COMMUNITY COUNSEL

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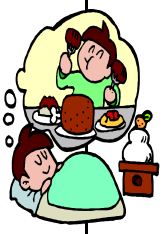
RECENT CASES

- CONDO ASSOCIATION COULD NOT AVOID MAKING REPAIRS TO COMMON ELEMENTS BY FAILING TO ASSESS MEMBERS FOR COST OF MAINTAINING SAME.
- PRIOR TO 2003, WHEN CONDO DOCS CONTROLLED WHAT WAS INSURED, CONDO WAS NOT REQUIRED TO INSURE ITS MARINA AND SLIP OWNERS HAD TO PAY A SPECIAL ASSESSMENT TO REBUILD IT AFTER HURRICANE DAMAGE.

LENDER LIABILITY FOR UPKEEP OF COLLATERAL

I have a recurring dream that Florida law will act to make all lenders responsible for the cost of preserving their collateral when the homeowner defaults and abandons the home. Rather than shift this burden to community associations (and through them to an owner's neighbors), the financial institution which will ultimately benefit from any care given to abandoned property, and which will ultimately own the property, should be required to step up to the plate and pay to preserve and care for its collateral from and after the date it commences action to foreclose and retake the property. Such a system seems inherently just, since the lender is - in essence – the owner in waiting, and since its actions ultimately precipitated the abandonment of the property in the first place.



So, if such a system would be fair and just, why is the burden of abandoned property routinely shifted onto community associations and county and local governments (and through them to the taxpayers at large)? The obvious and somewhat cynical reason is financial and political clout. But does it have to be that way? The answer is no, it does not.

In a Florida condominium bankruptcy case called ***In re Spa at Sunset Isles Condominium Association , Inc.*** the U.S. Bankruptcy Court for the Southern District of Florida entered an order requiring lenders holding first mortgages to pay a "surchange" to the debtor association for the purpose of maintaining the condominium property. Although the responding lender relied on Florida law, which shields lenders from liability until they become the unit owner, the court applied a simple provision of the U.S. Bankruptcy Code which, the court ruled, applies separately and independently of state law. Section 11 USC 506(c) provides:

The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim, including the payment of all ad valorem property taxes with respect to the property.

The court reasoned that:

Section 506(c) codifies a long line of cases "expressing and applying the equitable principle that a lienholder may be charged with the reasonable costs and expenses incurred by the estate that are necessary to preserve or dispose of the lienholder's collateral to the extent that the lienholder derives a benefit as a result." .... " The purpose of this provision is to prevent a windfall to a secured creditor at the expense of the estate." [citations omitted]

The only problem with using this law is that an association would need to file bankruptcy to take advantage of it. In most cases that would be a rather extreme step. But then why not incorporate the rationale and effect of 11 USC 506(c) into Florida community association law? It could be done easily, with wording such as this:

In any action to foreclose a mortgage on residential real property the court, upon motion of any party, may allow recovery from property secured by the mortgage of the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such mortgage, including the payment of all ad valorem property taxes with respect to the property.

When I dream of the justice such a provision would evoke, I sleep better, but when I remember the real world difficulty of making this the law, I wake up with a start, realizing that its time to get up and walk the dogs.

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RECENT CASE SUMMARIES

In Re: Colony Beach & Tennis Club Association, Inc., Case Number 8:09-cv-2560-T-23, Document 28, The U. S. District Court for the Middle District of Florida, sitting as an appellate bankruptcy court (7/27/2011). Unit owners are members of the debtor Association and limited partners in a partnership that operates a condominium and resort hotel. In addition to governing documents, a partnership agreement permitted the Unit Owners to pay assessments to Association directly from their share of hotel profits. The condominium needed repairs to common elements totaling approximately $10 million. A dispute arose between the limited partnership and Association as to which entity should pay for the repairs. Instead of Association levying assessments that would cover the cost of necessary repairs to the common elements as part of the Association's annual budget, there were two proposals to pass "emergency" special assessments to cover the cost of repairs. Both proposals, requiring a unit owner vote, were defeated. Repairs were not made and the common elements deteriorated as a result. The primary question before the Court was whether Association, through the assessment of Unit Owners, was required to pay for repairs. Analyzing how the statutory scheme of Chapter 718 unquestionably answered this question in the affirmative, the Court found that Section 718.117(1), Fla. Stat., imposed an affirmative duty on an association to prevent deterioration to the common elements. Accordingly, when Association's Board and a majority of Unit Owners allowed the common elements to deteriorate by not levying assessments for necessary repairs, an impermissible material alteration to the common elements resulted, to the detriment of the minority of Unit Owners who objected. The trial court had held that the refusal to implement assessments for repairs without a vote of the Unit Owners was a proper exercise of the Board's discretion pursuant to the Business Judgment Rule, thereby protecting it from the claims of third parties, but the appellate court flatly rejected this analysis, holding that "[i]f the Association Board flouts the statutes, violates the Declaration, lets the Colony crumble and drives the Partnership to ruin, the Association as a whole may not escape the consequences merely because the Board intentionally inflicted the harm to further the perceived self-interest of the Association."

In Roberts, et al., vs. Nine Island Condominium Association, Inc., No. 3D09-371 (Fla. 5th DCA, 9/21/2011). Slip Owners, members of Association who owned boat slips at the condominium's marina, filed a declaratory judgment action against Association after Association specially assessed each Slip Owner a proportionate share of the reconstruction costs of the marina and boat slips, which were destroyed by the first Hurricane Irene in 1999. The boat slips are limited common elements of the condominium. The Slip Owners alleged that they should not be responsible for the special assessments, because Association failed to have coverage in place to keep the marina and docks insured, as per the governing documents and applicable Florida statutes. Association filed foreclosure counterclaims against those Slip Owners that had not paid the special assessment. The trial court found in favor of Association. In reaching its decision, the appellate court reviewed the Declaration as it concerned Association's responsibility for maintaining insurance, finding that since the "Common Elements" and "Limited Common Elements" were distinguished in the Declaration, the drafters of same would have separately included Limited Common Elements in the Declaration's "Required Coverage" section if they had intended the Limited Common Elements to be included. The appellate court further found that the Declaration's Required Coverage section only included a requirement that Association purchase insurance on the land-based portions of the Condominium Property. Finally, Slip Owners argued that Association failed to "… use, its best efforts to obtain and maintain adequate insurance to protect the association, association property, the common elements, and the condominium property required to be insured by the association... " pursuant to Section 718.11(11) Fla. Stat., (1999). The appellate court reasoned that even if the statutory mandate encompassed the marina and boat slips, there had been no evidence introduced at trial that Association failed to seek insurance, or even that insurance was available. To the contrary, the testimony at trial was that prior to the first Hurricane Irene, an engineering firm had determined that the marina had outlived its useful life and that insurance was not renewed on the marina and docks by the prior carrier after 1994, due to its age. Furthermore, it did not become insurable again, until the marina was reconstructed in 2002. Based on the foregoing, the appellate court affirmed the trial court ruling.

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