COMMUNITY COUNSEL

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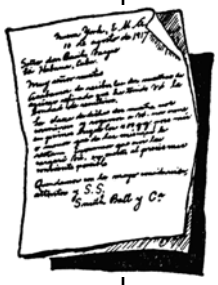
BULLIES ARE BAD–EVEN COMMERCIAL ONES

The Florida Legislature is the realm of the special interest. For example, in 2006 the developer special interests cut the statute of repose—the time in which a hidden construction defect claim has to be discovered and brought—from 15 to 10 years. This, after also creating a process by which all evidence of bad construction and practices has to be turned over to the other side prior to any suit being filed. And the same interests made it nearly impossible to bring claims against design professionals after only two years. Also, but for an adverse Florida Supreme Court decision they would have successfully prevented all warranty claims on HOA infrastructure. So whose interests are our legislators protecting?



If you can't guess, try this one. HB 203, is pending for consideration in 2016. It would apply to estoppel letters issued by all types of community associations. These letters state what sums are owed to the associations. They are routinely requested by brokers and lenders prior to closing on sales and refinances. Although the statutes contemplate that the requests will be made around two weeks before closing, any community association practitioner can tell you that they usually arrive one to two day prior to the scheduled closing. Further, a relatively new practice involves the request for such letters by foreclosing lenders after they have acquired title to a unit. If the amounts shown as due are not to the liking of the requesting lender/owner, they immediately bring suit, without further notice and without contesting or disputing the letter. Should they succeed in defeating the stated amounts, they claim entitlement to their attorney's fees and costs of the lawsuit.

Now this bill would mandate that all associations respond to every estoppel request within 10 business days (down from 15 days) of receipt of a request. The response must be *delivered* on the same date as the responding letter and must be good for at least 30 days. It may only claim amounts permitted by law and any amounts understated are permanently waived.

The fees for preparing this letter are capped at $200, plus an additional $100 if the response is received within 3 business days of the request. If the unit is delinquent the fee can be increased by another $200, but if the letter does not arrive until after the 10 business day deadline, the letter must be for no charge.

The fees for the estoppel letter are to be paid out of the closing at the unit owner's expense, but if the closing doesn't occur, since only the unit owner is responsible, the fee gets added to the owner's account and is treated like any other assessment—meaning that there is no guarantee that the association will ever get paid for it.

Meanwhile, anyone requesting an estoppel letter who does not like the service they are getting is free to bring summary proceeding to compel an association to produce an estoppel letter and they can recover attorney's fees for such a suit.

If this sounds a tad one-sided and pro-lender and realtor, that is no accident. Year-after-year community associations get kicked around by Tallahassee in a most shameful way. The deck is stacked in such a way that if it were a ship it would sink under its own lopsidedness. The bullying needs to stop.

RECENT CASES

- A MOTION TO DISMISS TESTS THE SUFFICIENCY OF THE PLEADINGS, NOT THE EVIDENCE TO SUPPORT IT, AND SHOULD NOT MIX UP ISSUES OF STANDING WITH PROOF OF ISSUES LIKE OWNERSHIP OF THE FIRST MORTGAGE.
- NO BOND WAS REQUIRED TO SUPPORT A LIS PENDENS WHERE IT WAS RECORDED BASED ON RIGHTS FLOWING FROM ANOTHER RECORDED INSTRUMENT, I.E. A RECORDED DECLARATION OF CONDOMINIUM.

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.

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RECENT CASE SUMMARIES

In **Federal National Mortgage Association, Inc., vs. Legacy Parc Condominium Association, Inc.**, 40 Fla. L. Weekly D2367d (Fla. 5th DCA, October 16, 2015) Fannie Mae filed a complaint for declaratory and injunctive relief against Association to clarify the amount of condominium assessments it owed to Association. Fannie Mae argued that the amount owed to Association was limited to the safe harbor amounts owed pursuant to Section 718.116, Florida Statutes. Association moved to dismiss the complaint on the basis that Fannie Mae did not attach any documents to show that it acquired title as the first mortgagee or its assignee or successor by way of Bank of America's mortgage foreclosure action. Association argued that this documentation is necessary to show Fannie Mae had standing to bring this action under either the safe harbor provision or the terms of the declaration. The trial court dismissed the complaint with prejudice. On appeal to the Fifth District Court of Appeal, Fannie Mae argued that it did not need to attach evidence proving its allegations at the pleading stage and that it had standing to maintain the suit. The appellate court noted that Fannie Mae's cause of action was based not upon the underlying foreclosure suit but upon Section 718.116 and the declaration. Fannie Mae attached the declaration to its complaint. The appellate court further found that Fannie Mae was not obligated to attach evidence proving its status as first mortgagee in its pleadings. The appellate court noted that the purpose of a motion to dismiss is to test the legal sufficiency of the complaint and not to determine issues of fact. Fannie Mae alleged in its complaint that it purchased the note and first-priority mortgage at issue and was therefore entitled to the safe harbor provisions of Section 718.116 and the declaration. Taking these allegations as true, as the court must when weighing a motion to dismiss, the facts stated a legally sufficient cause of action against Association. The trial court's order erroneously conflated standing with the merits of the case. A party's standing is distinct from the merits of the case and should be considered separately. Fannie Mae attached two documents to its complaint indicating its stake in the proceedings; 1) the certificate of title to the condominium showing that Fannie Mae purchased the property at the foreclosure sale; and 2) the notice of claim of lien filed by Association. Because these documents demonstrated that Fannie Mae would reasonably expect to be affected by the outcome of the case, the appellate court reversed the trial court's dismissal.

In **100 Lincoln RD SB, LLC vs. Daxan 26 (FL), LLC**, 40 Fla. L. Weekly D2417a (Fla. 3rd DCA, October 28, 2015) 100 Lincoln petitioned for a writ of certiorari quashing circuit court orders permitting Daxan to maintain a recorded lis pendens without a bond. The trial court ruled that Daxan could maintain its lis pendens without bond. On appeal to the Third District Court of Appeal, the court noted that this case illuminates the difference between (a) a condominium association's right to consent to or reject a proposed unit sale or transfer and (b) the association's right to exercise a right of first refusal. Association is a multi-use building in a prime area of Miami Beach. Under Association's declaration of condominium, the sixteen story building has 625 residential condominium units and 42 commercial units. This case involves the sale of four valuable street-level commercial units owned by a company controlled by the drug store chain Walgreens and sought to be purchased by 100 Lincoln. At the outset, the attorney for 100 Lincoln provided written notice to Association and requested that Association waive its right of first refusal. The declaration also requires a buyer to provide a copy of the contract and permits Association to designate one or more non-Unit Owners "who are willing to purchase upon the same terms as those specified in the selling unit owner's notice. Association designated Daxan as a non-unit owner willing to purchase upon the same terms as 100 Lincoln. Walgreen's responded that the right of first refusal did not apply and that a different provision of the declaration applied to the commercial units which provided that the commercial units "may be used for any and all lawful purposes, without the consent of the Association, and may be transferred, conveyed, leased or disposed of without the consent of the Association." Walgreens closed on the sale of the units to 100 Lincoln. Three days later Association recorded its Notice of Association's Exercising Option to Purchase designating Daxan as Association's assignee of its right of first refusal. Daxan ultimately filed a notice of lis pendens to prevent 100 Lincoln from selling the property. 100 Lincoln moved to dissolve the lis pendens or alternatively require Daxan to post a bond. The trial court denied 100 Lincoln's motion. On appeal, the Third District Court found that the notice of lis pendens was properly recorded pursuant to a duly recorded instrument, i.e., the declaration and thus no bond was required to maintain the lis pendens.

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