COMMUNITY COUNSEL

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RECENT CASES

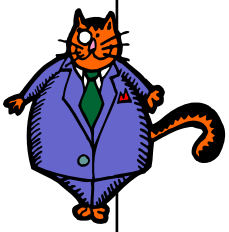
- CONDO PRE-ARBITRATION NOTICE DEFECTIVE WHEN IT WAS GIVEN UNDER THE HOA PRESUIT MEDIATION STATUTE INSTEAD.
- BUYER AT LIEN FORECLOSURE SALE DID NOT ACQUIRE TITLE FREE OF BANK'S INTEREST EVEN THOUGH BANK DIDN'T NAME HIM IN ITS FORECLOSURE ACTION OR FILE A LIS PENDENS BECAUSE ITS INTEREST WAS BASED ON A RECORDED INSTRUMENT OF WHICH BUYER HAD NOTICE.

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 II

We continue our review of 2014 community association legislation with more of HB 807.

In connection with abandoned units, condo associations are given the power to enter into units, on at least two days prior notice directed to the address of record for the unit owners, and to make repairs to the units and adjacent common elements, including mold remediation and climate control—which would allow utilities to be turned on. In addition, the association is allowed to recover its costs and expenses either via the lien and foreclosure remedy or by the use of a receiver, who is empowered to rent the units for the benefit of the association. In other words, the statute expressly sanctions the use of blanket receiverships. The receiver is empowered to collect the costs of the receivership, including attorneys fees and costs.



A hole in the insurance provisions of the Condominium Act is finally plugged, so that if there is a casualty loss that is not covered by the association's master policy the association or the unit owners will be responsible for repairing the damage by reference to the provisions of the governing documents of the community. This may refer to either the general maintenance provisions or to separate provisions dealing with loss and destruction of the condominium property.

Outgoing officers, directors and committee members must surrender association records and property within five (5) days or face civil penalties for willful failure to do so.

Real time video conferencing is added to speakerphones as a means of permissible virtual attendance at meetings.

On the continuing problem on how an association that acquires title to a unit fits into the equation of joint and several liability among former and current owners of a unit, Section 718.116(1)(a) has been amended (again) to read:

For the purposes of this paragraph, the term "previous owner" does not include an association that acquires title to a delinquent property through foreclosure or by deed in lieu of foreclosure. A present unit owner's liability for unpaid assessments is limited to any unpaid assessments that accrued before the association acquired title to the delinquent property through foreclosure or by deed in lieu of foreclosure.

Thus, the association is <u>not</u> made liable for back assessments—since it would be liable either to itself or to another association, but an owner who acquires a unit after it is owned by an association has no liability for assessments that accrue during or after the association's ownership. Is this the final word on this subject? We shall see.

Changes have been made to Section 718.117, dealing with termination of a condominium. However, it is interesting to note that the entire statute is currently under constitutional attack as amounting to a forced taking of private property.

To no one's surprise the temporary provisions for distressed condo relief that created quasi developer immunity for bulk buyers and bulk assignees, have been further extended, until July 1, 2016.

Next month—coops and HOA changes

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RECENT CASE SUMMARIES

In **In Re: Petition for Arbitration, Isla Merita Homeowner's Condominium Association, Inc., vs. Killian**, Case No. 2013-05-0174 (Final Order of Dismissal), the Division dismissed an arbitration petition filed against Owners. The basis for the dismissal was the lack of pre-arbitration notice as required by law. Prior to filing the arbitration action, Association sent a letter providing Owners with notice of the specific nature of the dispute, *i.e.,* Owners were allegedly parking a commercial vehicle in a location where parking of such vehicles is prohibited. However, the letter also demanded the payment of $300 in attorneys' fees. The letter went on to reference exclusively the pre-suit *mediation* provisions of Chapter *720*, Florida Statutes. However, Association is a condominium association governed by Chapter *718*, Florida Statutes. As such, the pre-arbitration notice failed to comply with the requirements of Section 718.1255, Fla. Stat., and thus dismissal was the only remedy for failure to provide adequate pre-arbitration notice.

In **U.S. Bank National Association vs. Bevans**, 39 Fla. L. Weekly D1072a (Fla. 3d DCA, May 21, 2014) Owner obtained a mortgage from Bank. The mortgage was recorded in January 2008. At some point, Owner stopped paying her mortgage and her condominium assessments. In 2009, Association recorded a lien against the property for unpaid assessments. At that point in time, there were two relevant liens against owner's unit: Bank's senior first mortgage lien and Association's junior lien. In January, 2010 Association filed a lien foreclosure action. In Association's foreclosure action, it did not name Bank as a defendant. The court in that case entered a final judgment of foreclosure in favor of Association in July, 2010. In February, 2011 Bank filed the main action to foreclose its mortgage. Bank's action to foreclose was filed before the Association's foreclosure sale took place. Bank named Association as a junior lienholder in its foreclosure action. However, Bank failed to file a notice of lis pendens. In March, 2011, after Bank had filed its foreclosure action, the judicial sale based on Association's foreclosure took place. At the sale, a third party bidder purchased the subject property. Third party bidder then sold the property to Buyer by quitclaim deed in July, 2011. The trial court subsequently entered a judgment of foreclosure in favor of Bank in the main case. Buyer sought to intervene in the main action and moved to vacate the final judgment. Buyer argued that it took title to the unit free of bank's mortgage because Bank failed to properly file a notice of lis pendens and Bank did not name Buyer in its foreclosure action. The trial court agreed and entered an order vacating the final judgment. Besides vacating Bank's final judgment of foreclosure, the order stated that Buyer should keep the property exempt from the claims of Bank. On appeal to the Third District Court of Appeal, the appellate court first considered whether Buyer obtained an interest exempt from Bank's mortgage. Buyer obtained his interest as a result of a judicial sale that resulted from Association lien foreclosure. Association did not, and ordinarily could not have, named a superior lienholder like Bank as a defendant in Association's foreclosure action. Buyer argued that the Florida Statutes related to the filing of a lis pendens protected him if he had "no actual or constructive notice of the proceeding or claims" made therein. However, the appellate court noted that this provision of *the statute does not apply to actions based upon a duly recorded instrument, like bank's mortgage.* The appellate court next considered whether Bank's foreclosure action eliminated Buyer's inferior interest in light of the fact that Bank did not file a lis pendens and Buyer was not a party to the foreclosure action. Buyer was the legal title holder of the subject property at the time the court entered the final judgment in the main action. As title holder, Buyer would normally be an indispensable party to Bank's foreclosure action. One exception to this rule, however, is when a lis pendens has been properly filed in the public records giving notice of Bank's foreclosure action. Another exception to this rule concerns a party who acquires an interest in property with actual or constructive knowledge of another party's lawsuit concerning the property. However, this exception does not apply to actions based on duly recorded instruments. *For actions based on a duly recorded instrument, like Bank's mortgage, the common law rule still applies: the filing of a notice of lis pendens is not required in order to enforce a lien against a subsequent purchaser who has actual or constructive knowledge of the pending litigation*. Thus, the appellate court reversed the order setting aside the foreclosure judgment and remanded the case to the trial court. If Buyer had actual or constructive notice of Bank's foreclosure action before it purchased the property, Bank's foreclosure terminated Buyer's interest in the property. If Buyer did not have actual or constructive notice, Bank would have to name Buyer in the foreclosure action in order to terminate Buyer's junior interest.

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