

COMMUNITY COUNSEL

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RECENT CASES

- ◆ COURT ENFORCED AN ASSIGNMENT OF DEVELOPMENT RIGHTS AGAINST SUBSEQUENT DEVELOPER AND REFUSED TO ALLOW DEVELOPMENT OF LAND PROMISED TO ASSOCIATION AS COMMON PROPERTY.
- ◆ COURT LACKS POWER TO SANCTION BANK'S DELAY BY MAKING INFERIOR ASSOCIATION LIEN SUPERIOR TO BANK'S FIRST MORTGAGE LIEN.

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.

END OF THE "PROTECTING TENANTS IN FORECLOSURE ACT"

On December 31, 2014, the Federal Protecting Tenants at Foreclosure Act expired. The 2009 law protected tenants from immediate eviction when the property they were renting changed owners pursuant to a foreclosure action. Under the law, any party taking title at a foreclosure sale was required to provide a 90-day notice to vacate, or permit the tenants to stay until the end of their written lease. The Act was originally scheduled to expire in 2012, but was extended as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act. There were bills in both the House and Senate to permanently extend the Act, but those were not voted on by Congress, and will likely not be revived by the new Congress.

Many Associations have taken advantage of slow-moving mortgage foreclosure cases and taken title to properties as part of their own lien foreclosure actions. They have been able to generate rental income from these properties. When the Association chooses to become a landlord of a property subject to a superior mortgage, it is important to keep the line of communication open with your tenant.

First, make sure that your tenant is fully aware that they are renting a property subject to foreclosure. We recommend that your lease agreement contains a foreclosure disclosure agreement so that the tenant is aware that the Association's ownership of the property and their ability to rent the property is temporary, dependent upon the completion of a superior mortgage foreclosure case.

Second, discuss any major developments in the mortgage foreclosure with your tenant. Do not rely on the bank to keep your tenant informed of the status of the case. Even though copies of the pleadings may be sent to the property, it is important that you, as the landlord, notify your tenant of any changes that could affect their lease. You should inform them when a Final Judgment is issued and advise them of any upcoming foreclosure sale dates or cancellations. Remember, the Association will maintain ownership of the property until at least 10 days after any sale. Ownership of the property is not transferred until the Certificate of Title is issued.

Finally, remind your tenant that although you may provide them with information concerning the foreclosure action, they should contact their own attorney to learn their rights and protect themselves. We cannot be certain at this time how the expiration of this Act will impact tenants affected by foreclosure. Until we have a better idea of how the banks will respond, it is best for tenants to be prepared for possible eviction soon after the Certificate of Title is issued.

By communicating with your tenant, you protect the Association's interests and increase the Association's chances for a successful financial investment. Please contact our office if you need any assistance with leases, landlord/tenant issues—including tenant disclosures of pending foreclosure actions—and mortgage foreclosure defense.



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RECENT CASE SUMMARIES

In **Bethany Trace Owner's Association, Inc., vs. Whispering Lakes I, LLC, et al.**, 39 Fla. L. Weekly D2517a (Fla. 2d DCA, December 3, 2014) Association filed suit against the Subsequent Developer and Development Company claiming ownership of certain common areas as defined in the declaration of covenants and conditions. As part of the development, the original developer prepared and recorded a declaration of covenants. The declaration defined "Common Elements" to "mean those tracts, easements or areas of land shown on any recorded subdivision plat of the Property. . . . which shall include without limitation, any areas denoted thereon as common area, including any fences surrounding or within the Property and the entranceway thereof, and water management, conservation tracts and retention tracts, including, without limitation, Bethany Lake, the Lake Maintenance Area, the Park Areas, and the Conservation Area and Conservation Buffer Area. . . ." Attached to the declaration were metes and bounds descriptions of Bethany Lake (Exhibit "B"), the Lake Maintenance Area (Exhibit "C"), the Park Areas (Exhibit "D"), and the Conservation Area and the Conservation Buffer Area (Exhibit "E"). The declaration was recorded in 1994. In 2001, the original developer assigned its rights and obligations under the declaration to Subsequent Developer. In that assignment, Subsequent Developer agreed to "convey to the Association, for no further consideration and free and clear of any liens or encumbrances, those Common Areas referred to as "Bethany Lake", the "Lake Maintenance Area", the Park Area", and the Conservation Area and Conservation Buffer Area." Rather than doing so, Subsequent Developer sold the property to Development Company, which bulldozed certain improvements on them, apparently in anticipation of building additional residences in the area. Association filed suit for breach of contract, breach of covenant, and trespass. The trial court granted summary judgment in favor of Subsequent Developer and Development Company and held that the declaration's provision related to "Common Areas" applied *only* to those areas identified as common areas on a recorded plat. Association, however, argued that the definition of "Common Areas" contemplated four different types of common areas: (1) those identified on a recorded plat; (2) water management and conservation tracts, including Bethany Lake, the Lake Maintenance Area, the Park Areas, and the Conservation Area and Conservation Buffer Area; (3) improvements constructed on any of the foregoing areas; and (4) additional areas designated by the developer. On appeal, the court sided with Association and found that Subsequent Developer and Development Company's interpretation did violence to the other provisions of the declaration which required the Association to "own and maintain" the common areas and defined common expenses to include the cost of owning and maintaining the common areas. Thus, the appellate court reversed entry of the prior summary judgment in favor of Subsequent Developer and Development Company.

In **U.S. Bank National Association vs. Sides Moreno West, et al.**, 39 Fla. L. Weekly D2594a (Fla. 1st DCA, December 16, 2014) Bank filed a foreclosure action against Owner, therein naming Association as a defendant based upon Association's recorded claim of lien. The original complaint was filed in 2007. The litigation progressed slowly for several years. On September 1, 2011, upon Bank's motion to dismiss Association's counterclaim, the circuit court entered an order denying the motion to dismiss. In that order, the trial court found that Bank had delayed the case and failed to act upon it. As a "sanction", the court ordered Bank to pay Association \$2,500. In 2012, Bank filed its motion for summary judgment alleging that its interest was superior to that of all defendants, including Association. Association filed its motion to dismiss and for additional sanctions against Bank for further delay tactics. Association also sought summary judgment on its counterclaim for foreclosure on its claim of lien for the assessments and alleged that its lien was superior to any interest of bank. The trial court held that Bank's failure to pursue the litigation had been "willful, deliberate, and/or contumacious," resulting in prejudice to Association. The trial court then exercised its equitable power and authority to give Association first lien priority and declared Association's lien superior to that of Bank. On appeal, the First District Court reversed the trial court and found that the trial court's exercise of "equitable jurisdiction" to award lien priority to Association violated the common law rules governing priority of lien interests which is "first in time, first in right."

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