COMMUNITY COUNSEL

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RECENT CASES

- TENANT, WHO WAS TOLD BY THE UNIT OWNER (AT THE BEHEST OF ASSOCIATION), TO GET RID OF HER SERVICE DOG HAD MORE THAN ONE CHANCE TO PLEAD A DISCRIMINATION CASE DIRECTLY AGAINST ASSOCIATION.
- PARKING LICENSE GIVEN TO UNIT OWNER WAS REVOCABLE BY ASSOCIATION ABSENT LARGE EXPENDITURE TO PERMANENTLY IMPROVE THE PARKING SPACE.

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.

RECOVERY FROM A FIRST MORTGAGEE

The Florida Bar's Real Property, Probate and Trust Law section is just the latest group to try to bring some order to an increasingly unruly statute—Section 718.116, Fla. Stat. This statute is the collections statute, governing (among other things) liens, lien foreclosures, sequestration of rental payments, liability for unpaid back charges, and priorities between and among secured creditors of a condominium unit owner.

One troubling area arising from the wording of the statute involves the limited liability of first mortgage holders who either foreclose or accept a deed in lieu of foreclosure. The statute provides that such creditors have liability to the association for "the unpaid assessments" limited to the lesser amount of twelve months of assessments or one percent of the original mortgage principal. Some aggressive attorneys have argued that the limited liability is itself limited—i.e. that the only break a foreclosing lender gets is on the assessments — but that no break exists as to liability of a foreclosing lender for interest, costs of collection and attorneys' fees the association may incur when appearing in the lender's mortgage foreclosure action or in taking action to collect the assessments prior to the foreclosure.

However, in one case, a local circuit court has decided that no liability exists for interest, late fees, costs and attorneys' fees on the part of a successor in title to the unit owner. The court reasoned that where the stature says that a successor is jointly liable for "assessments" this does not include the types of charges referred to elsewhere in the statute. The same reasoning can apply to the similar language about lender liability to an association after a mortgage foreclosure.

Thus, while the aggressive attorneys' argument might appear correct from a very narrow reading of one part of the statute taken out of context, one court already has disagreed.

This law firm also does not agree with this interpretation, if only for the practical reason that the Association stands to gain little, if anything from the assertion of claim for interest costs and attorneys' fees against a foreclosing lender. Rather, when making this argument it is the attorney that stands to gain much, since the attorneys' fees being generated are for the purpose of collecting those same attorneys' fees.

Obviously, we wish to earn legal fees, but we cannot, consistent with our obligations to our clients, ask them to spend money that will primarily benefit only the law firm, since if the Association is completely successful in its argument, it stands to be reimbursed for its attorneys' fees and little else by way of interest and late fees. In other words, we feel that an association should not pursue legal action that provides it with no benefit. We think far too many lawyers and debt collectors are pursuing non-assessment debt largely to benefit themselves.

It will not be too long before the debate is over and a court will clearly hold that lenders have no liability to associations beyond the limited assessments provided for in the statute and we welcome such a decision to prevent parties from exploiting associations for their own enrichment.

WEAN & MALCHOW, P.A.
646 EAST COLONIAL DRIVE, ORLANDO, FLORIDA 32803
TEL: (407) 999-7780 FAX: (407) 999-LAW1 E-MAIL: W-M@WMLO.COM
WWW.WMLO.COM

RECENT CASE SUMMARIES

In **Fowler vs. Paradise Lakes Condominium Association, Inc.**, 39 Fla. L. Weekly D402a (Fla. 2d DCA, February 19, 2014) Owner rented his unit to a Tenant who was visually impaired. Tenant had a Labrador Retriever as a service animal. After Tenant occupied the unit, Association sent a letter to Owner, as her landlord, notifying him that the Labrador was an oversized pet in violation of Association's rules and regulations. Association told Owner to "address the situation immediately." Allegedly, Owner advised Tenant that she must either give up the service animal or move from the unit. In response, Tenant provided Owner with documentation that included her agreement with Southeastern Guide Dogs, Inc., from whom Tenant obtained possession of the Labrador. About two weeks later, Tenant checked with Association's manager, who demanded further proof of her disability and need for a service animal. Tenant apparently provided no additional proof, and Association did not withdraw its notice that Owner was in violation of the regulations. At this point in the stalemate, Tenant filed suit against Association alleging that Association violated the Fair Housing Act. Tenant sought declaratory relief as well as monetary damages. Association responded with a motion to dismiss claiming, among other things, that Association never notified tenant that she could not reside in the unit. The trial court granted Association's motion to dismiss. On appeal to the Second District Court of Appeal, the appellate court noted that the dismissal was against Tenant's first complaint. Therefore, dismissal of the complaint without leave to amend was improper. As such, the appellate court reversed the trial court and remanded the case to permit Tenant to file an amended complaint.

In **Keane vs. The President Condominium Association, Inc.**, 39 Fla. L. Weekly D402c (Fla. 3d DCA, February 19, 2014) Owner purchased his condominium unit in 1998. Shortly after purchasing the unit, Owner paid Association an additional $5,000.00 for an extra parking space. To memorialize Owner's parking space arrangement, Owner and Association entered into a license agreement which granted Owner a "*license. . . . for the use and all rights and benefit of the parking space specifically delineated and described" in the attached exhibit "A*". The license was also subject to all of the rules and regulations of Association as they may exist from time to time. The parking space license was signed by the property manager on behalf of Association. Nearly ten years later, in 2009, Association, through its attorney, sent written notice to Owner purporting to revoke the license. Owner filed suit seeking a declaratory judgment in count one, removal of the board in count two, intentional interference with a contract in count three, and for civil conspiracy in count four. Owner sought a declaratory judgment, essentially alleging that Association had wrongfully revoked Owner's parking space license. The trial court entered summary judgment against Owner on all four counts of the complaint. With respect to count one, seeking declaratory judgment, the trial court held that the parking license was correctly revoked by Association and that the revocation was proper in all respects, as any rights Owner had pursuant to the parking license were personal to him and revocable by Association. On appeal to the Third District Court of Appeal, the parties stipulated that the "Parking Space License" is a license as opposed to an easement or a lease. The court noted that the law is well-established in Florida that a license is generally revocable at the pleasure of the grantor. Unlike a lease or an easement, a license is not an interest in real property; it merely gives one the authority to do a particular act on another's land. Therefore, the parking space license was revocable at the will of Association and Association properly revoked it. The appellate court further recognized that the narrow exception to the "revocable at will" rule did not apply in this case. The exception to the rule requires that permission be granted to use the property for a particular purpose, *and* in the execution of that use the permittee has expended large sums or incurred heavy obligations for its permanent improvement. Here, although Owner paid a substantial sum for the license, there was nothing in the record to evidence that Owner expended a substantial sum of money to improve the parking space so as to make the exception relevant.

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TEL: (407) 999-7780 FAX: (407) 999-LAW1 E-MAIL: W-M@WMLO.COM
WWW.WMLO.COM