COMMUNITY COUNSEL

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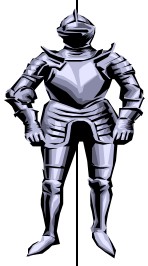
ANOTHER CHINK IN LENDERS' ARMOR?

In **South Bay Lakes Homeowners Association, Inc., vs. Wells Fargo Bank, N.A.**, 36 Fla. L. Weekly D389a (Fla. 2nd DCA, February 18, 2011) a bank sought to foreclose a mortgage against a lot owner, and named the association as a party to the foreclosure action. The Bank filed the complaint "… by virtue of an assignment to be recorded." The complaint also contained a second count to enforce a lost, destroyed, or stolen promissory note. The complaint itself did not contain a legal description of the property on which bank sought to foreclose. Bank alleged it held a recorded mortgage dated January 18, 2006, as modified on July 13, 2006. The mortgage identified the relevant property with one description, but the modification changed the description to a different property. The notice of lis pendens that the bank recorded when it commenced the action identified the property it sought to foreclose as the original description, and not the modified description. Yet only the property described in the modification is within association.



The association filed an answer disputing that bank had standing to bring the action, raising other defenses, and pointing out the confusion associated with the legal description. Association also served bank's attorneys with requests for admission, asking the bank to admit that it did not have an assignment of the mortgage in its possession nor was it recorded in the public records. One of the requests for admission asked bank to admit that it had no documentary evidence to show that bank was an owner of the note and mortgage. The bank never responded to the requests for admission. The Association filed a motion for summary judgment, based in part on bank's failure to respond to the request for admissions. The Association's attorney also filed an affidavit explaining that a search of the public records had found no assignment of the mortgage and that the legal description in the lis pendens was not the encumbered property.

The association served a motion for an award of attorney's fees pursuant to section 57.105, Fla. Stat. (frivolous claims) in order to give the bank an opportunity to resolve the matter within the statutory time period of twenty-one days. But the bank took no action on the motion. A hearing was held on association's motion for summary judgment. The bank failed to attend the hearing. Based upon the affidavits and the request for admissions, the trial court entered a final judgment dismissing the entire action without leave to amend.

Thereafter, association filed its motion for attorneys' fees. The bank sent a local attorney to the hearing, who had "no idea" whether the legal description in the complaint was inaccurate. Even so, the trial court denied the motion for fees, reasoning that *some* lender was entitled to file an action to foreclose on the parcel owned by *these* owners and that the action was, therefore, not one entitling the association to attorneys' fees.

On appeal, the Second District Court of Appeal noted that the case was not a question of whether the owners would have been entitled to attorney's fees, but whether ***the association*** is entitlement to fees. At oral argument, the bank's attorney tried to justify this improper case based on the volume of foreclosure cases in the judicial system. The court noted the obvious detrimental effect that such volume has upon the legal system but said this requires attorneys who file the actions to engage in a higher degree of professional care. The undisputed facts established a right by the association to recover its attorney's fees from the bank and its attorney.

Recent Cases

- **Please remember to file your annual corporate report before May 1st. Also please note the two scams discussed on page 2.**
- **Failure of Association to respond to a request to inspect records and fact that officer had other personal matters to distract her does not does not present evidence sufficient to rebut the presumption that failure to allow inspection was willful .**

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RECENT CASE SUMMARIES

IT IS TIME TO FILE YOUR ANNUAL CORPORATE REPORT — FROM THE FLORIDA SECRETARY OF STATE

IMPORTANT REMINDER FOR ALL BUSINESS ENTITIES: It is now time to file the 2011 Annual Report to maintain "active" status with the Division of Corporations. The report is due by May 1st. Annual Reports filed after May 1st will be assessed a $400.00 late fee, which cannot be waived.

CONSUMER ALERT! Please be aware that COMPLIANCE SERVICES (not to be confused with the Florida corporation, Compliance Services, Inc.) is mailing notices to business entities requesting that "Annual Minutes" and a fee of $125.00 be sent to them for filing. These notices are NOT from the Dept. of State, Division of Corporations. "Annual Minutes" are NOT required to be filed with any agency. They are to be kept by the business entity itself. Do NOT confuse these notices with the messages sent by the Division of Corporations reminding each business entity to file its 2011 Annual Report.

CONSUMER ALERT! Arvitas, LLC is a private company sending e-mails to businesses in Florida offering to file annual reports. ARVITAS IS NOT AN AGENT OR REPRESENTATIVE FOR THE FLORIDA DEPT. OF STATE, DIVISION OF CORPORATIONS. Arvitas is acting on its own to solicit business for its own company. It is offering to file annual reports for business entities in Florida at an inflated fee. They do not offer any additional service than what is available to the public on sunbiz.org. The Attorney General´s Office, on behalf of the Dept. of State, is currently pursuing legal action against Arvitas.

In **Binns vs. Wekiva Springs Reserve Homeowners Association, Inc.**, 17 Fla. L. Weekly Supp. 1169a (Fla. 9th Judicial Circuit (Appellate), September 13, 2010) Owners appealed a decision of the trial court that Association had not “willfully” failed to permit a timely inspection of Association’s official records. Owner sent a demand to inspect and copy official records to Association’s post office box. Association failed to timely respond to this letter. Owners sent a second letter to Association demanding statutory damages of $500.00. After a non-jury trial, the trial court ruled that the request to inspect the records was “received” five (5) days after mailing, and thus Association failed to timely permit an inspection of the official records. However, the trial court found that Association’s failure to permit inspection of the official records was not “willful” on the basis that Association’s treasurer, who was responsible for retrieving mail from the post office box, was distracted from her duties due to personal issues. On appeal to the Circuit Court of the Ninth Judicial Circuit, the appellate court held that the trial court was correct in its application of law that the request to inspect the records was “received” five (5) days after mailing, regardless of when the letter was retrieved from the post office box by Association’s treasurer. The appellate court also held that the trial court’s determination that Association rebutted the presumption of “willfulness” was not supported by competent, substantial evidence. Specifically, the testimony and evidence did not support the trial court’s conclusion that the treasurer was distracted in her duties. As such, the appellate court reversed the findings of the trial court and held that Association failed to timely permit Owners to inspect and copy the official records and therefore that Owners were entitled to the minimum statutory damages of $500.00.

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