COMMUNITY COUNSEL

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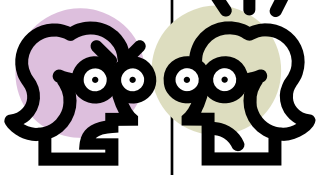
WHAT IS WRONG WITH PRESUIT MEDIATION?

Early word on the street is that in 2014 a proposal will be made to the Florida Legislature to ditch mandatory presuit mediation in HOAs in favor of mandatory presuit arbitration conducted by the Florida Division of Condominiums. This is the latest salvo in an ongoing effort to regulate HOAs just like Florida condominiums, and to do this each HOA would be charged the same $4.00 per door that condos currently pay. This would have the effect of raising considerable cash for state coffers and that may be enough to overcome objections to the growth of government and the added expense of regulating tens of thousands of new community associations.



This is the second such attempt in the past several years and it raises the dual questions, just what is wrong with the current system of mandatory presuit mediation under Section 720.311, Fla. Stat., and would state-run arbitration be better? In two words, the answers are nothing and no.

Arbitration is a system where non-judicial personnel act like judges and make decisions in cases. Mediation is a facilitated negotiation between competing parties. We have long maintained that a negotiated settlement based on voluntary compromise is better for neighborhood tranquility than a system that declares winners and losers, and mediation is infinitely faster at reaching a resolution. In addition, while the expense of the arbitration process would be borne by all taxpayers, the parties to a mediation negotiate the sharing of the costs of the process between themselves. Finally, mediations statewide have a success rate well over 75%. So why are some people so keen to do away with mediation? In a word, money.

Section 720.311 contemplates an initial sharing of the costs of the mediation, subject to negotiation as part of the process. Depending on the hourly rate and requirements of the selected mediator (usually chosen by the homeowner as the responding party) this may require each party to hand over several hundred dollars prior to the start of the mediation session.

In contrast, under the current condo arbitration system, a responding owner pays nothing unless and until the association wins, at which time the prevailing party may be awarded its attorneys fees and costs. Thus, the initial costs to a homeowner are greater in mediation, although this ignores the far higher fees and costs the owner becomes liable for in arbitration if the association prevails. So is there really an advantage to changing the system from mediation to arbitration? We think not.

Indeed, we strongly suspect that the entire issue might go away once and for all if the mediation statute were amended to require the association to pay all or most of the cost of the mediation initially. Making this change would more equate the two systems in terms of the initial costs to homeowners, and after all it is homeowners, not associations, that vote in elections.

This may be a cynical position, and admittedly it ignores the long term aim of those who want to keep condos and HOAs in regulatory lock step, but we suggest that the real issue here is not the type of system used to resolve disputes. This is because no one has yet produced empirical data showing that arbitration is a superior problem solving system for community associations.

RECENT CASES

- BY PARTICIPATING IN THE CASE ASSOCIATION WAIVES LATER CLAIMS THAT CASE WAS IMPROPER FORUM TO ADJUDICATE THE ISSUES.
- DOCUMENT INTERPRETATION BASED ON USE OF A STRUCTURE PRECLUDES ENTRY OF JUDGMENT IN ABSENCE OF EVIDENCE OF PLANNED USE. WORDS USED ARE GIVEN THEIR ORDINARY MEANING AND AMBIGUITIES RESOLVED IN FAVOR OF FREEST USE OF PROPERTY.

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RECENT CASE SUMMARIES

In **Ocean Bank vs. Caribbean Towers Condominium Association, Inc.**, 38 Fla. L. Weekly D1726a (Fla. 3d DCA, August 14, 2013) Bank appealed the denial of its request for attorney's fees from Association. Bank brought foreclosure actions against two condominium unit owners. Bank named Association as a defendant in the foreclosure cases because Association had liens for unpaid assessments. Bank ultimately obtained foreclosure judgments and subsequently purchased the condominium units at the foreclosure sale. The dispute underlying Bank's claims for attorney's fees concerned the extent of Bank's liability to Association for unpaid assessments after purchasing the condominium units at the foreclosure sales. Section 718.116(1)(b), Fla. Stat., capped Bank's liability for condominium assessments at no more than one percent of the original mortgage debt. Notwithstanding this statutory cap, Association demanded unpaid assessments far in excess of the statutory cap. Association's repeated demands for payment of the liens in excess of the statutory maximum force Bank to delay closings on the resale of the units. Seeking a speedy and inexpensive resolution of the dispute, Bank filed post-judgment motions in the foreclosure actions against Association requesting the application of the statutory cap to the liens and an award of attorneys' fees pursuant to Section 718.301, Fla. Stat. Both trial judges ruled in favor of Bank in each of the foreclosure actions. However, both judges denied an award of attorneys' fees. On the consolidated appeal, Association argued that the denial of fees should be upheld on the basis that the trial courts lacked subject matter jurisdiction to entertain Bank's motions in post-judgment proceedings, because the substantive motions raised issues not strictly within the four corners of the foreclosure proceedings. On appeal, the appellate court declined to rule on the issue of whether Bank was procedurally barred from requesting post-judgment relief because it held that Association waived the issue in the unusual posture of the appeal. Having accepted the post-judgment process as a proper forum to decide the merits of the disputes over unpaid assessments (by not appealing or cross-appealing the decision on the merits), Association cannot now argue that the post-judgment proceedings were in an improper forum.

In **Heleski vs. Harrell, et al.,** 38 Fla. L. Weekly D1860a (Fla. 2d DCA, August 30, 2013), Heleski began building a structure on the property in Association without notifying or getting approval from Association. The structure was 24 foot by 24 foot and is separate from the main house. Harrell, who is a neighbor of Heleski, complained to Association that the structure was in violation of the neighborhood's deed restrictions. When Association approved the structure, Harrell filed an action in circuit court to prohibit the construction. The trial court granted summary judgment in favor of Harrell and prohibited Heleski from building the structure. Heleski appealed the trial court's decision to the Second District Court of Appeal. The appellate court noted that the general rule in Florida is that a reasonable, unambiguous restriction will be enforced according to the intent of the parties as expressed by the clear and ordinary meaning of its terms. The court must give effect to the commonly understood meaning of the terms used in the deed restrictions. Restrictive covenants are not favored and are to be strictly construed in favor of the free and unrestricted use of real property. Any doubt as to the meaning of the words used must be resolved against those seeking to enforce. In this case, the dispute centered upon the language of the restriction related to "garages" and "outbuildings." The restrictions contained specific requirements for "garages", but the only requirement for a "utility building" was obtaining approval of Association. Neither "garage" nor "outbuilding" is defined in the restrictions. The dictionary defines "outbuilding" as " … a building separate from but associated with a main building," and a "shed" as a "… small structure, either freestanding or attached to a larger structure." A "garage" on the other hand, is defined as a "… building or indoor space in which to park or keep a motor vehicle." The trial court determined that the structure was a prohibited garage and that there "… is simply no way a garage may fit within the definition of "outbuilding" as that term is used" in the restrictions. On appeal however, the appellate court noted that the fact that Heleski had referred to the structure as a "garage" does not conclusively establish that it is actually a "garage" and the record was unclear how Heleski intended to use the structure. If the structure would be used to park vehicles, it would likely be considered a prohibited garage. If, however, the structure would be used for storage, it would probably fall within the definition of "outbuilding" and would be permitted with association approval. Because of the existence of this unresolved issue of fact, the appellate court reversed and remanded the case to the trial court to resolve this disputed issue of fact.

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