COMMUNITY COUNSEL

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IS DUE PROCESS NO LONGER DUE?

On January 2, 2013 Florida's Third District Court of Appeal of gave us a decision that both lacks common sense and is a prime example of the new style of "laissez faire" judicial activism which - though ideologues may criticize more liberal courts for wrongfully engaging in judicial activism - is every bit as much of an activist approach as any other.

The case, called Estoril, Inc. v. Mayfield Condominium Association, Inc., arose over the interpretation of a set of recorded master covenants in a mixed use property, consisting of a high rise hotel, a high rise residential condominium and a commercial office project. All three were served by a separate twelve-story parking facility. Although not specifically stated, it is assumed that Estoril was the developer.

The master covenants permitted Estoril to regulate the parking, including making rules for its use and setting parking rates, saying that it:

….shall have the right to establish, from time to time, rules and regulations regarding the use of the General Shared Facilities, including, without limitation, the right to charge reasonable use fees for use of the General Shared Facilities and/or for services offered from the General Shared Facilities.

Although parking was a budgeted line item, starting prior to and continuing after turnover of the residential condominium in 2007, the developer began sending numerous bills at different intervals for parking charges, some after-the-fact. The condo association quickly stopped paying and Estoril filed suit.

The Association, as might logically be expected, alleged that the parking chares were not valid because "Estoril did not charge the use fee properly as they never formally adopted a written rule or regulation regarding such use fee." After all, does it not make sense to expect that the residents would be entitled to know what the rules and criteria are that were being used to set their "reasonable" parking fees? Although the trial court found for the Association, the appellate court reversed the decision stating that its reading of the master covenants indicated that:

…. there is nothing in the language of this provision, or in the remaining provisions of the Master Covenants, that requires some formalized writing or particular process, and the trial court erred in ascribing such a requirement to the provision at issue.

Thus, the residents were not entitled to any due process in the setting of their parking fees, i.e. notice and an opportunity to be heard on the issue. The developer was free to act unilaterally and arbitrarily.

The decision retreats from earlier decisions such as the 1983 decision in Majestic View v. Bolotin, which addressed the due process needed to enforce covenants, saying:

Appellant has correctly outlined the requirements for enforcement of a restrictive covenant such as that which is the subject of this appeal: (1) constructive or actual notice of the existence of the restriction by the defendant prior to enforcement .... 2) a reasonable demand for compliance with the restriction after the breach has occurred .... (3) ***compliance with any applicable procedural due process considerations*** *which require notice of the commencement of the litigation and an opportunity to be heard in court.* (Emphasis supplied)

If no fundamentally fair process is due in the making or rules and policy, then owners are left at the mercy of arbitrary developers. That is nothing less than a dictionary definition of "'laissez faire' judicial activism."

RECENT CASES

- DEVELOPER ENTITLED TO RETAIN EXTRA PARKING AND STORAGE SPACES UNTIL ALL UNITS WERE SOLD UNDER PLAIN LANGUAGE OF DECLARATION OF CONDOMINIUM.
- WHERE BANK HAD TO REFORECLOSE ON CONDO UNIT DUE TO CHANGE IN OWNERSHIP BEFORE SALE, CONDO ASSOCIATION'S LIEN AGAINST BANK FOR UNPAID ASSESSMENTS WAS INVALID AS BEING RECORDED AFTER THE LIS PENDENS IN THE NEW FORECLOSURE ACTION.

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RECENT CASE SUMMARIES

In **Courvoisier Courts, LLC vs. Courvoisier Courts Condominium Association, Inc.**, 38 Fla. L. Weekly D36a (Fla. 3rd DCA, December 19, 2012), Developer recorded the declaration of condominium in April 2005. Following the recording of the declaration, Developer proceeded to assign certain limited common elements– parking and storage spaces – to purchasing unit owners in the course of selling units. In July 2006, Developer executed a "Transfer of Unassigned Units" which assigned the remaining parking spaces and storage spaces to one of Developer's unsold units. Two weeks later Developer turned over control of Association to the purchasing unit owners. In July 2007 Association filed suit against Developer for construction defects. Association subsequently amended its complaint to assert that Developer improperly transferred to itself those remaining parking and storage spaces just prior to turnover, which prevented those limited common elements from becoming Association owned property. Association sought a declaratory judgment from the trial court as to whether the transfer was valid. Both parties ultimately sought a partial summary judgment on the issue. The trial court ruled in favor of Association and ordered Developer to immediately turn over to Association any limited common elements still in its possession. On appeal to the Third District Court of Appeal, the appellate court noted that the standard of review of a motion for summary judgment is *de novo* and that a trial court's interpretation of the declaration is also reviewed *de novo*. Article 3.3 of the declaration provided that the parking spaces and storage spaces would initially be assigned by Developer and that Developer could receive compensation from a purchaser in connection with such an assignment. The declaration further provided that any *". . . . parking spaces and storage spaces that have not been assigned by the time Developer has sold all Units owned by it will become common elements and become the property of the Association.*" On appeal, Association argued that under Article 3.4 of the declaration, Developer's rights to the remaining parking and storage spaces terminated upon turnover, and the spaces became property of Association. Article 3.4 of the declaration provided that notwithstanding *". . . . the foregoing, Developer's rights to the common elements shall terminate upon transfer of Association control, or when Developer ceases to offer units for sale, whichever occurs first.*" In sum, Association contended that Developer was allowed to assign the limited common elements until *either* its stops offering units for sale or it turns over control, whichever occurred first. The appellate court held that such an interpretation is untenable. The appellate court held that Article 3.3 of the declaration was clear and unambiguous. To read the last sentence of Article 3.4 of the declaration as a limitation on the clear language of Article 3.3 would be to "violate the clear meaning of [the] contract in order to create an ambiguity." Thus, Developer retained the right to assign the exclusive use of the limited common elements until such time as it had "sold all units owned by it."

In **U.S. Bank National Association vs. Quadomain Condominium Association, Inc.**, 38 Fla. L. Weekly D20b (Fla. 4th DCA, December 19, 2012) Bank appealed an order of the trial court denying its motion to vacate a final judgment of lien foreclosure entered in favor of Association. Bank was the holder of a first mortgage and note securing a unit in the condominium. Bank instituted a foreclosure action, recorded a notice of lis pendens in the public record, and obtained a final summary judgment and a certificate of title. However, before judgment was entered and the certificate of title was issued, the owner of the unit passed away and the unit transferred to the owner's heirs. Upon learning of owner's death Bank, having not named the new owners as parties to the foreclosure action, moved for and was granted leave to file a Supplemental Complaint to Re-Foreclose Mortgage to Foreclose Omitted Defendant. Bank recorded a supplemental notice of lis pendens in conjunction with the reforeclosure. Between the time bank obtained the certificate of title and the time it filed its re-foreclosure action, Association fees went unpaid. After Bank recorded its supplemental notice of lis pendens, Association recorded a claim of lien against bank for Association fees. Association then filed suit to foreclose. Bank did not respond to Association's complaint and a default was entered and the unit ultimately sold at public sale. Bank then filed a motion to vacate arguing that the lien foreclosure action was barred since the lien was filed after Bank recorded its supplemental notice of lis pendens. The trial court denied the motion and Bank appealed. On appeal to the Fourth District Court of Appeal, the appellate court reversed the trial court. The appellate court noted that the Florida lis pendens statute "*constitutes a bar to the enforcement against the property of . . . . all liens. . . . unrecorded at the time of recording the notice. . . .*" Thus, the only way Association could have legally enforced its lien rights would have been to intervene in the suit creating the lis pendens.

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