Community Counsel

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RECENT CASES

- Mobile Home Park Owner not liable for death of resident by multiple fire ant bites, as they are wild animals indigenous to the land and not under control of owner.
- Resident failed to show that emotional support dog was a reasonable accommodation needed to support his fiancée's unproven handicap.

THE ROUGH AND TUMBLE OF PRIORITIES

At the very end of the last legislative session a bill died that would have "clarified" some provisions of the HOA and Condo Acts relating to foreclosures and what expenses lenders with superior liens might have liability for. Some attorneys argue that the 12 month or one percent cap imposed by Sections 718.116 and 720.3085, Fla. Stat. are limited to liability for assessments, but are silent on liability for items such as late fees, interest, collections costs and – most significantly – attorney's fees. I say significantly because the attorney's fees are the largest amount of any of these items and some law firms have used this argument to collect fees from foreclosing lenders.

While that is all well and good for the law firms involved, the associations being represented really see little or no benefit from these fees, so the argument can be seen as a dispute between lenders and associations attorneys.

Some of us think the argument needs to be re-framed to address more important issues. If lenders want relief from non-assessment costs, then they need to be prepared to act more responsibly then they have been. It is both unrealistic and unfair to expect associations to maintain the banks' collateral while the bank disavows any responsibility to preserve its own collateral before it acquires title. Thus, one proposal to lenders for further limiting liability to associations is to make them responsible for their collateral at an earlier time, say when they commence a mortgage foreclosure action.

If lenders balk at this potentially unlimited expense, especially given the time that mortgage foreclosures can take to complete, then another proposal that has been put forth is to have lenders agree to a statutory change that would make the association's lien in the rental income generated by units and homes superior to the lender's mortgage lien until a mortgage foreclosure has been completed. This would provide associations an incentive and a potential source of revenue from which to cover not only unpaid assessments but the costs of preserving abandoned property. This proposal makes sense, especially since so few lenders seeks to levy on rental income during mortgage foreclosure matters.

Another proposal is to impose fees and costs to varying degrees depending in how long a lender takes to complete a mortgage foreclosure. The longer a case takes to complete the more liability they would have to an association. This would discourage lenders from engaging in the all too common practice of dismissing and then refilling suits as a way of delaying reaching a final conclusion in a case.

As we write talks between lenders – and association go on. The game has begun and all sides are scrimmaging.

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RECENT CASE SUMMARIES

In **Hanrahan vs. Hometown America, LLC, et al.,** 37 Fla. L. Weekly D1444b (Fla. 4th DCA, June 20, 2012) Resident sued Mobile Home Park Owner for the wrongful death of her husband, who died of fire ant bites. Resident alleged that the Park Owner had a duty to guard against fire ants, that Park Owner violated this duty, and that as a result Resident's husband died of fire ant bites. Resident's husband took his dog for a walk one evening. He rushed back home telling his wife that ants were biting his face and neck. He also told his wife that he "brushed up against the bushes" and "they must have come from the bushes because they did not climb up his legs." He attempted to wash off the fire ants, but collapsed on the shower floor. He died two days later. According to Resident, the only bushes that he could have touched while walking his dog would have been in a particular common area of the mobile home park. The manager testified that she was not aware of any resident ever being attacked by fire ants anywhere on the property. She was also not aware of any fire ant infestation where the event allegedly took place. An exterminator testified that fire ants are "wild animals" whose natural habitat is outdoors in South Florida. He further testified that permanent eradication of fire ants from a property would be "an impossibility." Maintenance personnel for the park testified that they would treat visible ant mounds with granules. Occasionally, while trimming bushes, several members of the maintenance staff had been bitten by ants in the past. The trial court granted summary judgment in favor of the Park Owner. The trial court found that Park Owner was not on notice of a fire ant infestation at the area of the alleged incident, and therefore he did not have a duty to Resident to guard against fire ants. On appeal to the Fourth District Court of Appeal, the appellate court noted that "…. 'animals of a wild nature or disposition,' *ferae naturae,* is a common law doctrine tracing its origins back to the Roman empire whereby wild animals are presumed to be owned by no one specifically but the people generally." In Florida, the law does not require the owner or possessor of land to anticipate the presence of or guard an invitee against harm from animals *ferae naturae* unless such owner or possessor has reduced the animals to possession, harbors such animals, or has introduced onto his premises wild animals not indigenous to the locality. In affirming the trial court, the appellate court noted that the presence of the fire ants was not caused by any act of Park Owner to bring them onto the property, Park Owner did not harbor, introduce, or reduce the fire ants to possession, and finally Park Owner regularly attempted to treat mounds or any other manifestations of fire ants.

In **Sun Harbor Homeowners Association, Inc. vs. Bonura**, 37 Fla. L. Weekly D1398a (Fla. 4th DCA, June 13, 2012) Association was a townhouse community which had a "no dogs allowed" policy. Owner owned the townhouse in which he lived with his fiancée and her dog. Association filed suit for declaratory judgment and an injunction requiring the removal of the dog. Owner responded by filing an answer and a counterclaim alleging that Association's actions in trying to have the dog removed were in violation of the Fair Housing Act because Owner's fiancée suffered from a disability, thus entitling her to a reasonable accommodation for the use of an emotional therapy dog. Owner alleged that Association was on notice that his fiancée suffered from a disability. Relevant to the appeal and prior to filing the counterclaim, neither Owner nor his fiancée filed a complaint with the Florida Commission on Human Relations. Association responded denying liability and affirmatively alleging that Owner never requested an accommodation; that there was no nexus between the alleged disability and any assistance provided by the alleged service animal; that the dog was not an individually trained service animal; that Owner produced no evidence that an accommodation was necessary; and that Owner failed to comply with conditions precedent to pursue a claim under Florida law. The trial court ruled in favor of Owner. On appeal to the Fourth District Court of Appeal, the court noted that the "no dog" provision was contained in the recorded declaration of covenants and restrictions pursuant to an amendment to the declaration recorded in 1997. Owner purchased his unit in 2009, after the amendment was recorded. About a month after buying the unit, Owner's fiancée brought her dog into the unit. Shortly thereafter, Association sent a demand to Owner to remove the dog. After several more demand letters, Owner finally responded through his attorney admitting that the dog resided with them, that it belonged to his fiancée, and that it was a "registered service dog" needed to assist his fiancée with an unspecified disability. Owner demanded an accommodation based upon this letter. Association responded that any request for an accommodation would have to be addressed by the board at a meeting and that more information regarding the disability and the need for an accommodation would have to be provided by Owner. Owner never requested to be placed on the agenda at a meeting and never produced any additional information. The appellate court found that Owner failed to establish that his fiancée was "handicapped" within the meaning of the statutes, or that a reasonable accommodation was necessary. Therefore, the appellate court reversed the trial court and remanded the case to the trial court to enter judgment in favor of Association.

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