

# COMMUNITY COUNSEL

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## MORTGAGE FORECLOSURES & COMMUNITY ASSOCIATIONS PT 2

### Recent Cases

- ◆ In suit between a unit owner and a condo association involving parking rights, joinder of all other unit owners was unnecessary where the parking space was a common element.
- ◆ In a mobile home park split decision prevailing party attorneys fees were denied to one party which prevailed on a claim that did not seek enforcement of a provision of Chapter 723.

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.

We continue with Part 2 of an article on mortgage foreclosures. Part 1 appeared in January, 2010.

### Part II - Determining when to proceed with collections against an owner while a mortgage foreclosure action is pending.

The high number of mortgage foreclosure have led the federal government and several states, including Florida, to create plans to prevent or delay mortgage foreclosures to help troubled borrowers. Our statewide plan, adopted on December 28, 2009 by the Florida Supreme Court, now requires mandatory mediation on mortgage foreclosures involving all owner-occupied residential property. This program is intended to assist borrowers who were having trouble contacting lenders to determine whether they would qualify for modifications of their loans.

Under the model administrative order, the costs of the mediation will be paid for by the mortgagee as the plaintiff in the mortgage foreclosure action. The Plaintiff must attend the hearing with its counsel and must have full settlement authority; the borrower and borrower's counsel, if any, also must attend in person. The Association is not required to attend the mediation, and does not normally attend unless it has something to contribute to a potential settlement between the borrower and the mortgagee. A successful mediation is in the best interests of the Association, as it gives the Association the opportunity to proceed with its own collection action against the owner for any unpaid assessments.

The Florida Supreme Court will continue to monitor the statistics of these programs to determine whether the mediations result in borrowers successfully negotiating modifications to their loans, avoiding foreclosure. However, implementation of this administrative procedure will slow down the mortgage foreclosure process as a whole.

When the Association hasn't already completed its own foreclosure action and acquired title there is very little an Association can do to "speed up" the mortgage foreclosure process. In such cases, your best course of action is to pursue the association's own remedies against the owner. Please note, however,

that any judgment, including attorney fees incurred during this collection process will eventually be wiped out by the mortgage foreclosure action, once it has concluded, and unless you act quickly and vigorously pursue use of the property once title is acquired, you may not collect the judgment from a new owner who acquires title pursuant to the mortgage foreclosure sale. Again, you have a business decision to make; to determine whether it is cost-effective to pursue a collections action against a delinquent. If the property is usable and in good shape, acquiring it may let you rent it and recover some or all of what is due the association.

You also should be aware that if the Association is not named as a defendant in the mortgage foreclosure suit, the best thing the Association can do is to simply wait out the foreclosure. Although rare, this does happen on occasion. If the Association remains unnamed as a defendant, then its interest is not wiped out by the foreclosure and the Association will be entitled to collect all unpaid assessments from the new owner at the conclusion of the mortgage foreclosure case.

If a property is acquired as a result of a mortgage foreclosure, the new owner is not responsible for payment of any late fees, interest or attorney fees that accrued on the account prior to the date of the Certificate of Title issued pursuant to the mortgage foreclosure. This applies to mortgagees who acquire title pursuant to the foreclosure sale, and may also apply to third party bidders.

Associations should be concerned with the mortgage foreclosure process and they should understand that the facts of each individual case need to be fully explored to determine what action is in the association's best interests. There is no perfect formula for determining how to proceed that works in all cases. It is a matter of making a business decision that best suits your various interests. While repayment may or may not be a viable short term objective, your long term goal is to get a paying owner onto the property in the shortest amount of time possible so as to minimize the adverse affect on the critical operations of the Association. We suggest you contact us to discuss the facts of each case you are facing.



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## RECENT CASE SUMMARIES

In **Tedeschi vs. Surf Side Tower Condominium Association, Inc.**, 35 Fla. L. Weekly D640a (Fla. 2<sup>nd</sup> DCA, March 24, 2010) Owners filed suit against Association asking the circuit court to determine their right to parking space number eighty-two in their condominium's parking lot and also asking the court for compensation for the time period during which Association used the parking space as a guest space. Owners alleged in the complaint that when they purchased their condominium in 1979, they were assigned parking space number eight-two. In 1984, Owners purchased another parking space in the condominium's covered garage, and in 1993, they received a letter from Association informing them that parking space number eighty-two would be converted to a guest space. After service of the complaint on Association, Association moved to dismiss for failure to join all unit owners as indispensable parties to the lawsuit. The trial court granted the motion and ordered Owners to join all other unit owners in the condominium into the lawsuit. Owners then filed a petition for writ of certiorari with the appellate court seeking review of the non-final order requiring the joinder of all other unit owners. On appeal to the Second District Court of Appeal, the appellate court reviewed a number of cases similar to the instant case. In some of the cases, joinder of all unit owners was not necessary because by law Association is permitted to act as a class representative for all unit owners. In other cases, joinder of individual unit owners was necessary because the substance of the lawsuit involved an individual and unique property right of a particular unit owner or unit owners, and as such relief could not be granted without the joinder of these other unit owners. In the instant case, the appellate court noted that the trial court's order affects a parking space which is a common element of the condominium, and therefore Owners could bring their suit against Association as the representative of all the condominium unit owners. As such, Owners argued that the circuit court departed from the essential requirements of law when it required the joinder of all condominium unit owners and that Owners would suffer material injury for the remainder of the proceedings for which there is no adequate remedy at law. The appellate court agreed with Owners, granted the writ of certiorari, and reversed the order of the trial court requiring Owners to join all other unit owners into the lawsuit.

In **T&W Developers, Inc., d/b/a Hollywood Estates vs. Salmonsens, et. al.**, 35 Fla. L. Weekly D 757a (Fla. 5<sup>th</sup> DCA, April 1, 2010) Park Owner brought a class action seeking injunctive and declaratory relief against a newly formed homeowners association and various Park Residents seeking to invalidate certain amendments to the deed of restrictions. Specifically, the community had always acted as an age-restricted community. The deed restrictions required Park Owner to provide certain maintenance services, trash collection, security patrol, and "Cable Television basic service". In exchange for these services, the Park Residents paid a monthly fee. Park Owner notified the Park Residents that the deed of restrictions violated federal and state fair housing laws because the park did not properly qualify as an age-restricted community. Park Owner also informed the Park Residents that it was required to only provide "basic" cable service and not the expanded service it had been providing. In response, the Park Residents amended the deed of restrictions to comply with the fair housing laws and preserve the housing for older persons age-restricted status of the community. Concerned about potential liability, Park Owner filed suit to determine the validity of the amendments and the status of the park as an age-restricted community. Count I of the complaint sought injunctive relief. Count II of the complaint sought a declaration that the amendment to the deed of restrictions was invalid because it unreasonably changed the general plan of development. Count III sought a declaration related to the Park Owner's responsibility to provide cable television service. On cross-motions for summary judgment, the trial court granted relief to Park Residents on Count II, and to Park Owner on Count III. Both sides then sought an award of prevailing party attorneys' fees. The trial court found that the Park Residents had prevailed on substantial issues in the case and awarded fees pursuant to Section 723.068, Fla. Stat. On appeal, Park Owner argued that Park Residents were not entitled to fees pursuant to chapter 723 because Count II of the complaint did not implicate any provision of chapter 723. Park Owner also argued that because the trial court found in favor of Park Owner on Count III, Park Residents were not the prevailing party. On appeal to the Fifth District Court of Appeal, the appellate court noted that the ultimate relief sought in Count II was the invalidation of the amendment because it destroyed the general plan of development. These issues do not raise violations of, or otherwise implicate chapter 723. Consequently, because this count did not seek to enforce any provision of chapter 723 Park Residents were not entitled to attorneys' fees.