COMMUNITY COUNSEL

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RECENT CASES

- TRIAL COURT ERRED IN GRANTING SUMMARY JUDGEMENT FOR A PROSPECTIVE BUYER OF A UNIT BASED ON ISSUES NOT RAISED BY THE BUYER'S MOTION.
- TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF NON-MOVING PARTY IN THE ABSENCE OF A MOTION FOR JUDGMENT AND IN THE FACE OF DISPUTED FACTUAL ISSUES.

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.

MONKEY BUSINESS

One of the changes made to both the HOA and Condo Acts in 2011 involves a "clarification of existing law" that purports to excuse an association that forecloses its lien from paying assessments to another association. Ah, if only wishing could make it so!

The problem, of course, is that in this bad economy, an increasing number of community associations are finding themselves the owners of residential property. In communities with both master and sub associations, rivalries can and usually do develop over who owes what to whom. If the master association liens and forecloses on sub association property owners, the sub associations can, in turn, do the same once the master association acquires title. The process can go back and forth to the ultimate disadvantage to everyone. There has to be a better way.

That was the intention of the statutory change. But was it effective to accomplish this? Probably not, at least where the governing documents of the communities involved pre-date the statutory change and where they are clear and definitive on this point. In those circumstances, it is very likely that any attempt to immunize an association from debt would operate to constitutionally impair the contractual obligations of the various parties.

But that doesn't end the discussion, because in many - if not most - cases the documents are not clear. Sometimes the sub association is made a collections agent for the master association. Sometimes the sub association is personally liable to the master association. Rarely do the documents come out and say anything about the liability of a master or sub association for unpaid assessments coming due before of after the foreclosure of an association's lien. Even less frequently do they discuss the relative priorities of the competing lien rights of the master and sub associations. Does the master always prevail, or is it first-in-time, first-in-right? Whether or not there is a constitutional problem may have to be determined in much the same way that Johnny Carson divined the questions being asked of "Carnac the Magnificant" - by holding an envelope to ones head.

We respectfully suggest that there is a far better, more rational, and cheaper way to solve this problem; through cooperation and discussion. If the master and sub associations agreed to pool their lien rights and the costs and proceeds of recovery, they both would be far better off.

They could, for example, share the costs of a lien foreclosure action equally or in relation to the amount owned each of them. Either way each association would save money. They also could share the proceeds of renting or selling the property in the same way, with each party receiving an income stream for the period of time during which the associations own the property.

Since it is likely that the property will eventually be surrendered to a superior lienholder, its use is temporary at best, and time of use may be more important than dollars. Instead of quarreling over who has superior rights and who has to pay whom, the monkey business of making a series of potentially revolving claims needs to stop. Cooler heads need to prevail and through cooperation both community associations can come out further ahead than they would if they continue to screech at each other like a bunch of primates locked in the same cage.

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RECENT CASE SUMMARIES

In **TRG-Brickell Point NE, Ltd. vs. Gravante**, 36 Fla. L. Weekly D2263b (Fla. 3rd DCA, October 12, 2011), Prospective Owner filed suit against Developer alleging that Developer failed to complete construction of the condominium unit within two (2) years of the signing of the agreement for purchase. On May 16, 2005, Prospective Owner and Developer entered into a purchase and sale agreement by which Developer agreed to substantially complete the building within two years of the date of the signing of the agreement. When Developer did not complete the building within two years, Prospective Owner sought the return of his deposit in the amount of $84,580.00, plus prejudgment interest, costs, and attorneys' fees. Developer defended using an affirmative defense claiming that a later-signed purchase agreement, "Form H", superseded the first purchase and sale agreement and gave Developer through December 31, 2009 to complete the unit. On February 26, 2010, Prospective Owner filed a motion for partial summary judgment alleging that his signature on Form H was a forgery and filed an affidavit of an expert to that effect. The trial court granted partial summary judgment in favor of Prospective Owner based, not on the issue of whether the signature was a forgery, which was not decided by the court, but on the finding that Form H, a contract for purchase and sale was not witnessed or dated and was therefore invalid as a matter of law. Developer filed a motion for rehearing relying upon evidence showing that Form H was, in fact, dated and upon Florida law, contending that Form H, a contract for sale and purchase, was not required to be witnessed. The trial court denied Developer's motion for rehearing and reconsideration. On appeal to the Third District Court of Appeal, Developer contended that the trial court erred in granting summary judgment in favor of Prospective Owner for two reasons. Developer claimed first that Section 689.01, Florida Statutes, requiring transfers of real estate to be in writing and signed by the grantor in the presence of two subscribing witnesses, does not apply to a purchase and sale contract. Therefore, the grounds upon which the trial court granted the summary judgment were refuted. Secondly, Developer argued that the trial court abused its discretion by granting a motion for summary judgment on grounds that were never raised in the motion for partial summary judgment. The appellate court agreed with Developer. The court noted that on motions for summary judgment, a trial court may not make extraneous findings and conclusion of law *sua sponte* on matters that were not raised by the parties. Prospective Owner's motion for summary judgment was founded on the grounds that the signature on Form H was a forgery. It was error for the trial court to consider issues related to the lack of a date or subscribing witnesses because Prospective Owner did not raise these issues in his motion.

In **Ness Racquet Club, LLC vs. Ocean Four 2108, LLC**, 36 Fla. L. Weekly D2205a (Fla. 3rd DCA, October 5, 2011) on November 1, 2006, Ness, a developer, and Ocean Four, a prospective owner, entered into a pre-construction purchase and sale agreement for a condominium unit in Fort Lauderdale. Pursuant to the contract, Prospective Owner placed deposits on the condominium unit totaling $177,600.00 in escrow with an escrow agent. Developer agreed to substantially complete the unit within two years of the signing of the contract. The purchase and sale agreement provided for the closing to take place subsequent to the Developer obtaining a temporary certificate of occupancy. It also provided that the issuance of a temporary certificate of occupancy would constitute conclusive evidence of substantial completion. On October 15, 2008, within two years of the parties entering into the purchase and sale agreement, a temporary certificate of occupancy was issued for the unit. The closing was then set for October 31, 2008. Pursuant to a request from Prospective Owner, the closing was extended until December 1, 2008. Before the closing could take place Prospective Owner sent a letter seeking to rescind the contract and demanded return of its deposit, asserting that the building had not been completed and that Prospective Owner could not move into the unit. After the date for closing passed, Developer send a notice of default to Prospective Owner. Prospective Owner filed suit for, among other things, breach of contract and return of the deposit. Developer counterclaimed for breach of contract for failure to close. On August 19, 2009, Developer filed a motion for summary judgment. The trial court denied Developer's motion, and *sua sponte* entered summary judgment in favor of Prospective Owner, which had never filed or moved for summary judgment. On appeal to the Third District Court of Appeal, the appellate court reversed the summary judgment for two reasons. The first was the lack of opportunity for the opponent of the summary judgment motion to oppose its issuance where the trial judge *sua sponte* entered summary judgment for the non-moving party. The second reason for the reversal was the existence of disputed issues of material fact that preclude the granting of a summary judgment.

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