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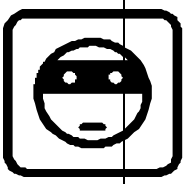
BANK SELF-INTEREST MASQUERADING AS HELP

During the late summer and early fall the agenda for the coming state legislative session gets into gear. Ideas and initiatives are floated, committee assignments are made and bills are drafted and pre-filed. Some early proposals being circulated may be well-meaning and ultimately will go nowhere, but far too many are blatant attempts to stoke an industry's particular self-interests. In some cases these proposals are wrapped in a soggy lettuce leaf of public relations, promising help for the working man and woman, when nothing is further from the truth.



One example of this is a proposal with the euphemistic name of the "Florida Fair Foreclosure Act." Who could be against such a proposal? After all, everyone loves fairness. Although the bill has not yet been filed so it can be subject to scrutiny, if the Palm Beach Post can be believed, it is being touted by its sponsor as help for everyone facing foreclosure, resulting from a deluge of emailed responses and inquiries. However, a read through the summary of its intended provisions shows nothing that qualifies as relief, except for banks and other institutional lenders. Here is a summery of the "high points" of the proposal:

1. Under certain conditions lenders could avoid sale of property at public auction, thereby eliminating competitive bidders. In return the lender agrees not to pursue the property owner for a deficiency judgment. Given that few if any lenders actually pursue a deficiency judgement and that the ability to obtain a judgment rests with the sound discretion of the court, how exactly does this help anyone but a bank wishing to cherry-pick the best properties for itself?

2. Anyone who is the subject of a mistaken foreclosure proceeding, who loses a home due to error, would be barred from seeking return of their home. Their remedy would be limited to money damages. In this age of deflating property values, this would seem to harm, not help an innocent owner who loses a home through mistake.

3. Lenders who have lost possession of loan instruments would be able to explain their way out of a dilemma that currently prevents them from being able to pursue foreclosure. Once again, such a law would make it easier for people to lose their homes, not to retain them.

4. The time for completing uncontested cases would be shortened from 90 to 45 days. Again, this helps banks not homeowners, who could assert the right to a quick resolution only in some cases, but not all cases.

The larger lessons derived from this proposal are instructive. Don't accept the PR wrapper at face value. When reading a bill or a proposal, think about the obvious and not-so obvious effects of what is being proposed. In a one party state like Florida, competition in the marketplace of ideas is weakened and there is great benefit to some powerful industries when they parade their proposals as generally beneficial, when in fact the fairness flows to only one party or industry.

Here are some suggestions for <u>real</u> fairness:

1. Lenders pay for upkeep of their collateral.
2. Complete <u>all</u> cases expeditiously.
3. No separate process for more desirable properties.
4. Make parties prove their entitlement to the relief they request, including ownership of the right to foreclose.
5. Hold parties responsible for all of the harm they cause in wrongful foreclosure cases.

RECENT CASES

- **Master Association could not bar all Sub Association members from using amenities where some were delinquent and some were current. The right to bar use was limited to members and the Sub Association was not a member of the Master.**
- **Trial court should not have entered summary judgment in favor of contractor where claims of defective work exist.**

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RECENT CASE SUMMARIES

In **Quail Run Master Association, Inc., vs. Quail Run Condominium One Association, Inc.**, 18 Fla. L. Weekly Supp. 827a (Circuit Court, 15th Judicial Circuit in and for Palm Beach County, Case No. 50-2010-CA-016914, April 7, 2011) Master Association prohibited all members of Sub Association from using the master community facilities, including those members who had fully paid their monetary obligations to Sub Association. On January 12, 2011, Master Association issued a statement that it had suspended "the use rights of all condo one members, family, guests, visitors, etc., as allowed by law." Master Association also threatened to fine any member who allowed or aided any Sub Association member to use the master common facilities. The rational for Master Association suspending all members of Sub Association - including those who were current in their monetary obligations - arose out of language in Sub Association's documents. Master Association also sought to utilize Section 720.305(2), Fla. Stat., which states that ". . . .an association may suspend, until such monetary obligation is paid, the rights of a member or a member's tenants, guests, or invitees, or both, to use the common areas. . . ." At the heart of the matter was whether Master Association may suspend the rights of all the members of Sub Association, including financially current unit and lot owners of Sub Association pursuant to Florida Law and/or the operative condominium documents when some of the 96 unit or lot owners were delinquent in their monetary obligation due the Sub Association. The trial court noted that pursuant to the Master Declaration, only "record owners of parcels, lots and dwelling units" are members of the Master Association. The Sub Association is not a record owner of any parcels, lots, or dwelling units. By definition, the Sub Association is, therefore, not a member of Master Association. In this case, Section 720.305(2), Fla. Stat., requires that *a member* who is delinquent in his/her monetary obligation to Master Association may have his/her rights suspended upon being provided the required notice and hearing before an impartial committee. In this case, Master Association collected funds paid by some of Sub Association's members but has suspended the privileges and use of common facilities not only of the individual delinquent members, but all unit owners of Sub Association. This mass suspension was implemented notwithstanding that funds paid by financially current members are used to support those same common facilities. Therefore, the trial court concluded that Master Association did not have the authority to suspend the right's of all Sub Association members because of the failure of some other unit owners to pay their assessments.

In **Riverwood Condominium Association, Inc., vs. Litecrete, Inc.**, 36 Fla. L. Weely D1916c, Fla. L. Weekly (Fla. 3d DCA, August 31, 2011) Contractor brought an action seeking to obtain amounts allegedly owed under a contract, asserting claims of breach of contract, unjust enrichment, and account stated. The contract between Contractor and Association called for Contractor to completely re-roof thirty-two condominium units, install new windows, and make miscellaneous wood repairs. After completion of all required governmental inspections, Contractor believed that it's performance under the contract was complete and therefore demanded payment of the final balance due under the contract. Association refused to tender the final payment as demanded by Contractor and Contractor filed suit. Association alleged in its affirmative defenses that Contractor caused significant damage to Association's property and performed unsatisfactory and defective work. Thus, Association claims it properly withheld final payment under the terms of the contract which provided ". . . . payment may be withheld on account of (1) defective work not remedied; (2) claims filed for damages caused by Contractor. . . ." In the suit Association claimed it was entitled to a set-off for damages caused by Contractor. Contractor moved for summary judgment. In response, Association filed an affidavit of its property manager attesting to the defective work, that the defective work had not been corrected, and that Contractor had damaged Association's property. After hearing argument, the trial court entered judgment in favor of Contractor. On appeal, Association claimed that the trial court erred in granting summary judgment in favor of Contractor because its affirmative defenses, combined with the affidavit, raised issues of material fact sufficient to preclude summary judgment. The Third District Court of Appeal concurred with Association and reversed the entry of summary judgment by the trial court.

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