COMMUNITY COUNSEL

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ONE OVERLOOKED FIX FROM 2015

RECENT CASES

- BUYER AT MORTGAGE FORECLOSURE SALE WAS NOT LIABLE FOR BACK ASSESSMENTS BECAUSE ASSOCIATION COULD NOT PROVE THERE WAS AN AGREEMENT TO BE BOUND BY LATER CHANGES IN STATUTE TO MAKE OWNER LIABLE FOR THOSE ASSESSMENTS.
- BANK WINS AGAIN AND IS NOT LIABLE FOR BACK ASSESSMENTS TO AN HOA DESPITE "CONTINUING LIEN" LANGUAGE FOUND IN THE DECLARATION.

Usually we find ourselves complaining about unintended consequences of poorly conceived or badly drafted bills coming out of Tallahassee each year. From our vantage point 2016 is shaping up to be no exception either, but that is a subject for another day, and don't get us started on "open carry gun bill." We can't wait for the bill that expressly allows guns at community association meetings.

But one genuine fix that did come out of the 2015 session, that corrected a problem that had festered for several years for all types of associations involved the suspension of voting rights and how such a suspension affected the total number of voting interests used to calculate the percentage or ratio of votes cast or obtained. Despite one attempted rewrite from the original statutory language, if voting rights were suspended, although the suspended voting rights could not be counted for any purpose, the statutes failed to permit the total number of available voting interests to be similarly reduced.

This meant that while the pool of available vote was reduced, the total votes in the community remained the same. That fact made the passage of initiatives that much harder.

For example, if a 100 unit community sought to amend its documents and needed 65 votes to accomplish this, by suspending 10 delinquent owners, it reduced the total available voters to 90. But without reducing number of voting interests to be considered, the community still needed 65%, that is 65 out of 100, but it had only 90 voters from whom to obtain the required number of votes. This would tend to discourage the use of voting suspension if important votes were on the horizon.

The statute was amended to read in part as follows:

A voting interest or consent right allocated to a unit or member which has been suspended by the association shall be subtracted from the total number of voting interests in the association.

As a result of this change, in the foregoing example, after suspending 10 voting interests, 90 would remain and if 65% were needed, the concurrence of only 59 voters (90 x .65 = 58.5 >> 59) would be necessary to pass the amendment, instead of the original 65 votes. So the impact of the suspension is carried through and has its intended full consequence.

This small fix should help associations in a multitude of ways going forward and should not be overlooked. It should no longer deter communities from suspending voting rights of delinquents.

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RECENT CASE SUMMARIES

In **Genesis RE Holdings, LLC, vs. Woodside Estates Homeowners Association, Inc.**, 23 Fla. L. Weekly Supp. 102d (Fla. 17th Cir., May 12, 2015) Owner purchased the property at a mortgage foreclosure sale due to the foreclosure of a first mortgage and obtained a certificate of title in October 2011. After its purchase of the property, Association demanded that Owner pay all delinquent maintenance assessments owed by the former owner and which became due prior to the acquisition of title. Owner refused to pay and Association filed a claim of lien for all unpaid assessments. In January 2012 Owner filed a four count complaint against Association alleging a breach of the declaration, for declaratory and injunctive relief, and for slander of title. Association answered and asserted several affirmative defenses, most of which were stricken by the court. Association later amended its affirmative defenses and took the position that Section 720.3085(2)(b), Fla. Stat., authorized its actions. At trial, the trial court ruled that Owner's rights did not vest until 2011, after enactment of the statutory provisions, that Owner did not gain the benefit of the declaration's "Subordination of Lien" provision, and that a novation occurred, creating a new contract that incorporated later statutory changes. The court ultimately entered judgment in favor of Association. On appeal, the circuit court noted that the declaration did operate as a contract between Owner and Association. The declaration's "Subordination of Lien" provision provided that whomever purchased property upon the foreclosure of a first mortgage would not be liable for assessments or other monies owed prior to becoming an Owner. The appellate court found that Owner was clearly a member of a class of persons that the "Subordination of Lien" provision was intended to benefit. Section 720.3085 does not supersede the declaration's "Subordination of Lien" provision. To impose the provisions of the statute upon Owner under these circumstances would unconstitutionally impair Owner's contractual rights arising under the declaration. Finally, the appellate court noted that novation is an affirmative defense. The party who advocates a novation has the burden of proving, by clear, satisfactory evidence, that the parties agreed to cancel and extinguish a prior contract and substitute another valid contract in its place. Association did not raise novation as an affirmative defense. Moreover, no evidence was presented to support a conclusion that the parties agreed to cancel and extinguish the declaration provision and substitute it with section 720.3085, Fla. Stat. Thus, the circuit court reversed the decision of the trial court.

In **Willoughby Estates vs. Bankunited**, 23 Fla. L. Weekly Supp. 84a (Fla. 15th Cir., June 23, 2015) a homeowner executed a note and mortgage in favor of Bank for $304,000 to purchase property in Association. The homeowner eventually became delinquent on the mortgage and Bank foreclosed and purchased the property at the foreclosure sale. Shortly thereafter, Association presented Bank with an estoppel certificate indicating that all assessments remained outstanding on the property. Bank made payment in full "under protest" and initiated this action to recover the money paid to Association. Article VI, Section 1 of the declaration provided Association with a "continuing lien" for all unpaid assessments. Article XII, Section 4 of the declaration provided that any institutional first lender who obtains title to a lot by foreclosure "*shall not be liable for any unpaid assessments or charges accrued against said Lot prior to the acquisition of title to said Lot by such Mortgagee*." Association argued that when read as a whole, makes it clear that in order for a first mortgagee to utilize the protections of Article XII, Section 4, the first mortgagee must join Association as a defendant in any foreclosure action. Association contended that the trial court overlooked the import of Article VI, Section 1 of the declaration which grants Association a continuing lien. On appeal, the court noted that when read in harmony, the declaration provisions create a continuing lien on the property for any unpaid assessments in favor of Association, but absolve Bank from liability for any unpaid assessments that accrued prior to Bank taking title. The circuit court affirmed the trial court and found that Association chose, in the unambiguous language of the declaration, to relinquish its right to collect unpaid assessments from entities such as Bank.

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