COMMUNITY COUNSEL

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HOAS UNDER ATTACK BY SHORT TERM RENTAL INTERESTS

HB 841 has passed the Florida House and its companion, SB 1274, is headed to the Florida Senate. Although attempts to pre-empt local government regulation of zoning of short term rentals are dead for this year, concurrent attacks on the ability of HOAs to amend their documents to prohibit or to regulate short term rentals are alive and well and moving forward aggressively.

HB 841, incorporates into Section 720,306, Fla. Stat. substantive restrictions on rental amendments similar to those already in the Condominium Act, even though homes are not creations of statute, like condominiums. The major difference—at least for now— is that HB 841 (which would become effective July 1, 2018) would permit HOAs to amend their documents to regulate rentals of under 6 months duration and to prohibit homes from being rented more than three times a year.

However, it is best to view these two provisions as a sort of Trojan horse, because powerful groups strongly oppose these exceptions permitting HOAs to regulate short term rentals and are fighting them in the Senate version of the bill. Indeed, an amendment filed in the House by Representative Grant and defeated on the floor would have prohibited HOAs from amending their documents to regulate rentals of <u>any</u> length. This represents the will of the powerful short term rental industry and you can bet they will be back asserting this position next year with a vengeance. These interests are looking to defeat SB 1274 this year so they can attack HOA rental amendments next year with a clean slate.

Whether SB 1274 passes this year—and makes an initial legislative intrusion into the ability of HOAs to amend their documents depending on the subject matter of those amendments—or whether it is defeated and the forces pushing to permit short term, hotel-like rentals in all Florida residential communities come back well-armed next year, one thing is abundantly clear: every HOA in Florida needs to address the issue of rental regulation by amending their governing documents in one way or another ***this year***. The issue should be at the top of every board's agenda in the coming year. Failure to act will likely result in an inability to act by next year at this time.

All knowledgeable community Association practitioners are in the process of sending out warnings to their clients, advising them to consider rental amendments as soon as possible. If HB 841 becomes law and the current restrictions on rentals become effective on July 1, 2018, there are barely 4 months before some rental restrictions become effective. If associations use the written consent method for adoption of amendments, this can take 90 days to consider amendment adoption. This means there are now less than 30 days to draft amendments for submission to the membership of the community. When adding time to tally votes and send them for recording if successful, HOAs are up against a rapidly approaching deadline for adoption of amendments. There is very little time to act, and we urge all homeowner associations to react immediately and adopt amendments giving associations the ability regulate rentals in their communities.

RECENT CASES

- AMOUNTS PAID BY BUYER AT FIRST MORTGAGEE'S FORECLOSURE SALE UNDER PROTEST WERE PROPERLY RETURNED WHEN IT WAS SHOWN THAT BUYER WAS ENTITLED TO BENEFITS OF SAFE HARBOR PROTECTIONS.
- REVERSAL REQUIRED WHEN HAND WRITTEN ENTRIES FOR JUDGMENT FOR ATTORNEY'S FEES DID NOT MATCH TYPE WRITTEN AMOUNTS, BUT NO REVERSAL FOR FAILURE TO ENTER ANY AMOUNT FOR COSTS AS NO INCONSISTENCY EXISTED IN THE JUDGMENT.

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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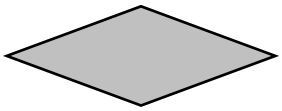
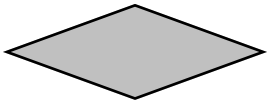
In **Hemingway Villa Condominium Owners Association, Inc., vs. Wells Fargo Bank, N.A.**, 43 Fla. L. Weekly D465a (Fla. 3rd DCA, February 28, 2018) Association was sued for return of funds paid by Bank under protest. JP Morgan filed a foreclosure action therein naming Association. JP Morgan was the then-servicer and holder of the note, acting on behalf of the Federal National Mortgage Association ("Fannie Mae"), the owner of the loan in the foreclosure action. Final judgment was ultimately entered in favor of JP Morgan. Fannie Mae was the successful bidder at the foreclosure sale, and took title to the unit. Shortly thereafter, Fannie Mae, through its subsequent servicer, Wells Fargo Bank, sought to sell the unit and requested an estoppel certificate from Association. Association issued its response and failed to account for the "Safe Harbor" amounts owed by Fannie Mae as the foreclosing first lender. Wells Fargo Bank paid the full amount under protest and then sued Association. The trial court entered summary judgment in favor of Bank, finding that Bank was entitled to the Safe Harbor protections as a first lender. Association argued that material issues of fact remained as to who actually owned the loan, and that Fannie Mae was not entitled to Safe Harbor protections. On appeal, the Third District Court of Appeal affirmed and found that Fannie Mae established that it owned the loan at all relevant times from 2007 through the sale of the unit in 2013, and that all of the remaining requirements of section 718.116 had been met, entitling Fannie Mae to the Safe Harbor protections.



In **Water Bridge 5 Association, Inc., vs. Davis**, 43 Fla. L. Weekly D380b (Fla. 4th DCA, February 14, 2018) Association filed a complaint against Tenants seeking injunctive relief. A clerk's default was entered against all four Tenants, and thereafter a default final judgment was entered. After judgment, Association moved for attorneys' fees and costs against all four Tenants, attaching to the motion an affidavit of fees and costs reflecting an hourly attorney's fee rate of $195 per hour and 31.7 hours of total hours expended and anticipated to be expended to complete the matter, amounting to a total of $6,181.50 in attorney's fees. In addition, Association sought $1,056.63 in costs. Association also filed an affidavit of another attorney attesting to the reasonableness of the hourly rate and the hours claimed. The trial court issued its final judgment awarding Association's attorney's fees and costs as to the four defaulted parties. Although the trial court's findings as to the reasonableness and amount of attorney's fees (31.7 hours at an hourly rate of $195.00) and costs were typed in the final judgment, the total amounts of fees and costs to be awarded were crossed out, with different amounts written over them by hand ($1500 for fees, instead of $6,181.50; $443.93 for costs, instead of $1,056.63). Similarly, the typed amount of the total judgment was also crossed out and corrected by hand with initials ($1500 for fees, instead of $6,181.50; $443.93 for costs, instead of $1,056.63; $1,943.93 for total judgment, instead of $7,238.13). Association filed a motion for rehearing arguing that the final judgment reflected that the trial court made a finding that 31.7 hours was reasonable number of hours spent on the case and that the hourly rate of $195 per hour for counsel was reasonable, but that the trial court's award of only $1500 in fees was inconsistent with those findings. Association argued that nothing had been presented at the hearing contesting the amount of time expended or the hourly rate charged and that the trial court had not expressed why it was only awarding $1500. Association also argued that the trial court's award of costs failed to include other reasonable and necessary costs. The trial court denied the motion for rehearing. On appeal, Association argued that the face of the final judgment reflects an error committed by the trial court, in that the findings are inconsistent with the amounts awarded. The appellate court noted that an award of fees without adequate findings justifying the amount of the award is reversible. The appellate court agreed with Association and reversed the amount of the fee award based upon the inconsistency in the final judgment. Association also argued that the award of costs was also inconsistent with the pleadings. However, the appellate court noted that unlike the fee award, there was no internal inconsistency with the amounts of costs awarded and the final judgment. Without a transcript of the hearing, the appellate court was obligated to affirm the costs award of the trial court.



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