COMMUNITY COUNSEL

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RECENT CASES

- **Recorded restrictions expired after 30 years and were extinguished, preventing an owner from enforcing them against another owner's nonconforming construction.**
- **Trial court gets it wrong when it rules that HOA mandatory presuit mediation statute unconstitutionally impairs a right to recover attorney's fees by nonmediating owner.**

CAN WE REALLY JUST TAKE THE RENT?

Most people are aware that starting in October, 2010 the Florida HOA and Condo Acts were amended to allow Associations to demand that tenants of delinquent members pay their rent directly to the association. While the original statutes were poorly drafted and full of ambiguity, the revised versions adopted and effective on July 1, 2011 are both clearer and more expansive in scope. Now, a demand can be made based on *any* arrearage on *any* obligation to the association, and rent seizure can be accomplished with *only* the sending of a statutory form of notice. Does it sound too good to be true? Perhaps it is.

In a case that is now pending in the U.S. District Court for the Middle District of Florida, entitled "*TCR Holdings, Inc. v. Windsor West Condominium Association, Inc*." a rental unit owner is making a strong argument that the Florida statutes are an unconstitutional taking of property without due process of law. The pleadings cite the famous 1969 decision by the United States Supreme Court in *Sniadach v. Family Finance Corp.* and its follow-up 1972 decision in *Fuentes v. Shevin*. Those cases, which are studied by every first or second year law student, held that the law cannot grant a party a private right of action to seize property of another without first providing the property owner with some due process of law. In other words, before property can be repossessed or otherwise permanently taken, the courts need to become involved. Yet the rent statutes adopted by Florida do not require any due process beyond providing a fourteen day notice to the owner and tenant.

Even before the *TCR Holdings* case was filed earlier this year, some courts had started to give indications that they are uncomfortable with this statute. In one case the local trial court refused to evict a tenant who declined to pay rent to the association after a demand. The court's reasoning was simple: notwithstanding what the statute says, the association isn't the landlord and therefor has no right to evict.

Many attorneys think that the position taken by the plaintiff in TCR Holding is well-founded and may eventually prevail. If it does so, the next question is, what potential impact could this decision have on associations who try to use the statutes?

A motivated owner may be able to seek recovery of rent money improperly collected by the association, but the association would also have an affirmative defense called set-off, by which it could claim the right to recover the original monies due it. The net result might be a wash. Thus, in an "ordinary" case, there appears to be little problem for a community that uses the statutes.

But bigger problems could arise if the owner also claims to have lost his or her property due to the inability to pay a mortgage out of the confiscated rental proceeds. In such a case the owner's claimed damages could include the lost value of the property. Those damages could far exceed any set-off claimed by the Association.

The problem for any association is how to tell in advance whether it might face the "ordinary" scenario discussed above, or a more extreme scenario. As there does not appear to be a way to know in advance, associations are best advised to exercise the rent seizure remedy with some care, and to move the matter to court, if possible, so that due process can be afforded the owner. Once that occurs, the argument made in the *TCR Holdings* case is avoided because the court will control the handling and application of the rental proceeds.

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RECENT CASE SUMMARIES

In **Matissek vs. Waller**, 36 Fla. L. Weekly D122b (Fla. 2nd DCA, January 14, 2011), Waller brought suit against Matissek to enforce recorded deed restrictions. Waller alleged that an airplane hanger constructed by Matissek was not in compliance with the Hidden Lakes Estates deed restrictions. Hidden Lakes Estates was never lawfully formed as a homeowners' association, and thus Waller filed this suit as an interested party and owner in Hidden Lakes Estates Unit 1. Matissek defended the claim on the basis that the Marketable Record Title Act (MRTA) extinguished the covenants and thus the covenants were unenforceable. Hidden Lakes Estates Unit 1 was created and platted in 1971 by the developer. As originally recorded, the restrictions required that all buildings be constructed of masonry or similar materials. The original restrictions also permitted the developer to prepare and record amendments. The developer amended the restrictions in 1977. Matissik purchase their lot in 1995. The deed of conveyance did not cite to the original plat, nor did it mention any restrictions on the property. During the summer of 2007, Matissek began constructing an airplane hanger on the property and submitted his plans to Pasco County to get a permit to build a pre-engineered hangar containing steel frames and steel paneling. Waller noticed the construction and believed the structure to violate the Hidden Lakes Estates restrictions requiring all buildings to be constructed of masonry or similar materials. Waller communicated to Matissek that if he did not bring the hangar into compliance with the restrictions, an injunction would be sought. Matissek proceeded with the construction of the hanger. In the trial court, Matissek sought a summary judgment arguing that MRTA extinguished the original restrictions recorded in 1971, and the amended restrictions recorded in 1977. The trial court denied the motion and the matter proceeded to trial. After the trial, the court ruled that MRTA extinguished the 1971 restrictions, but not the 1977 amended restrictions because the amended restrictions were recorded after the root of title created by a 1974 conveyance to Matissek's lot. The trial court ordered the hanger to be constructed in accordance with the requirements of the restrictions. On appeal to the Second District Court of Appeal, the appellate court reversed the trial court finding that both the 1971 restrictions and the 1974 restrictions were outside of the chain of title to Matissek's lot and thus expired prior to the time the lawsuit was filed in 2009.

In **Honeywoods Homeowners Association, Inc., vs. Jean-Pierre**, 18 Fla. L. Weekly Supp. 697d (County Court, 17th Judicial Circuit in and for Broward County, Florida, May 24, 2011) Association filed a motion for relief from judgment with the trial court. Association initially filed suit for injunctive relief against Owners. The trial court ultimately found in favor of Owners, and entered a final judgment accordingly. Owners then sought an award of entitlement to attorneys' fees. Association argued that Owners were not entitled to an award of attorneys' fees because Owners failed to participate in presuit mediation, as required by Section 720.311, Fla. Stat. Prior to filing suit, Association had sent Owners the presuit notice required by the statute. Owners ignored the notice and refused to participate in presuit mediation. After a hearing, the trial court nevertheless entered judgment awarding Owner its entitlement to an award of attorneys' fees. The trial court found that the governing documents of the Association, which contained a prevailing party attorney fees provision, were unconstitutionally impaired by the subsequent enactment of Section 720.311, Fla. Stat. As such, Owners were entitled to an award of attorneys' fees for prevailing in the action.

EDITOR'S NOTE: This opinion is currently on appeal to the Circuit Court of the 17th Judicial Circuit in and for Broward County, Florida. We report this decision to show just how glaringly wrong trial courts can sometimes be in their decisions. It is our opinion that the subject HOA statute is remedial in nature, and thus presents no unconstitutional impairment issues. Furthermore, the case law relied upon by the trial court, *Cohn vs. Grand Condominium Ass'n, Inc.* 36 Fla. L. Weekly S129a (March 31, 2011), is wholly inapplicable to the instant case. In *Cohn*, the Florida Supreme Court held that, in a condominium context, and absent any provision in the governing documents adopting subsequent legislative enactments, the retroactive application of Section 718.404(2), Fla. Stat., regarding makeup of the board in a mixed use, residential/commercial condominium, unconstitutionally impaired the preexisting rights of the commercial condominium owners. *Cohn* has absolutely no application in the instant case.

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