Community Counsel

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IS SELF-HELP NOW REQUIRED?

The "conventional wisdom" is that self-help remedies, to the extent that they are found in governing documents, are to be avoided for many reasons. Not the least of these is that self-help can amount to a breach of the peace or a trespass; that it can be a de facto loan to someone who doesn't deserve it; or that work done to fix up another person's property can carry a long tail of liability, as when the paint peels or the roof leaks after several years, or the irrigation system fails to work after the lawn is mowed.

For these reasons most association law practitioners recommend avoiding self-help and using equitable remedies instead, as by obtaining mandatory injunctions to force owners to maintain their own properties.

Now a troubling decision from January, 2012, out of Florida's Second District Court of Appeals raises the possibility that associations may actually be required to engage in self-help remedies if provided for in their governing documents. In the case of ALORDA v. SUTTON PLACE HOMEOWNERS ASSOCIATION, INC., the appellate court denied an association the right to recover prevailing party attorney's fees after it had sued to force an owner to obtain the mandatory insurance coverage required by the governing documents. During the suit, the owner eventually complied and with the case now moot, the association sought its fees and costs.

However, the owner successfully argued that the association was never entitled to the relief its sought, i.e. a court order compelling the owner to obtain the required insurance, because the governing documents provided that if an owner failed to obtain the insurance the association could do so itself and then recover its costs via the lien and foreclosure process. As such, the court reasoned, there was an adequate remedy at law, and therefore one of the traditional conditions precedent to proving entitlement to the equitable remedy of a mandatory injunction could not have been proven.

The holding in the case can easily extrapolated to other types of cases where owners fail to meet duties imposed on them by covenant, where the documents also provide the association with a range of enforcement options, including self-help. If a court were to buy the analogy, it could require an association to proceed to maintain or repair an owner's property and then use the lien process to attempt to recover, something that is by no means a certain result. The result could be to force already cash strapped communities to maintain properties for the benefit of foreclosing lenders, who would have no legal obligation to repay them.

Good advocates will undoubtedly attempt to distinguish ALORDA on its facts. For one thing, apparently the association's pleadings admitted that it had an adequate remedy at law, something that in retrospect was perhaps not entirely true. Second, decisions from other judicial districts in Florida indicate that when enforcing covenants on real property **both** the traditional requirement of irreparable harm and the requirement of an inadequate remedy at law are deemed met due to the legal uniqueness of real estate.

Nevertheless, one may expect to see this argument in the future, if only on the issue of whether an association can be a prevailing party for purposes of attorney's fees where the documents also permit self-help.

RECENT CASES

- **Speed Bump Easement case presented issues of fact for trial as to reasonableness of impairment of easement of access, and is not automatically unreasonable.**
- **Agreement that exempted equitable claims from arbitration requirement meant that equitable claims could be brought directly to court.**

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.

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RECENT CASE SUMMARIES

In **Gloria Dianne and Freddie Wingate vs. Adrian and Charline Wingate**, 37 Fla. L. Weekly D776a (Fla. 1st DCA, April 2, 2012), Adrian and Charline Wingate (hereinafter "Appellees") petitioned the court to remove all speed bumps installed by Gloria Dianne and Freddie Wingate (hereinafter "Appellants") on the passageway and easement at issue. Appellees in their petition filed in May 2010 alleged that (1) they possess and occupy a residence adjoining Appellants' property; (2) on February 1, 1999, Appellants granted and recorded an easement over and across their property, providing ingress and egress to Appellees; (3) around October 21, 2009, Appellants willfully and intentionally placed speed bumps across a paved portion of the easement, which Appellees use to gain access to their residence; (4) Appellees' right to use this private easement is the same as the right of any other owner with permission to use the easement; (5) Appellees' right is substantially diminished by the speed bumps; and (6) the speed bumps are dangerous to drivers and their passengers and have damaged vehicles passing over the speed bumps. Appellees sought a permanent injunction restraining Appellants from keeping the speed bumps on and across the easement. In their response, Appellants acknowledged the existence of the easement and admitted placing the speed bumps. Appellants also asserted that the passageway sustained heavy traffic, that some motorists used excessive speed, and over time, that the posted speed limit signs were regularly ignored. Appellants denied that the speed bumps are dangerous and/or diminish Appellees' rights. At the hearing on Appellees' motion for summary judgment, Appellees' counsel argued that the speed bumps, by their very nature, impede ingress and egress along the easement and must be removed. Appellants' counsel argued that the speed bumps provided a necessary safety function to reduce speed and did not constitute an impairment of the easement. At the hearing, the trial judge acknowledged that a factual question may arise as to whether the speed bumps are a substantial impairment. However, the court granted the injunction and ordered the speed bumps removed. On appeal to the First District Court of Appeal, the appellate court noted that summary judgment could not be granted if there remained any material issues of disputed fact. The appellate court noted that the parties admitted that a valid easement right was created giving the Appellees a non-exclusive right-of-way for ingress and egress. Next, in determining the scope of the easement, the court examined the intent of the parties in making the easement. The court noted that had the parties intended to keep the easement free of gates, signs, speed bumps, or other obstructions, they could have expressly provided as much in the easement agreement. Because the parties did not do so, there was no clear intent by which the trial court could find as a matter of law that the speed bumps violated the easement agreement. Therefore, whether the speed bumps constituted an unreasonable interference was an question of fact that could not be resolved on summary judgment.

In **Apartment Investment and Management Company, Inc. vs. Flamingo/South Beach 1 Condominium Association, Inc.**, 37 Fla. L. Weekly D631a (Fla. 3d DCA, March 14, 2012) the parties were subject to the provisions of a Reciprocal Maintenance, Use and Easement Agreement. The Agreement subjected three parcels (the North, Center, and South Towers) to various easements, restrictions and covenants that run with the land. Under the Agreement, the South Tower was allocated thirty-two percent of the parking spaces for the use of its residents and "permittees" – which were later divided into reserved and unreserved spaces. In addition, Association was permitted to charge and retain fees for the use of its allocated spaces. Association sued Management Company claiming that management company was improperly charging Association's condominium residents and their "permittees" for parking. According to Association, when a resident or guest obtains a parking pass from Management Company, Management Company charged the resident or guest and retains the fee. When Association complained, Management Company retaliated by selectively enforcing the policies governing issuance of parking permits and began aggressively exercising its right to tow unauthorized vehicles. Management company moved to dismiss the complaint and to compel arbitration as required under the Agreement. The trial court denied Management Company's demand to compel arbitration. On appeal to the Third District Court of Appeal, the appellate court affirmed and found that pursuant to the clear language of the Agreement, the parties intended that a "court of competent jurisdiction" would be allowed to grant equitable relief on a preliminary or permanent basis. Because the parties intended to exempt equitable claims from arbitration, and the complaint seeks only equitable relief, all of the claims may be resolved by the trial court without requiring resolution by arbitration.

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