COMMUNITY COUNSEL

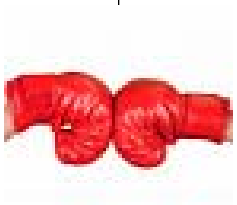
APRIL, 2016 | A PUBLICATION OF WEAN & MALCHOW, P.A. | VOLUME 20 ISSUE 4

RECENT CASES

- FAILURE TO MAKE A SUBSTANTIVE RESPONSE TO A CONDO OWNER'S CERTIFIED MAIL INQUIRY PREVENTED ASSOCIATION FROM RECOVERING PREVAILING PARTY ATTORNEY'S FEES IN A LATER CASE ON ISSUES RAISED BY THE INQUIRY.
- CONDO ASSOCIATION LIABLE FOR FAILURE TO MAINTAIN COMMON ELEMENTS WHEN OLDER CONDO FACILITIES COULD NOT HANDLE CURRENT WASHING MACHINES IN UNITS, CAUSING BACK-UP AND FLOODING OF DOWNSTAIRS UNIT WHEN USED.

THE NEXT BIG FIGHT

Take a ringside seat folks because the next big fight in Florida community association circles is shaping up to be a doozy, pitting an alliance of the ever helpless and hapless community association industry and the well-muscled resort hotel industry against a gargantuan upstart, Airbnb and companies of a similar ilk. At stake for communities across the state (and country) are the usual issues—home and hearth, abiding by the rules and playing fair, security and knowing who your neighbors are. At stake for the resort hotel industry is a huge amount of money and burgeoning competition from investor owners who are renting out units on a nightly basis on websites like Airbnb, which to the resort hotel industry, amounts to the creation of de facto, illegal and unregulated hotels.



According to a hotel industry funded study out of Penn State, in the greater Miami area 61.3% of Airbnb's Miami area revenue of over $77 million was derived from just about seven (7%) percent of its participants, these being full-time commercial operators. That means a whopping ninety-three (93%) percent of its Miami-area revenue was made by casual participants, like your snowbird neighbors, who rent out their units on a nightly basis when they go north. According to the study, this represents the highest degree of non-commercial participation nationwide. No surprise given the size of the condominium market and climate in Florida.

We have seen this in our practice as well and we expect to see it with greater frequency as more of our clients peruse the listings on Airbnb website to see what is available in their areas and discover units in their long term rental communities being offered on a nightly basis, complete with glowing reviews about the host's hospitality and the proximity of the venue to the attractions. A feeling of deception is inevitable even though the activity is going on in plain sight.

The hotel industry is gearing up a lobbying effort and we can expect to see legislative efforts on this issue in Tallahassee in the coming session(s). That industry is pitching its effort at the impact that Airbnb participants have on rental rates, reasoning that as units are held off the market to service tourists, fewer units are available for full time residents, causing rents to rise. Of course, if the approach also helps stop "illegal hotels," well so be it. What a public service they are providing the rental market.

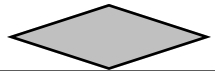
For community associations, it would be beneficial to have some further legislative weapons to help to stop persons who violate documentary prohibitions on short term rentals, which are notoriously difficult to enforce because by the time action is taken the tenants have come and gone. The usual legal weapons generally only hurt innocent third persons who have travelled long distances in good faith and now find themselves victimized by deceptive unit owners who choose to disregard their governing documents.

Airbnb had revenues of close to $1 billion last year and is valued at over $25 billion according to the Wall Street Journal. So this is truly a fight of giants, with the community association industry being more than an interested observer. But make no mistake, it is— as usual— the tail being wagged by more than one dog in this upcoming war over money.

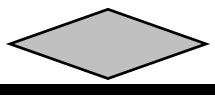
WEAN & MALCHOW, P.A.
646 EAST COLONIAL DRIVE, ORLANDO, FLORIDA 32803
TEL: (407) 999-7780 FAX: (407) 999-LAW1 E-MAIL: W-M@WMLO.COM
WWW.WMLO.COM

RECENT CASE SUMMARIES

In **Waterside at Coquina Key South Condominium Association, Inc., vs. Gamboni, et al.,** 23 Fla. L. Weekly Supp. 671a (Fla. 6th Jud. Cir. (Appellate) November 3, 2015) Owners filed suit against Association alleging a nuisance being caused by other owners and seeking damages for Association's failure to abate the nuisance. Ultimately, the trial court dismissed the complaint with prejudice. Association sought an award of attorneys' fees and costs from Owners, claiming to be the prevailing party in the litigation. In their fight against an award of attorneys' fees, Owners defended on the ground that Association failed to provide a substantive response to Owners' certified mail written inquiry. Association countered this defense and argued that the "written inquiry" was really a "complaint" to which no substantive response was required. Alternatively, Association argued that an email response from its manager stating that he was not aware of the problems but stating that the Association "will take whatever measures allowed by law to stop this harassment" constituted a substantive response. The trial court found that Association failed to provide a substantive response and thus denied Association's motion for attorneys' fees. On appeal, the circuit court found that the more specific provisions of Section 718.112(2), Fla. Stat., governing substantive responses to unit owner inquiries and the penalties for failure to provide a substantive response (denial of attorney fees) controlled over the more general provisions of Section 718.303(1), Fla. Stat., governing prevailing party attorneys' fees in general. The circuit court found that Owner's letter constituted an "inquiry", that Association's response was not "substantive" and thus Association was subject to the penalties of Section 718.112(2), Fla. Stat., preventing Association from recovering prevailing party attorneys' fees.



In **Harbor View Daytona Condominium Association, Inc., vs. Strachan**, 23 Fla. L. Weekly Supp. 894a (Fla. 7th Jud. Cir. (Appellate) December 22, 2014) Owners filed a complaint against Association seeking injunctive relief. In count one of the complaint, Owner alleged that Association violated its governing documents and Chapter 718 of the Florida Statutes by failing to maintain the common elements. Owner sought injunctive relief based upon Association's alleged failure to maintain the common elements and/or take action against another owner who was impairing the drainage facilities with the condominium and creating a nuisance. Owner owned unit 111 in the condominium, which unit is located on the ground floor. Owner's unit had drainage back-flow plumbing problems since March of 2009 in the form of black, soapy water backing up into the toilets, showers, and sinks. Owner contends that the source of the drainage problem is outdated and inadequate plumbing on the eighth floor of the condominium and the use of a high-efficiency washing machine in Unit 808. Owner argued that the common element drainage system did not provide enough time for used water coming from the high-efficiency washing machine in Unit 808 to drain from the condominium, leading to sewage backups in unit 111. One of the original plumbers who built the building testified that the condominium was originally built as an apartment building and that there were no washing machines in the units. There were common laundry facilities located on each floor of the building. Many years later, the apartment building was converted to condominium units and for the first seven floors the washing machines were added to individual units by adding a small room to each balcony to house washing machines. Each washing machine connected to a drainpipe that ran down the exterior of the building and tied directly into the main sewer line, so those washing machines did not drain into the building's interior plumbing. The eighth floor units were different. In the eighth floor units the washing machines were housed in a small room off the kitchen and these washing machines connect directly to the drainpipes servicing the kitchen sink. All eight vertical units share a kitchen sink drain line, so owner's unit 111 and Unit 808 shared a kitchen line. The plumber also testified that high-efficiency washing machines discharge water at a higher rate of speed than older machines. The trial court granted summary judgment against Association. On appeal to the circuit court, the circuit court relied heavily upon two prior arbitration decisions by the Department of Business and Professional Regulation finding, under similar circumstances, a failure to properly maintain the common elements. In affirming the decision of the trial court, the circuit court found that it was undisputed that the backup of water into Owner's unit only occurred when the washing machine in Unit 808 was in use and that Association had a duty to maintain the common elements to prevent such backup.



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