COMMUNITY COUNSEL

JULY, 2014 | A PUBLICATION OF WEAN & MALCHOW, P.A. | VOLUME 18, ISSUE 7

RECENT CASES

- OWNER'S CLAIM THAT CONDO ASSOCIATION MISLEAD OWNER INTO MISSING THE STATUTE OF LIMITATIONS WHEN FILING SUIT WAS DEFICIENT DEFENSE AS A MATTER OF LAW.
- A GENERAL RESERVATION OF JURISDICTION IN A MORTGAGE FORECLOSURE JUDGMENT WAS NOT A SUFFICIENT RESERVATION OF JURISDICTION TO DETERMINE LENDER'S LIABILITY TO POST JUDGMENT ASSESSMENTS.

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.

A 2015 LEGISLATIVE WISH LIST - PART I

We have heard the expression "Christmas in July," as indicating either premature good fortune or a desire for same, and suppose that it has equal application to affairs legislative, although in our case, it has more the latter meaning. It is never too early to start assembling a list of cherry plums we'd like to see in our stockings when the weather turns, well, seasonable and less oppressive in Florida. So here are some suggested legislative initiatives we hope (or expect) to see on the docket in 2015.

1. Sort out the safe harbor mess once and for all. For the past few years the competition between associations and lenders over who pays what to whom has been as spirited and chaotic as a summer camp game of capture the flag. This needs to stop and the actors need to get in line, organize and play nice. The lenders need to recognize that they need the community associations and should support them. Without them the residential real estate market will wither and die and with it a large part of their lending portfolio will go with it. The lenders have incredible economic power and it is time for them to stop being greedy or they will rapidly kill off the gatekeeper that protects a large part of their investment portfolio. So lenders, stop being so shortsighted.

2. Managers and attorneys, start with a 72 hour cease fire and negotiate from there with an eye toward a more lasting peace. After all, Christmas is a time of goodwill and peace, and Lord knows our community associations could use us to set a good example. A few clearly delineated lines need to be set in the battle between the forces to determine what is the practice of law and what isn't. Let's start with these few modest proposals:

a. Let's agree that from HB 7037 anything that involves complying with the governing documents and applicable law to the extent necessary to carry out any of the foregoing management tasks – which necessarily involves determining and understanding what the law is and requires, or that involves negotiating terms of contracts of Board approval – which necessarily involves the ability to draft the terms of contracts, constitutes the practice of law, notwithstanding what this bill says.

b. Let's agree that if lawyers can't disavow their ordinary negligence, managers can't either. Level playing fields will go a long way toward ending the war.

c. Let's make CAI what it once was and what it should be again: a multi-disciplinary organization that works for the benefit of our mutual clients – the rank and file owners and boards we represent. It should not be a trade organization lobbying for any trade member constituency. Otherwise, CAI will be ceding the legislative high ground to the legislative action committees run by the law firms that can afford to do so – something that is ultimately not in the best interests of managers anywhere.

3. Glitches galore – in Chs. 718, 719 and 720 there are so many and so little time. From amendments related to condo screening, to official records exclusions, from the counting of association owned units for some purposes but not for others, to the fining and suspension process, from the timing of HOA amendments to notices of handicapped meeting accessibility, the wording of each has annoyances, problems and "issues." Oh joy!

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RECENT CASE SUMMARIES

In **Olean Medical Condominium Association, Inc., vs. Azima**, 39 Fla. L. Weekly D1321a (Fla. 2d DCA, June 20, 2014) Owner brought suit against Association for an alleged failure to maintain the roof. Owner owned one unit in a small commercial condominium complex. In 2004 the condominium sustained damage when Hurricane Charley hit the area. Association's insurance policy covered some of the damages, and following an on-site visit by an adjuster, an insurance check was given to Association. Association paid for repair of the common elements of the condominium from these funds until the funds were depleted. Immediately following the storm, Owner noticed water and roof damage to his unit. Association responded that it was looking for an available roofer to survey the damage to the condominium. Owner apparently took this response as an agreement by Association to cover the cost of repair to the roof. However, when the insurance contractor actually inspected the roof, he concluded that although there was extensive damage to Owner's roof, only a small portion of the damage was caused by the hurricane. According to the contractor, the majority of the damage was due to the generally poor condition of the roof and flashing. This led to the instant dispute because while Association's insurance policy covered storm damage to common roofing elements, regular unit roof maintenance and repair was the responsibility of the unit owners. Owner threatened a lawsuit if his roof was not repaired. In 2005 Association responded that it had completed the roofing repairs for which it was responsible and that it would not pay for the additional repairs. Owner then requested copies of Association's insurance policies and certain corporate documents. Association provided documents in its possession, the name of the insurance agent, but it could not provide all of the documents requested, allegedly because they had been destroyed in the hurricane. Although Owner did not file suit in 2005, he declared that he would not pay assessments until he was provided with the documentation and his roof repaired. In fact, Owner did not file suit until January 20, 2011, instead opting to pursue alternative tactics designed to entice Association to agree to make further repairs to the roof and other damaged parts of the unit. When Owner finally did file suit, Association claimed that the suit was barred by the five (5) year statute of limitation. Owner claimed that Association was estopped from raising the affirmative defense of statute of limitation because Association's actions had lulled and/or mislead owner into not filing suit. The trial court held in favor of Owner and awarded damages against Association. On appeal to the Second District Court of Appeal, the appellate court, reversed the trial court and held as a matter of law that Owner's lawsuit was barred by the statute of limitations.

In **Central Mortgage Company vs. Callahan, et al.,** 39 Fla. L. Weekly D1478a (Fla. 3d DCA, July 16, 2014), Mortgage Company appealed a trial court order denying its post-judgment motion for a determination of assessments due to Associations. In 2009, Mortgage Company filed an action to foreclose a mortgage after borrower defaulted on the underlying loan. Mortgage Company named Associations as defendants in the action. On October 4, 2011, the trial court entered final judgment of foreclosure in favor of Mortgage Company. The final judgment found that Mortgage Company's lien was superior to any claim of defendants, including Associations. Mortgage Company was the high bidder at the foreclosure sale. After receiving title, Mortgage Company requested estoppel letters from Associations to determine the past due assessments, late charges, costs, and attorneys' fees claimed. Associations responded by claiming all unpaid amounts due and owing, without reduction based on the safe-harbor provisions of the statutes. Mortgage Company then filed a post-judgment motion seeking a determination of the amounts due and owing to Associations. The trial court denied the motion and Mortgage Company filed its appeal to the Third District Court of Appeal. On appeal, the court reviewed a trial court's inherent jurisdiction to enforce its judgment and whether it included the authority to determine statutory assessments where the time to alter, modify, or vacate the judgment has lapsed and the judgment provided for only a general reservation of jurisdiction. The appellate court held that the general reservation of jurisdiction did not confer upon the trial court the power to determine the amount of assessments due pursuant to either section 718.116 or 720.3085, Fla. Stat.

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