COMMUNITY COUNSEL

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RECENT CASES

- APPELLATE COURT IGNORES CLEAR STATUTE AND HELD THAT A RESTRICTIVE ENDORSEMENT ON A PARTIAL PAYMENT OF CONDO ASSESSMENTS WAS EFFECTIVE TO CUT OFF LIABILITY FOR THE BALANCE OF THE AMOUNT OWED. SHAME.
- CONDO'S REPEATED REQUESTS TO DISABLED UNIT OWNER FOR INFORMATION ABOUT HIS NEED FOR AN EMOTIONAL SUPPORT ANIMAL WERE EQUIVALENT TO A DENIAL .

A 2015 LEGISLATIVE WISH LIST - PART II

We continue our wish list for 2015 legislation.

In 2014 the HOA Act was amended to allow any qualified person to request that both Board and membership meetings be held in handicap accessible locations. The problem with this language is that it fails to state when the request must be made—so that it is possible that it could occur just as the meeting is being convened. It could even occur in small associations where the meeting is being held in a private home. This seems a rather odd way of doing business, especially if the request is posed by a non-member proxyholder at the last moment. There may arise a suspicion that the request is being interposed for purposes of delay rather than for handicap access. In short, this provision needs a rewrite.

In 2013 the HOA Act was amended to provide that amendments to the governing documents must be provided to members within 30 days after recording. In 2014 that was modified to state that only notice of the amendment is required to be given unless the content of the amendment changed between the time it was proposed and the time it was adopted, in which case the members must receive an as recorded copy.

There are two problems with this provision as it now exists. First, there is no remedy stated for failure to comply with the time requirement. Is the amendment made invalid? Second, exactly how does the content of a proposed amendment get changed between the time it is proposed and the time it is voted on and adopted? We know of no process that permits such a change, but the statute seems to imply that this is possible. We suggest this provision needs to be revisited and corrected or scrapped entirely as creating rights without a corresponding remedy.

Condominium insurance received a needed fix in 2014 but –surprise — it still needs another one. Specifically, Section 718.111(11)(1)(j), Fla. Stat. was amended to provide:

In the absence of an insurable event, the association or the unit owners shall be responsible for the reconstruction, repair, or replacement, as determined by the provisions of the declaration or by-laws. (Emphasis supplied)

This language had the effect of referring the parties back to their governing documents in situations where a loss was of a type that was not caused by an insurable event. The intent was to have the responsibility shared in the manner that the routine maintenance, repair and replacement duties are shared. However, another necessary change to the next line of the statute was neglected, and that omission tends to negate that intent of the change that was made. The next sentence reads:

*All property insurance deductibles, **uninsured losses,** and other damages in excess of property insurance coverage under the property insurance policies maintained by the association are a common expense of the condominium.* (Emphasis supplied)

The words "uninsured losses" should have been deleted. Otherwise, in the absence of an insurable event there is an uninsured loss, and now the two sentences directly conflict in how that event is handled. This conflict needs to be addressed by a further amendment to the statute striking the words "uninsured losses" from the statute, thus finally making the two sentences consistent.

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 **St. Croix Lane Trust, et al., vs. St. Croix at Pelican Marsh Condominium Association, Inc.,** 39 Fla. L. Weekly D1679b (Fla. 2d DCA, August 8, 2014) Association filed an action to foreclose its lien on a condominium unit for past due assessments, interest, late fees, costs, and attorneys' fees. Association obtained a final judgment of foreclosure, and the unit was scheduled for sale. The unit was subject to a first mortgage, and Association elected not to bid at the sale. St. Croix Lane Trust was the successful bidder at the sale. On March 13, 2012, the clerk of the court issued and recorded a certificate of title in favor of the Trust. The Trust purchased the property at auction for $100. Association's attorney wrote the Trust a letter demanding payment of $36,584.54. This figure included unpaid quarterly assessments against the unit for several years, accrued interest, late fees, a substantial balance for a delinquent water bill, costs, and attorneys' fees. The Trust did not pay the amount demanded, and Association filed a claim of lien against the unit. The Trust offered to pay Association $840.00, the full amount of the first quarterly assessment, to settle the matter. The Trust's attorney sent a letter to counsel for Association disputing the amounts claimed to be owed, enclosing a check for $840.00, and stating "be advised and warned, this check is tendered in full and final satisfaction of all claims made against the Trust and the property for the amounts demanded in your May 7, 2012 correspondence." Association's attorney accepted the check and negotiated it. However, the attorney responded that he would accept this as a "partial payment" based upon the applicable statutes and case law. The Trust filed suit to adjudicate whether it was obligated to pay Association the amounts demanded, to discharge the lien, and for attorneys' fees and costs. The circuit court granted Association's motion for summary judgment. The trial court found that the Trust was jointly liable for all unpaid assessments and that Association's acceptance of the partial payment was ineffective to satisfy association's claims. The appellate court found that the restrictive endorsement acted as an accord and satisfaction in accordance with Section 673.3111, Fla. Stat. The appellate court further held that the language of Section 718.116(3), Fla. Stat., which applies to payments received "notwithstanding any restrictive endorsement" does not apply to abrogate the accord and satisfaction provisions of Section 673.3111, Fla. Stat. Thus, the court reversed the trial court and found that an accord and satisfaction arose, thus terminating the Trust's liability for unpaid assessments.

In **Bhogaita vs. Altamonte Heights Condominium Association, Inc.**, ___ Fla. L. Weekly Fed ____, (11th Circuit, August 27, 2014) Owner was awarded $5,000 by a jury, and more than $100,000 in attorneys' fees, for Association's alleged violation of the Fair Housing Act. Owner was an air force veteran who suffered from post traumatic stress disorder. Association's declaration prohibited pets weighing in excess of 25 pounds. Owner obtained a dog which weighed considerably more than 25 pounds. When Association discovered the existence of the oversized dog, it demanded removal of the dog from the unit. Owner responded with the first of three letters from his treating psychiatrist, explaining that the dog was an emotional support animal and that the dog was prescribed to assist Owner in coping with his disability. In a second letter from the doctor to Association, the doctor wrote that Owner "has a therapeutic relationship with this specific dog, Kane. As an emotional support animal, Kane serves to ameliorate otherwise difficult to manage day to day psychiatric symptoms" in Owner. Later, Association sent its first request for additional information. Owner responded with a third letter from his doctor indicating that Owner suffered from "anxiety related to military trauma." Owner further responded to Association's individual inquiries and explained how his PTSD "affects major life activities" and that the dog assisted Owner relating to five knee surgeries Owner incurred in his military service. Association sent yet another inquiry letter, this time requesting information related to Owner's physical disabilities related to the knee surgeries. When Owner did not respond, Association sent a third demand for additional information and demanded the removal of the dog unless and until Owner responded. Owner filed a fair housing complaint with the Department of Housing and Urban Development ("HUD"). HUD ruled in favor of Owner and found Association failed to make a reasonable accommodation. Owner filed suit for damages against Association. After a lengthy jury trial, the jury awarded owner $5,000 in actual damages, as well as $127,512 in attorneys' fees. On appeal to the Eleventh Circuit Court of Appeal, the appellate court affirmed. The appellate court found that Association's multiple inquiries were tantamount to a refusal to make a reasonable accommodation, and thus Association violated the Fair Housing Act.

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WWW.WMLO.COM