COMMUNITY COUNSEL

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OVERREACT ! WHO US?! NEVER!!

An April 28, 2016 report from the *Miami Herald* is stirring the pot statewide. The report documented several instances of rigged condominium elections in Miami-Dade County. In some cases the rigged elections occurred in the same association on multiple occasions. All episodes involved the submission of fraudulent ballots bearing falsified signatures. In some instances more than one ballot was received from the same owner and in one community this resulted in an astounding 115% voter turnout. Clearly a problem exists.

Even before this report appeared - and especially since the report confirmed what many had been saying for some time - in the early run-up to the 2017 legislative session voices have been raised calling for the criminalization of certain violations of the Florida Condominium Act.

For some time those who see associations as a haven for tinhorn dictators and self-interested conmen have urged local and state police and prosecutors to go after perceived widespread condominium corruption. Those authorities have demurred, saying that the issues are civil in nature and best left to the Division's jurisdiction. The Division claims no criminal authority over the sort of violations at issue, so the matter has teetered for years—until this most recent *Miami Herald* report. Is this the chink in the levy that finally caused the regulatory flood to burst forth? Maybe.

At a recent Bar function one well known lobbyist indicated that criminalization would be proposed in 2017 and to avoid it a strong regulatory alternative needed to be proposed - the same argument put forth during the cold war to justify increased defense spending.

But wait a minute. What is the problem here? Falsifying signatures of voters in a small election seems to be a particularly stupid and ineffective way of attempting to commit fraud. It is more than likely that some of the voters whose signatures have been forged will vote in the election and call foul, thereby putting the election into dispute. So anyone wishing to steal an election in this fashion seems doomed to failure.

In terms of criminal penalties, falsifying a signature in Florida is already criminal conduct, a felony punishable by five years in prison and a $5000 fine.

There were over 20,000 condominium associations in Florida and almost the same number of homeowner associations. According to the *Miami Herald* story, the number of complaints (of all types) that the Division handled last year was under 2000. Of those, 500 were from Miami-Dade County condominium owners and only 27 involved irregular elections. That works out to .0001%. For this we need to criminalize your regular elections?

One does not need to be a lawyer toiling every day representing community associations to know that if violations of the condominium act are criminalized, for every one bona fide criminal violation, at least 1000 non-criminal violators will be threatened with criminal prosecution by persons in their Association wishing to intimidate or harass them.

If we are going to overreact, then let's go all the way. Let us ask the Governor to call out the National Guard, seize all Florida condominiums, install military governments, and turn Florida condominiums into the banana republics they were destined to become.

RECENT CASES

- UNDER 2013 VERSION OF CONDO ACT NEW OWNER OF UNIT DID NOT HAVE TO PAY BACK ASSESSMENTS TO ASSOCIATION WHERE THE ASSOCIATION WAS THE IMMEDIATE PRIOR OWNER AND WAS JOINTLY LIABLE FOR THE UNPAID ASSESSMENTS.
- DEMAND TO HOMEOWNERS TO CLEAN EXTERIOR OF HOME INCLUDED STAINS LEFT AFTER THEY PRESSURE CLEANED AND THEY WERE NOT THE PREVAILING PARTY EVEN THOUGH THEY DID PRESSURE CLEAN, SINCE THE STAINS REMAINED.

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 **Bona Vista Condominium Association, Inc., vs. FNS6, LLC**, 41 Fla. L. Weekly D1325a (Fla. 3rd DCA, June 1, 2016) Owner brought suit against Association challenging Association's allegations that Owner owed almost $21,000 in unpaid assessments that accrued from July 29, 2011, when Association took title in its foreclosure action, through February 13, 2014, when Owner took title through the foreclosure of the first mortgage. Following a hearing on the matter, the trial court determined that Owner did not owe any condominium association assessments incurred through February 13, 2014, the time of its purchase of the condominium unit because even though Association and Owner were "jointly and severally liable" for the assessments, Owner's right to recover any amounts it paid to or on behalf of Association made Owner's obligations "basically a wash." On appeal, the Third District Court of Appeal noted that the 2013 version of Section 718.116(1)(a), Fla. Stat., provides that while the current owner and immediate prior owner are jointly and severally liable for unpaid assessments which came due while the immediate prior owner owned or held title to the condominium unit at issue, the obligation to pay such assessments is without prejudice to the right of the current owner to recover the amounts it paid for the immediate prior owner. Thus, while Owner did in fact owe the assessments, it had the right to sue Association to recover the amounts it paid to Association. Thus, in affirming the trial court the appellate court agreed that "it was basically a wash" and Owner did not have to pay the assessments demanded by Association. [EDITOR'S NOTE– This decision most likely would have a different outcome based upon the 2014 amendments to Section 718.116(1)(a)].

In **Hibbs Grove Plantation Homeowners Association, Inc., vs. Aviv**, 41 Fla. L. Weekly D1125a (Fla. 4th DCA, May 11, 2016) Association sued Owners alleging that Owners failed to maintain their home in "first class, good, safe, clean, neat, and attractive condition" by failing to pressure wash mold/mildew from the home and driveway. The declaration provided that roofs and exterior surfaces and pavement shall be pressure treated within 30 days of notice by the architectural control committee. On August 6, 2013, Association sent Owners a demand informing Owners that they were in violation of the rules by failing to remove mold and mildew from Owner's property. In response to the demand letter, Owners sent a fax to Association advising that they had hired a contractor to pressure clean and that the job would be completed within a week. After a month of no further communication from Owners, Association filed its complaint for injunctive relief. Two days after being served with the complaint, Owners faxed the Association's attorney a letter stating that they complied with the demand letter and in support attached: (1) a copy of a pressure cleaning payment invoice and check; and (2) photographs of the exterior of the home showing the pressure cleaned walls. After some efforts at resolving the dispute, Owners hired an attorney and moved to dismiss the complaint for failure to state a cause of action. At the hearing on the motion to dismiss, the trial court forewarned Association's attorney that if he proceeded with the action and it turned out that Owners did in fact comply by pressure cleaning the exterior of the home, the court could tax costs and fees against Association. The trial court denied the motion to dismiss, noting that the proper remedy would be the filing of a motion for summary judgment. Owners then filed a motion for summary judgment with supporting affidavits. Association filed a response to the motion which emphasized Owner's deposition testimony wherein Owners acknowledged that after the pressure cleaning some "stains" remained. Accordingly, Association argued that the relief demanded had not been obtained and the action for injunctive relief was proper. Despite the fact that Association presented evidence that Owners' efforts to remove the stains on the exterior walls of the home were unsuccessful, the trial court granted the motion and entered summary judgment against Association. The trial court also granted sanctions against Association and awarded fees and costs in favor of Owners pursuant to Section 57.105, Fla. Stat. On appeal to the Fourth District Court of Appeal, the appellate court agreed with Association and held that a fair reading of the complaint clearly established that Owners were on notice that the stains on the exterior walls of their home constituted a violation of the declaration. The fact that Association sought to compel Owners to pressure wash the walls in its prayer for relief did not obviate the need to remediate the staining problem if pressure cleaning did not cure the violation. Thus, the appellate court reversed the ruling of the trial court, as well as the order taxing fees and costs as a sanction.

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