COMMUNITY COUNSEL

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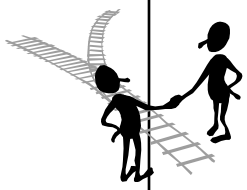
RECENT CASES

- INSURER DENIED SUMMARY JUDGMENT AGAINST CONDO ASSOCIATION BASED ON FACTUAL ISSUE AS TO WHETHER DAMAGE TO BUILDING WAS CAUSED BY WEATHER OR DEFECTIVE CONSTRUCTION, EVEN THOUGH THE COURT ALLOWED DEVELOPER AND CONTRACTOR TO PREVAIL BASED ON A PRIOR SETTLEMENT WITH ASSOCIATION.
- OWNER REQUIRED TO ABIDE BY ONE PET POLICY WITHOUT NEED OF CONVENTIONAL SHOWING OF ENTITLEMENT TO AN INJUNCTION.

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.

HOW TO SETTLE NEIGHBORHOOD DISPUTES

In Florida condominiums, before non-monetary disputes can go to court they must first be heard and decided by state-appointed arbitrators in mandatory presuit arbitration. In Florida HOAs, before non-monetary disputes can go to court, they must first go through a facilitated negotiation process that is called mandatory presuit mediation.



The former proceeding results in a decision on the merits and subsequent resort to court is, effectively, a re-trial of the issues. In the latter situation, if the mediation is successful, a voluntary written settlement agreement results. The parties either honor it or have it enforced by a court. So which system is better at solving neighborhood disputes?

Admittedly we have no empirical data to say definitively, but our working hypothesis is that mediation is the superior process and has specific unique advantages in resolving the type of neighbor-to-neighbor disputes that require the parties to deal with each other in their respective home environments, even after all is said and done.

Arbitration is an adversarial proceeding where someone (the arbitrator) adjudicates who is right and who is wrong, so that there is a winner and a loser. One party is defeated and one party licks its wounds, and probably faces the onerous prospect of paying the other side's attorney's fees and costs.

Mediation makes no such determination. Indeed, a mediator may easily accept everything he or she hears from all sides as being completely true, but nevertheless then seeks to help the parties fashion a compromise, moving them from a position of trying to get ***what they want*** to articulating and obtaining just ***what they need***. In this way, there are no winners and losers. No resentment and no arrogance lingers. If everyone leaves a mediation just a little unhappy, the mediation has succeeded. More significantly, the case is over, the economic bleeding stops and the parties can get on with their lives with their heads held relatively high.

One aspect of mediation that is downright therapeutic is the "plenary session" that is held at the outset of the process. This affords both parties an opportunity to face each other, to make a statement and to have their positions ***heard*** by the other side. The sense that you have been heard can go a long way to resolving neighborhood disputes. No longer does one party feel it is howling in the wind.

Recently I mediated a case where the entire negotiation was held in the plenary session. There was no need to break out into separate caucuses, with the mediator shuttling back and forth between the sides, as is most often the case. The parties dialogued maturely and calmly and came out of the mediation with a written action plan for resolving their differences. The owner involved got the satisfaction of knowing he had been heard and that his concerns were not dismissed out of hand. The association got valuable feedback and an opportunity to look at some rough patches in its operations without further economic impact.

Not all mediations result in settlement and certainly many participants are far from calm and mature. But this process and result reaffirmed to me the important role that even informal mediations can play in resolving disputes in community associations.

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RECENT CASE SUMMARIES

In **Landmark American Insurance Company vs. Santa Rosa Beach Development Corp., et al.**, 37 Fla. L. Weekly D2759a (Fla. 1st DCA, November 30, 2012), Insurance Company sued Developer and Contractor in a third party subrogation action. Insurance Company's third party complaint was filed in a breach of contract action instituted by Association for Insurance Company's alleged failure to provide insurance coverage for structural damages allegedly caused by Hurricanes Ivan and Dennis in 2004 and 2005. Developer and Contractor constructed the condominium, which construction was completed in 2002. Prior to the hurricanes, Association sustained damage resulting from water intrusion through the stucco exterior cladding. In response to this damage, Association entered into an agreement for warranty repairs with Developer and Contractor in which Developer and Contractor recognized that they owed certain warranty obligations to Association and that certain ". . . . *issues have arisen with the exterior cladding of the condominium which have resulted in water intrusion into the condominium*. . . ." Further, Developer and Contractor agreed to repair the water intrusion and bring the exterior cladding in compliance with the warranty obligations under section 718.203, Fla. Stat. The agreement for warranty repairs further provided that Developer and Contractor would transfer any warranties from manufacturers to Association after completing the repair work and that, once transferred, Developer and Contractor were released from any further liability. Pursuant to the agreement, Developer and Contractor constructed a new exterior cladding, taped and inspected all caulking joints, removed and replaced all questionable caulking joints, reworked baseboards, and repainted the building. Following Hurricane Ivan, Association notified Insurance Company of losses sustained to the condominium building. Insurance Company investigated the claim and found that water from the storm entered the building through the improperly designed and installed exterior cladding. Because the policy provided that Insurance Company was not liable for "defective construction", Insurance Company denied the claim. Insurance Company also denied a second claim for the same reasons after Hurricane Dennis in July, 2005. Association filed suit against Insurance Company for breach of contract. Insurance Company defended and raised several defenses and a third party claim against Developer and Contractor. Among the defenses raised was that the agreement for warranty repairs which effectively released Developer and Contractor impaired Insurance Company's third party right of subrogation arising under the insurance policy. Developer and Contractor moved for summary judgment on the basis of the waiver language in the agreement. Insurance Company moved for summary judgment arguing that Association breached its insurance contract by entering into the agreement with Developer and Contractor. The trial court granted Developer's and Contractor's motions for summary judgment, finding that the agreement wholly released Developer and Contractor from further liability for any alleged construction defects. However, the trial court denied Insurance Company's motion for summary judgment, finding disputed issues of material fact concerning whether the damage to the condominium building was caused by the hurricanes or the prior stucco cladding defects. On appeal to the First District Court of Appeal, the appellate court affirmed the holdings of the trial court.

In **Mullins vs. Gull Aire Village Association, Inc.**, 18 Fla. L. Weekly Supp. 1098a (6th Jud. Cir., Pinellas County, August 31, 2011) Association filed suit seeking injunctive relief to enforce provisions of deed restrictions affecting property within Association. Pursuant to the terms of the declaration as amended, only one dog, cat, or bird may be kept on a single lot or residence within the community. Owner allegedly had two dogs at his residence. The trial court entered a final judgment in favor of Association, therein ordering Owner to comply with the "one pet" restriction. On appeal to the circuit court, Owner argued that to obtain an injunction, a petitioner must show a clear legal right, an inadequate remedy at law and that irreparable harm will arise absent injunctive relief. The appellate court quickly dismissed this argument on the basis that no showing of irreparable harm is required when enjoining a violation of a restrictive covenant. Owner next argued that the judgment should be set aside as he allegedly proved his defense of selective enforcement. However, the trial court found that based upon the testimony of Association's president the other examples of multiple pets were "grandfathered" when the declaration amendment limiting the number of pets was enacted. The appellate court affirmed the decision of the trial court and ordered Owner to comply with the one pet restriction.

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