, 2009, Plaintiff, an African American woman, brought an action for discrimination against Association. Plaintiff inquired about leasing a condominium unit in Association. Plaintiff contacted the property management company and made an appointment to see the unit with a leasing agent. During her inspection of the unit, Plaintiff and the leasing agent were joined by the manager of Association. Manager informed Plaintiff that she knew the unit had been rented. The leasing agent disagreed and informed Plaintiff that the unit was still available. During this discussion, property manager asked Plaintiff where she worked and whether she had children. Property manager also informed Plaintiff that she would have to be approved by the board of directors. Finally, property manager informed Plaintiff that Association had strict rules, including a rule against loud parties and a rule that tenants pay their rent in a timely fashion. Property manager also informed Plaintiff that she could not have multiple boyfriends spending the night. After this discussion, Plaintiff did **not** submit a leasing application and subsequently sued property manager and Association for discrimination. Plaintiff's lawsuit contained three counts that alleged violation of the Fair Housing Act related to ensuring that all citizens have the same right to make and enforce contracts, regardless of race. Association defended and claimed that it was exempt from the Fair Housing Act because it did not own or lease any condominium units, and therefore could not affect the availability of housing. However, Association conceded that its bylaws gave it the authority to reject potential lessees. Moreover, Association admitted that it requires criminal background checks on potential lessees before it will grant approval. Association sought a summary judgment on the issue of whether it was subject to the Fair Housing Act. The trial court held that Association was subject to the Fair Housing Act because Association had the authority to reject potential lessees, and the Association's actions were rooted in negative racial stereotypes. As such, the court rules that summary judgment was not appropriate as to Plaintiff's punitive damages claim because there was a least some evidence that property manager was aware of the requirements of the Fair Housing Act and its prohibitions.

In **Stackman vs. Susan Pope, POA for the Owners**, 35 Fla. L. Weekly D300a (Fla. 5th DCA, February 5, 2010), Owners appealed a judgment of the trial court imposing a prescriptive easement on their property in favor of other Members in the community. Located on Owners' property was a boat ramp. Through powers of attorney, other Members in the community joined together to sue Owners to ensure continued access to the boat ramp. In support of their claim, the group of Members filed multiple affidavits in support of a motion for summary judgment. Included in the affidavits was a statement that the Members had ". . . . continually used the boat ramp located on. . . ." Owners' property for the past several years. None of the affidavits referenced use by predecessors in title, nor did any of the affidavits contain specific factual representations to support the conclusory claim of "continuously used." Owners filed their own affidavits disputing the continuous and open use of the boat ramp. Furthermore, these affidavits alleged that the boat ramp was unusable for a significant period of time because of a lack of maintenance on the property. The trial court granted summary judgment and found the existence of a prescriptive easement on Owners' property. On appeal to the Fifth District Court of Appeal, the appellate court noted that to establish a prescriptive easement, a claimant must prove, by clear and positive proof, 1) actual, continuous, and uninterrupted use by the claimant or any predecessor in title for the prescribed period of twenty years; 2) that the use was related to a certain, limited and defined area of land; 3) that the use has been either with the actual knowledge of the owners, or so open, notorious, and visible that knowledge of the use must be imputed to the owner; and 4) that the use has been adverse to the owner – that is, without permission (express or implied) from the owner, under some claim of right, inconsistent with the rights of the owner, and such that, for the entire period, the owner could have sued to prevent further use. In this case, the appellate court noted that the evidence in this case was clearly insufficient to meet the twenty-year requirement. On remand to the trial court, the appellate court ordered the trial court to evaluate each member's prescriptive easement claim separately, and not permit members to "bootstrap" onto the prescriptive easement claims of other members.

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