Community Counsel

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What is the Truth about HB 213 and 319?

Both HB 213 and HB 319 have passed the Florida House and their respective companions in the Senate, SB 1890 and SB 680 are being heard imminently. Much has been said and written about whether these bills are helpful or harmful to community associations, with various community association interests groups coming down on different sides of the issue. From this observer's viewpoint, they are far more destructive than productive, and merely continue a steady trend of advancing interests of powerful banking and financial firms, while throwing bones to consumers and community associations alike.

Let's start with HB 319. As written it would prevent lenders from being liable for any interest, late fee, collection cost, attorney's fees or other charge incurred by an Association prior to the lender acquiring title. This hurts associations because there have been actions in which courts have awarded fees to communities in actions to compel completion of mortgage foreclosures. Now, if an association seeks to compel completion of a foreclosure action, including in the manner provided for in HB 213, it does so on its own nickel, and it cannot recover any of its costs from the reticent lender.

In return for denying associations any possible recovery for its costs, HB 319 removes the 2015 date for compliance with new elevator safety rules and requires updating of elevators only when the elevator needs to be replaced or substantially rehabilitated. The Bill also monkeys with the director recall process, allowing more people to challenge elections and recalls, but within narrower timeframes. Finally, the bill extends to cooperatives and HOAs the current condominium provisions related to lender consent to amendments, when the documents require same. To say that these are bones thrown to the communities is to be kind.

HB 213 revises the mortgage (and lien) foreclosure process. It creates a one year statute of limitations on actions for deficiency judgments and seems to make such claims more likely than at present. It sets forth a process for lenders to verify their authority to file a foreclosure. It slightly revises an existing and little used process which allows a party to a foreclosure action to ask the court to order a plaintiff to show cause why a foreclosure judgment should not be entered. By removing any entitlement to recovery of attorney's fees, the two bills effectively take away with one hand what they give with the other.

The bill also contains an "expedited" process that relates to abandoned residential property, where the condition of the property is deteriorating. The process allows a court to determine the issue of abandonment and to summarily enter a judgment of foreclosure. However, use of this expedited process is not mandatory and if used, it can only be initiated by the holder of a note and mortgage, not by a community association. Thus, it allows lenders to cherry pick properties with value and to seize these properties with great speed and haste. At the same time, it can continue to allow other foreclosure actions to languish, and associations would have to chase the lender at its own expense to force the completion of foreclosure proceedings.

Frankly, anyone who sees these measures as benefiting anyone but banks must be smoking something. Perhaps mandatory drug testing for lobbyists is needed.

Recent Cases

- Manufacturer of coating used on metal components incorporated into a condominium was not a "supplier" and did not give statutory warranties in Condo Act.
- Court upheld improperly granted injunction when defendant failed to appeal it, re affirming old adage that "if you snooze, you lose."

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RECENT CASE SUMMARIES

In **Harbor Landing Condominium Owners Association, Inc., vs. Harbor Landing, LLC**, 37 Fla. L. Weekly D265a (Fla. 1st DCA, January 30, 2012) Association brought a breach of statutory implied warranty claim under Section 718.203(2), Fla. Stat. Included as defendants in the action were the Manufacturer of coatings used on the railings, and the company that actually supplied the railings for installation at the condominium. The coating Manufacturer moved to dismiss the complaint against it on the grounds that although it manufactured the coatings, it was not a "supplier" as required by the statute. Section 718.203(2), Fla. Stat., provides that the ". . . . *contractor, and all subcontractors and* ***suppliers****, grant to the developer and to the purchaser of each unit implied warranties of fitness as to the work performed or materials supplied by them*. . . ." Association argued in the trial court, and again in the appeal, that Manufacturer should be considered a supplier for purposes of the statute. The trial court found that Manufacturer was not a "supplier" and therefore granted the motion to dismiss. On appeal to the First District Court of Appeal, the appellate court noted that had the Legislature wished to include manufacturers, regardless of whether they have any direct connection to a condominium project, it could have done so. Additionally, the appellate court noted that the Legislature did not equate "suppliers" with "manufacturers" for purposes of Section 718.203(2) in that the Legislature used the term "manufacturers" in subsection (1) of Section 718.203, Fla. Stat., which addresses a developer's implied warranty of fitness to unit owners. Therefore, had the Legislature intended to include "manufacturers" is subsection (2), it clearly could have done so. The court noted that a "manufacturer" could in some circumstances be considered a "supplier" for purposes of the warranties provided for in Section 718.203(2), Fla. Stat., but that in this case dismissal was appropriate because Manufacturer did not supply anything for this particular condominium project.

In **Fong vs. Courvoisier Courts Condominium Association, Inc.**, 37 Fla. L. Weekly D455b (Fla. 3rd DCA, February 22, 2012), Association sought and obtained an "emergency ex parte temporary injunction" regarding the use of certain property owned by Owner, on March 4, 2010. Five days later, on March 9, 2010, with notice to Owner, the trial court conducted a hearing to determine whether the temporary injunction granted on March 4, 2010, should remain in place. Owner, represented by legal counsel, presented evidence and argument at the hearing. The trial court extended the temporary injunction, and Owner did not appeal that ruling. Over one year later, Owner filed a motion to dissolve the temporary injunction. The trial court denied the motion to dissolve and Owner appealed. On appeal to the Third District Court of Appeal, the appellate court agreed with Owner that the trial court abused its discretion in granting the temporary injunction. The record reflected that Association failed to demonstrate (i) irreparable harm that would result if the temporary injunction was not entered, (ii) that an adequate remedy at law was unavailable, (iii) Association had a substantial likelihood of success on the merits, nor (iv) that the threatened injury to Association outweighed the obvious harm to Owner and its tenant. However, the appellate court was compelled to affirm the order denying the motion to dissolve because: (1) the grounds raised relate to the procedure and the sufficiency of the evidence regarding the granting of the underlying injunction; (2) Owner did not appeal the order granting the temporary injunction when it was granted; (3) the standard regarding a motion to dissolve a temporary injunction, entered after notice and a hearing, required Owner to demonstrate a change in circumstances; and (4) Owner failed to meet that standard of proof. Therefore, the appellate court was reluctantly compelled to affirm the trial court's order denying Owner's motion to dissolve the temporary injunction.

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