COMMUNITY COUNSEL

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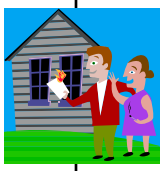
HB 87—BOOM OR BUST??

House Bill 87 represents a set of proposals that have been kicking around since last year. With some touch-ups the bill passed again in 2013 and is now awaiting action by the Governor. He is supposed to act on it by June 12, 2013, and there are calls from both side of the consumer mortgage foreclosure issue for him to take wildly divergent action on the bill. Senator Darren Soto, for one, demands that he veto the bill and some say that suit will be filed to challenge its constitutionality the moment he signs it. Others, including some notable community association practitioners feel it is a good bill that benefits their clients. So which is it? Here is what this bill does:



1. It shortens the statute of limitations on actions to seek a deficiency judgment against a delinquent borrower following a mortgage foreclosure action from five years to one year with a phase-in period. This is not a major concession, especially since the bill also limits the size of any possible deficiency judgment on residential property.

2. It sets out in great detail, like a roadmap for a lender, the allegations that must be made in the foreclosure lawsuit concerning the status of the party bringing the action and its authority to do so, as well as its relationship to the promissory note on which the debt is based and the documents that must be filed in the case. However, the filing of original instruments must occur before the entry of final judgment, meaning that the case can proceed without production of the original instruments at the outset of the case. In this regard, the bill is a big help to the lenders.

3. It creates a procedure for allowing a case to proceed based on a lost or destroyed note or other instrument, using copies and sworn affidavits, with provision for both supplying "adequate protection" and for "sanctions" for failure to comply. But that does not mean that the foreclosure may not occur anyway.

4. It prevents a foreclosure sale to an unrelated third party from being overturned and the property recovered after a properly served lawsuit and after all appeals have run and it will treat any later challenge as a claim for money damages.

5. It permits a community association to request an order to show cause for entry of a final judgment. At first blush this would appear to allow the association to speed the foreclosure to a conclusion and this accelerated process is what is favored by the bill's community association supporters. However, there are many obstacles to getting to the finish line, not the least of which are the rights of the property owner, who is free to contest the case and slow it right down again. The court's order to show cause must contain a list of rights available to the home owner and this may prompt the exercise of those rights, thereby making the truncated process illusory.

On balance the bill heavily favors lenders by providing a way of avoiding the legal pitfalls that lenders have experienced over the past five years. It throws a minor bone to homeowners in the form of limited protections from the already limited liability they face for deficiency judgments, and it throws a procedural bone to community associations in the form of an accelerated process that is designed to pit the community associations against the homeowners in a procedural death match.

RECENT CASES

- IN A DECISION THAT CONFLICTS WITH THE *ALORDA* CASE OF LAST YEAR, COURT FINDS THAT HOA ACT PROVIDES A BASIS TO ENJOIN VIOLATIONS OF DECLARATION.
- ABSENTEE BALLOTS ARE NEITHER WRITTEN CONSENTS NOR PROXIES FOR PURPOSE OF BYLAWS REQUIRING THAT VOTES BE CAST IN PERSON, BY PROXY OR BY WRITTEN CONSENT, AND AS SUCH THEY CAN NOT BE COUNTED.

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 **Neuteleers, et al., vs. Patio Homeowners Association, Inc.,** 38 Fla. L. Weekly D1023a (Fla. 4th DCA, May 8, 2013) Association filed suit against Owners to compel Owners to provide proof of insurance. The complaint alleged that the declaration and protective covenants for Association required proof of property and hazard insurance for all members of Association, and that Owners had failed to provide a copy of said insurance. Association sought an injunction to compel appellants to provide proof of insurance, and also sought attorney's fees and costs in connection with bringing the complaint. One of the Owners filed an answer to the complaint. The other Owner was defaulted by the court. Association moved for summary judgment against both Owners. The trial court granted the motion, enjoining Owners from their continued violation of the insurance provisions and compelling them to provide proof of insurance to Association. Nine months later, Association's president filed an affidavit stating that Owners had failed to comply with the terms of the final judgment by providing proof of insurance. Nearly a year after the final judgment was entered, Owners sought to vacate the final judgment on the grounds that it failed to state a cause of action, that Association did not have the authority to bring the action, and that Association violated the declaration by failing to provide notice to Owners prior to filing suit. Association moved to strike the motion, and the matter was set for hearing. The trial court denied the motion to vacate the final judgment and subsequently entered an order assessing attorneys' fees against Owners. On appeal to the Fourth District Court of Appeal, the appellate court noted that a failure to state a cause of action may be fatal to a complaint and may render void a default final judgment based upon the complaint. However, because one Owner filed an answer without raising this defense, that Owner waived the claim that the complaint failed to state a cause of action. As to the other Owner, the appellate court held that the complaint did in fact state a cause of action for an injunction and Association was entitled to bring the action by, at a minimum, the terms and provisions of Section 720.305, Fla. Stat. Therefore, the appellate court affirmed the judgment of the trial court, including the assessment of attorneys' fees in favor of Association.

In **Berkovich vs. Casa Paradiso North, Inc.,** 38 Fla. L. Weekly D1174a (Fla. 4th DCA, May 29, 2013) a dispute arose between Association and Owner over the validity of amendments to the bylaws limiting the length of tenancies. In 2005 the board sent out ballots for four proposed bylaws changes; the votes were to be counted at the May 5, 2005 meeting. One of the four amendments included a provision to restrict the leasing of units to only six months per year. The bylaws provided for amendments to be made *". . . at any duly called meeting of the members, provided. . . . three-fourths of the entire membership vote for the amendment at a called meeting, or give their consent thereto in writing*." Fifty percent of the total number of members of the corporation, present in person or by proxy, shall be requisite and shall constitute a quorum at all meetings of the members for the transaction of business. The certificate of incorporation stated that the bylaws *". . . shall only be altered, rescinded or amended with the approval of three-fourths of the entire membership obtained by written consent, or at a meeting called for such purpose.*" Thirty members needed to be present or represented by proxy to establish a quorum. At the May 5, 2005 meeting, fourteen unit owner representatives and six limited proxies attended. Association's unit owners submitted 51 absentee ballots. The board counted 53 votes (including the absentee ballots and in-person votes) in favor of amending the bylaws, including the six-month lease limitation. Owner took title in September 2005 and later learned of the amendments. In March 2009 Association sued Owner to enjoin Owner from renting his unit to a tenant who had resided there for more than six months. Owner filed a counterclaim against Association alleging, among other things, breach of fiduciary duty by enacting a lease restriction despite knowing it lacked the requisite quorum. Owner also sought relief with respect to the improperly passed amendment. The trial court ruled in favor of Association on Owners' counterclaim for declaratory relief, but denied Association's motion on its claim for injunctive relief. On appeal to the Fourth District Court of Appeal, the court noted that the bylaws required at least 50% of the members present "in person or by proxy." The appellate court noted that Owners must be present "in person or by proxy." The bylaws did not permit Owners to attend by absentee ballot. The court also noted that a "ballot" is not a written consent because it does not identify the person giving consent and include their signature. Instead, a ballot is anonymous and cannot be considered a written consent. Nor is an absentee ballot a proxy because the person casting it is not present. The absentee ballots should not have been counted.

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