

COMMUNITY COUNSEL

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Recent Cases

- ♦ Denial of summary judgment on foreclosure counter-claims is required when moving party failed to prove entitlement to judgment as a matter of law.
- ♦ Where governing documents of a community are susceptible to more than one meaning, entry of summary judgment is not appropriate.

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.

THE THEORY OF RETROACTIVITY

In *Cohn vs. The Grand Condominium Association, Inc.*, 36 Fla. L. Weekly 5129 (Fla. 2011), the Florida Supreme Court affirmed a ruling by the Third District Court of Appeal, holding that a retroactive application of a 2007 legislative amendment to Section 718.404 Fla. Stat. would result in a substantial change in the composition of the association's board of directors and therefore, was an unconstitutional impairment of the parties' contract rights.

The Grand Condominium was organized in 1986. It is a mixed-use condominium comprised of 810 residential units, 259 commercial units (a hotel) and 141 retail units. The organizational documents provide for a seven member board of directors, comprised of two members elected by the owners of the residential units, two by the commercial units, two by the retail units, and a seventh member elected at large.

Section 718.404, Fla. Stat., (1995), was enacted by the legislature for the regulation of mixed-use condominiums. Subsection (2) provided that in a mixed-use condominium, where the residential unit owners make up 50% or more of the total units, the residential owners must be entitled to vote for a majority of the seats on the board.

Subsection (2) was amended in 2007 to add the following: "*This subsection shall apply retroactively as a remedial measure.*" Thereafter, in accordance with the foregoing amendment, Cohen, a residential owner, requested that the Association change its voting system. The Association filed an action for declaratory relief, in which it sought a declaration that the amended subsection (2), Fla. Stat., was an unconstitutional impairment of an existing contract. The trial judge granted Summary Judgment in favor of The Association, holding the "retroactivity" provision unconstitutional under Article I, Section 10 of the



Florida Constitution. The Third District Court of Appeals affirmed.

The Florida Supreme Court's analysis included the well-established doctrines that when a condominium is established, the then current version of Chapter 718, Fla. Stat. applies, and the recorded declaration of condominium function as a binding contract between and among the unit owners and the association. In this case, the declaration was filed in 1986, and it specifically adopted the Condominium Act in effect at the time of the recording of the declaration. Additionally, the declaration did not contain any language that would incorporate future amendments to the Condominium Act.

The Court went on to quote Article I, Section 10 of the Florida Constitution, which prohibits the enactment of any "... law impairing the obligation of contracts." Thus, the retroactive application of Section 718.404(2), Fla. Stat., to this Association would operate to alter the voting rights of the unit owners in contravention of their existing contractual agreement, as set forth in the declaration of condominium. Based on this analysis, the Florida Supreme Court affirmed the holding of the Third District Court of Appeal.

Some suggest that this decision stands for the broad principal that all statutory amendments affecting pre-existing contracts are unconstitutional. However, we suggest that this holding is not new law, but merely applies one narrow aspect of a multifaceted doctrine to a unique substantive right – that of voting. This decision serves as an important reminder that associations need to consult with counsel as to whether statutory amendments do or do not operate to impair existing contract rights.

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RECENT CASE SUMMARIES

In **E. Qualcomm Corp., vs. Global Commerce Center Association, Inc.**, 36 Fla. L. Weekly D886a (Fla. 4th DCA, April 27, 2011) Association filed a lien foreclosure action against Owner to foreclose a lien for unpaid assessments. Owner filed an answer, affirmative defenses and counterclaim to the foreclosure complaint filed by Association. The counterclaim sought damages for negligence and breach of contract, stemming from Association's alleged failure to maintain the roof, which in turn led to water damage that irreparably damaged Owner's computer systems and hardware and other equipment necessary for Owner to carry on its business. More specifically, Owner sought damages for loss of personal property, loss of business opportunities, and loss of business income. As an affirmative defense to Association's foreclosure and collection action, Owner asserted, among other defenses, that it was entitled to a set-off in an amount equal to the damages suffered by Owner due to the leaking roof. Association sought a partial summary judgment of foreclosure based upon Owner's alleged failure to show proof of payment of any and all assessments allegedly due from Owner to Association. Additionally, Association filed a second motion for summary judgment as to Owner's counterclaim asserting that Owner had failed to prove damages to a reasonable degree of certainty as a matter of law. The trial court ultimately granted both motions. On appeal, the Fourth District Court of Appeal reversed both orders. As to the foreclosure judgment, the appellate court noted that Association failed to overcome the affirmative defense of set-off, which requires the movant to "... demonstrate that the defendant could not prevail." In setting aside the second order, the appellate court noted that the trial court used the wrong standard when it found that Owner was required to show its damages within a reasonable degree of certainty.

In **Swain vs. The Meadows at Martin Downs Homeowners Association, Inc.**, 36 Fla. L. Weekly D729a (Fla. 4th DCA, April 6, 2011) Owners filed suit against Association seeking a declaratory judgment and injunctive relief after Association constructed a 1,920 square foot maintenance facility on the common area adjacent to the recreational grounds. Owners alleged that Association did not have the authority to build the structure without a vote of the unit owners. Conversely, Association argued that it did, and a dispute arose regarding the parties' rights under Association's declaration of covenants and restrictions. Association's board of directors is composed of six voting members, each elected by a majority of the unit owners in each of the six villages that make up the Meadows. The board of directors met on July 5, 2006, to vote on approval of the construction of the maintenance facility to replace a fenced-in portion of the parking lot known as the "green corral," which was used to store building materials. The board voted five to one to approve the construction. Following approval, Owners filed an action for declaratory and injunctive relief and "... to enjoin the Association from proceeding with the proposed construction of a maintenance building on designated common area at the community." Owners also sought an emergency injunction. The trial court denied the injunction, determining that it did not constitute an emergency. Association then moved for summary judgment, asserting that Association's authority to act is established in the governing documents. In response, Owners filed an opposition to the summary judgment and a cross-motion for summary judgment. Ultimately, the trial court granted Association's motion for summary judgment on a finding that the construction was permitted under the governing documents. Owners appealed this judgment to the Fourth District Court of Appeal, arguing that disputed issues of material fact were sufficient to deny summary judgment. On appeal, the Fourth District Court of Appeal noted that neither the governing documents nor the Florida Statutes *explicitly* permit the board of directors to authorize the construction of the maintenance facility. Association responded that the governing documents make Association responsible for the "management, maintenance, and operation of the Common Areas." Owners do not dispute that Association is charged with such a duty. Rather, Owners maintain that "... the Association does not have any authority to take away portions of the common areas ..." without the consent of the membership. After a review of the governing documents, the appellate court concluded that summary judgment was improper because the record reflects a material issue of fact in dispute; i.e. different inferences can reasonably be drawn from the application of the declaration's provisions to Association's proposed activities in building the maintenance facility.