COMMUNITY COUNSEL

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RECENT CASES

- IMPORTANT DECISION PREVENTS CONDO ASSOCIATIONS FROM COLLECTING UNPAID ASSESSMENTS FROM NEW OWNERS OF UNITS ONCE IT ACQUIRES TITLE TO UNIT, EVEN IF IT DOESN'T COLLECT ANYTHING.
- VAGUENESS IN ASSOCIATION'S CONSTRUCTION DEFECT COMPLAINT DOES NOT WORK TO AVOID ARBITRATION CLAUSE IN INDIVIDUAL OWNERS' PURCHASE CONTRACTS.

AVENTURA CASE – A HOLE CALLING FOR A PATCH

We don't usually write articles about cases we brief in our newsletter, but this time we feel that further discussion of the ***Aventura*** case is warranted.

Making new owners of condominium units jointly and severally liable with prior owners of the same unit for unpaid assessments is good legislative and public policy, as it protects associations, given the limited sources of income available to these entities, while also recognizing the important function they play in caring for commonly owned residential property.

The sole express limited exception contained in the Condominium Act has been the holder of a first mortgage, when the mortgage holder acquires title to the unit. In such cases, liability is limited to the lesser of 12 months of assessments or a fraction of the mortgage amount. That exemption also makes sense as a means of encouraging the availability of purchase money mortgage financing for residential condominiums.

Now the courts have read the statute to reach an unfortunately nonsensical conclusion that guts the obvious policy considerations behind the statute. In doing so, the best that can be said of the ***Aventura*** decision is that it points out a drafting error that calls out for a prompt legislative fix.

There are at least two ways to patch this hole. The first is to add to the current statutory language, the following sentence:

The foregoing liability of a unit owner shall not apply to an association that has taken title to a unit by foreclosing upon its assessment lien hereunder, or via a deed in lieu of foreclosure, and such association shall be exempt from liability for sums which came due prior to or during such ownership.

This language would exclude the association itself from the definition of a "prior owner" for purposes of joint and several liability.

The second correction involves exempting the association from joint liability to the extent that during its ownership it has actually recovered its prior debt and any money it has had to expend to rehab the unit. That language might read like this:

However, the association shall be entitled to recover from the subsequent owner receiving the benefit thereof the actual and reasonable expenses incurred by the association, if any, of restoring the unit to a habitable and rentable condition and of preserving same, including the payment of taxes thereon and the replacement of appliances.

These fixes seem easy enough. Now the real question: does anyone really think that the Legislature will act to fix this problem? Frankly, we do not. In fact, we have been advocating for language like this for no less than *three (3) years.* The ***Aventura*** decision is no surprise to us. It is just a sign that what we have been seeking is overdue.

However, convincing legislators that this is a genuine fix and not a gift is surprisingly hard. Many do not understand the policy behind the original statute. Until they do, foreclosure and ownership by the association will create risks that should not be present when acting to prevent nonpaying owners from profiting from their nonpayment.

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RECENT CASE SUMMARIES

In **Aventura Management, LLC vs. Spiaggia Ocean Condominium Association, Inc.**, 38 Fla. L. Weekly D190b (Fla. 3rd DCA, January 23, 2013) Association initiated a lien foreclosure against Unit Owner. Association ultimately obtained a default final judgment and a foreclosure sale was scheduled for December, 2009 in its lien foreclosure action. In September, 2009 the holder of the first mortgage on the unit initiated its own foreclosure proceedings against the Unit Owner and named Association as a defendant. At the December sale pursuant to Association's final judgment in the lien foreclosure action, Association was the only bidder and took title to the unit subject to the mortgage. Association proceeded to rent out the unit. Bank subsequently obtained a final judgment of foreclosure and a second foreclosure sale was scheduled for September 2010. Appellant, Aventura, was the successful bidder at that sale and obtained title to the unit, at which point Association relinquished its ownership interest. After Aventura obtained title to the unit, Association attempted to recover from Avenura all past due assessments, late fees, and interest that had accrued since the Unit Owner defaulted. Association maintained that, as a third party purchaser, Aventura was liable under section 718.116(1)(a), Fla. Stat., which provides that a unit owner is jointly and severally liable with the previous owner for all unpaid assessments that came due up to the time of transfer of title. Aventura claimed it was not liable for the past due assessments. Aventura argued that as an intervening owner between the Unit Owner and Aventura, Association was responsible for the assessments owed by the Unit Owner. Aventura brought a declaratory judgment action seeking an interpretation of the statute, arguing that it was liable only for assessments accruing after it took title to the unit. Both parties moved for summary judgment and the trial court granted Association's motion, ruling that Association's lien did not merge with the certificate of title it was issued in connection with its lien foreclosure action, and that Aventura was obligated to pay all amounts owed on the unit. The trial court also ruled that Association was not jointly and severally liable to Aventura for any amounts. On appeal to the Third District Court of Appeal, in a split decision, reversed the trial court. The majority court decision noted that the statute clearly provides that "…. a unit owner is jointly and severally liable *with the previous owner* for all unpaid assessments that came due up to the time of transfer of title." Association was the previous owner of the unit. The statute does not state or suggest that an exception is to be made when the previous owner is the condominium association. Therefore Aventura was not liable for the unpaid assessments.

In **Pulte Home Corporation vs. Vermillion Homeowners Association, Inc.**, 38 Fla. L. Weekly D143a (Fla. 2nd DCA, January 16, 2013) Association sued Developer for construction defects arising in townhomes built by Developer. Pursuant to the declaration, Association was responsible for maintaining the "exterior" of the townhome units, including the roofs and walls. Association sued Developer as a representative of all owners. However, as part of the purchase contract, all owners agreed to submit any claims to arbitration prior to filing suit. Association's complaint was carefully crafted to avoid a specific description of the construction issues in dispute. Association alleged generally that Developer was the builder of "the common areas, roads, drainage, ponds, building exteriors, roofs, and other matters" in the community. Thus, from the complaint, it was impossible to know what defects were at issue. The trial court denied Developer's motion to compel arbitration finding that Association was not a party to the sales agreements between the owners and Developer. On appeal to the Second District Court of Appeal, the appellate court reversed the trial court. The appellate court found that on the pleadings before it, it appeared that Association was raising claims on behalf of townhome owners related to the construction of the townhomes, for which arbitration would be required. However, the appellate court left open the possibility that Association could amend its complaint to clarify the exact nature of the alleged defects and, to the extent these defects were defects in the common areas, then Association could not be compelled to arbitrate the claim because Association never entered into an agreement with Developer to arbitrate these types of claims.

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