COMMUNITY COUNSEL

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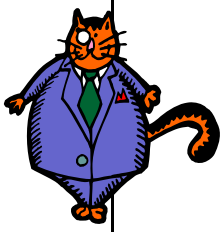
RECENT CASES

- THE RIGHT TO HAVE A DOG AS A REASONABLE ACCOMMODATION FOR A HANDICAP IS NOT TRANSFERABLE FROM A DECEASED OWNER TO HIS SUCCESSOR DAUGHTER.
- THE RIGHT OF A CONDO ASSOCIATION TO GAIN ACCESS TO A UNIT MUST BE SHOWN TO BE BOTH WITHIN ITS POWERS AND REASONABLE. REASONABLENESS WILL ALMOST INVARIABLY INVOLVE ISSUES OF FACT REQUIRING A TRIAL.

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.

THE – AHH – FAT CAT HAS SUNG — PART I

The Florida legislature has ended its 2014 regular session. It passed three (3) bills of note that are relevant to community associations. They are HB 807, HB 7037 and SB 440. It appears very likely that each will become law, so a survey of each is appropriate at this time.



SB 440 is the easiest to summarize. Its sole purpose is to draw a distinction between residential and commercial condominiums when it comes to determining whether the provisions of the Florida Condominium Act apply to the latter. It does this by inserting phrases such as "in a residential condominium" or "except in a non-residential condominium" or their equivalents in various places throughout the Act. In so doing it seems to set up a wild west, anything goes environment for commercial condos, even to the extent of permitting convicted felons to qualify to serve on the board of directors in non-residential condominiums.

HB 7037 is the somewhat anti-climactic result of the latest death struggle between community association management companies and law firms over what constitutes the practice of management/law. This bill will allow managers to engage in:

... determining the number of days required for statutory notices [i.e. ***counting****], **determining amounts due** to the association, **collecting** amounts due to the association before the filing of a civil action, **calculating the votes** required for a quorum or to approve a proposition or amendment, **completing forms** related to the management of a community association that have been created by statute or by a state agency, **drafting meeting notices and agendas**, calculating and preparing **certificates of assessment and estoppel** certificates, responding to requests for certificates of assessment and estoppel certificates, **negotiating** monetary or performance terms of a contract subject to approval by an association, **drafting prearbitration demands**, **coordinating or performing maintenance** for real or personal property and other related routine services involved in the operation of a community association, and **complying with the association's governing documents** and the requirements of law as necessary to perform such practices ...* (Emphasis supplied)

We suspect that both sides can and will live with this result - at least until the Florida Supreme Court has its say since it is the final authority on what constitutes the practice of law. The only real controversy is that the bill allows managers to disavow liability for their ordinary negligence - something that attorneys cannot do. We suspect this is not the end of this issue.

Finally, HB 807, the so-called association omnibus bill, does not break a lot of new ground, although it does chip away at some prominent protrusions. It condones the use of emails, although not to vote. It permits the publication of members' phone numbers in community directories, but puts the burden on the member to opt-out. It also allows the members to opt-in to disclose additional personal information. It permits associations to enter units that have been "abandoned," which the bill defines as having no activity without notice of the occupant's absence for one month if the unit is in foreclosure or two months if there is no pending foreclosure. *Continued Next Month*

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 **In Re: Petition for Arbitration of Bridgeview Association, Inc., vs. Donath**, Case No.: 2013-00-2607 (Order Lifting Abatement and Summary Final Order, November 7, 2013), Association filed an action against Owner seeking removal of a dog from the unit. Association had a strict "no pets" policy. Owner inherited the unit and the dog from her deceased father. Association allowed the dog to live in the unit with the father prior to his death as a reasonable accommodation for his verified disabilities. Owner claimed that she now needed the dog as a reasonable accommodation for her unspecified disabilities. Owner also claimed that Association waived its right to seek removal of the dog when it allowed the dog to live in the unit with Owner's father prior to his death. Owner's discrimination claim filed with HUD resulted in a finding of no cause. The arbitrator held that Association's compliance with the Fair Housing Act in allowing the father to keep the dog in the unit did not act as "waiver" of Association's right to enforce the declaration. Owner was ordered to immediately remove the dog from the unit.

In **Small vs. Devon Condominium B Association, Inc.**, 39 Fla. L. Weekly D698a (Fla. 4th DCA, April 2, 2014), Owner purchased her unit in 1989. Initially, Association did not provide pest-control services, but later offered them as an optional service. Owner accepted those services until being diagnosed with a breathing disorder. Owner's doctor recommended against the use of chemical pesticides. Thereafter, Owner advised Association that she no longer desired the pest-control service, and Association stopped spraying her unit from 2005 through 2009. During that time Owner used an alternative method of pest control. In 2009 Association demanded access to Owner's unit to perform pest-control services and Owner refused access to Association. Association filed a petition for mandatory non-binding arbitration seeking access to the unit. Owner did not timely answer the petition, resulting in a default in favor of Association. The arbitrator ordered Owner to allow access to the unit each month to perform pest-control services. Owner filed a complaint for *trial de novo*. Association answered, asserted various affirmative defenses, and filed a counterclaim for breach of contract, injunctive relief, and a request to uphold the arbitrator's award. Owner answered the counterclaim and pled lack of authority, waiver, and estoppel as affirmative defenses. Association moved for summary judgment. Association argued that Section 718.111(5), Fla. Stat., and Association's declaration of condominium provided Association with a legal right to enter all units for necessary maintenance. Owner responded with an affidavit attesting to her medical condition and the circumstances surrounding her cancellation of the pest-control services, as well as an affidavit from her treating physician. At the hearing, Association argued that it had an irrevocable right to access Owner's unit pursuant to both the Florida Statutes and its declaration. Owner responded that a factual issue remained as to whether Association's demands were reasonable and necessary, and summary judgment should be denied. The trial court granted Association's motion for summary judgment. The trial court's order provided for Association to "have access to the unit for preventative services– chemical free pesticides." Owner could provide a non-chemical pesticide or vendor, or Association would have "the right to service with a chemical free pesticide." Both parties moved for attorneys' fees. Association argued that it prevailed because it succeeded on the access issue. Owner argued that she prevailed because the trial court altered the arbitration order in her favor by now requiring the use of non-toxic, chemical free pesticides. The trial court found that Association prevailed and awarded it attorneys' fees. On appeal to the Fourth District Court of Appeal, Owner argued the trial court erred in granting summary judgment because an issue of material fact existed as to whether Association's demands were reasonable and necessary. Association responded that whether its actions were reasonable and necessary is not material, and, nevertheless, its actions were necessary and reasonable to prevent a pest infestation that may spread to the common elements. Owner asserted that Association had no legitimate need for access to her unit and that Association failed to demonstrate the necessary conditions for access. The appellate court noted that it had previously adopted a two part test to determine the validity of similar Association decisions. The action must be (1) within Association's authority and (2) reasonable. Given that Owner had lived in the unit for several years without pest service provided by Association, and there was no evidence of a pest problem in 2009, there was a genuine issue of material fact as to the necessity of Association's actions. And, considering Owner's health risks, there was a genuine issue of material fact about the reasonableness of Association's actions. The appellate court reversed summary judgment, as well as the attorneys' fees judgment entered pursuant to the entry of that judgment.

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