RM 'On the Watch'

The RM Association Reporter

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Daniel S. Rosenbaum

President's Message

We have focused with great intensity over the years in our representation of community associations on the most pressing issues at any given time. For example, the last six years have been dominated by the mortgage foreclosure crisis and its impact upon community associations.

During this time period, we significantly ramped up our collections and foreclosure legal team and it has been a primary emphasis of our association practice. However, just before we saw the effects of the mortgage foreclosure crisis, community associations had to deal with the reconstruction of property after hurricanes and tropical storms, and obtaining insurance proceeds to pay for the repairs. During this time period, we zealously represented our community association clients against insurance carriers who would not pay claims. From year to year, statutory amendments to the laws affecting community associations have also caused associations to scrutinize their governing documents and adopt amendments, which we drafted on their behalf. Between these events, however, more routine matters, such as concrete restoration, roof replacement, elevator modernization and fire sprinkler retrofitting, to name a few, have been the focus of our legal representation. Our firm has been heavily involved in these matters, from the drafting of contracts, to reviewing bank loan documents and, when necessary, handling construction defect and contractor/vendor litigation.

More recently, we are seeing a significant increase in demand from associations for our land use and construction legal services. More clients are coming to us with land use issues pertaining to their property, adjoining properties and properties in close proximity that will result in adverse effects in one form or another.

For example, some clients have retained us to represent them on issues such as beach re-nourish-

"Our firm's land use, governmental and construction-related legal services will soon become critically important to our clients given the sustained growth, low interest rate environment of Florida's economy."

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ment projects, the construction of seawalls and other governmental and environmental matters requiring legal services.

Similarly, we are having increased requests for our services in the area of construction disputes, contractor's liens and construction litigation. We anticipate that our clients' needs in these areas will continue to grow in view of the sustained growth and low interest rate environment of the United States economy, and the economy of Florida, in particular, for the coming years. Accordingly, in addition to the wealth of talent and experience that our firm already has to service these needs, and in recognition of the growing demand for these legal services, we have recently added another attorney, Lisa Reves, to expand our capabilities. Lisa, prior to becoming an attorney, had twelve years of extensive experience as a project manager with a large land planning firm in Palm Beach County, handling the entire range of land use, planning and environmental services. Therefore, as our firm is currently staffed, we can provide your association legal representation in almost any land use, governmental, environmental or construction-related matter. These are critically important legal services that may not immediately come to mind, but may become necessary for the proper operation of your community in the coming years. We hope that you will think of us for these services and know that we stand ready, willing and able to provide our best representation.

Quality, Resilient, Experienced, Proven, Accessible, Involved, Relentless, Unique, Committed

No Voting Allowed! - *by Allison L. Hertz, Esquire*

With annual meetings and elections just around the corner, we want to remind condominium associations that boards of directors cannot vote for, or on behalf of, association owned units. Specifically, the Florida Condominium Act was amended to provide that:

> *A voting interest or consent right allocated to a unit owned by the association may not be exercised or considered for any purpose, whether for a quorum, an election, or otherwise.*

Therefore, in the event your condominium association has acquired title to a unit by foreclosure or otherwise, the board is not permitted to exercise the vote for any purpose. Remember, there is no quorum necessary for the election of directors in a condominium association, but at least 20% of the eligible voters must cast a ballot in order to have an election. This means that the number of voting interests required for the election will be reduced by the number of units owned by association. Similarly, if the membership is voting on matters other than the election of directors at the annual meeting, such as the waiver of statutory reserves or an amendment to the condominium documents, units owned by the association do not count towards the number of voting interests required to establish the quorum or to approve the particular vote being taken at the meeting.

REVERSAL OF FORTUNE - *by Peter Mollengarden, Esquire*

In the legal world few things or issues are well settled or can be relied upon with rock solid predictability. Until very recently, one of those was the ineffectiveness of a restrictive endorsement, designation, or instruction placed on or accompanying an owner's partial payment to a condominium, homeowners or cooperative association. The recent decision of the Second District Court of Appeal of Florida in *St. Croix Lane Trust & M.L. Shapiro, Trustee v. St Croix at Pelican Marsh Condominium Association, Inc.*, 144 So. 3d 639 (Fla. 2d DCA 2014) has pulled the rug out from under associations with respect to this issue.

Sections 718.116(3), 719.108(3) and 720.3085(3)(b) of the Florida Condominium Act, Cooperative Act and Homeowners Association Act, respectively, basically provide that any payment received by an association must be applied first to any interest accrued by the association, then to any administrative late fee, then to any costs and reasonable attorney's fees incurred in collection, and then to the delinquent assessment. The statutes then provide that the foregoing applies notwithstanding any restrictive endorsement, designation or instruction placed on or accompanying a payment. Therefore, for years this language has been construed to mean that if an owner, for any reason, submitted a partial payment, or otherwise less than full payment, but included a notation on the check, or an accompanying note or letter, asserting "Paid in Full," or "Full Payment," or "Accord and Satisfaction," or other similar statement asserting the payment represented full payment, such restrictive endorsement, notation or instruction was ineffective and could be ignored by the association such that the association could accept the payment and proceed to collect the balance from the owner without adverse consequences. This interpretation of these statutes was upheld by the Third District Court of Appeal of Florida in *Ocean Two Condominium Association, Inc. v. Kliger*, 983 So. 2d (Fla. 3d DCA 2008).

However, in *St. Croix Lane Trust*, which involved a dispute over the amount owed the association by an owner, the owner tendered a check to the association accompanied by a letter from the owner's attorney stating:

> *Regardless of intent, negotiation of the enclosed check shall be deemed an acceptance of the offer of settlement made herein, and shall be in full and final settlement of all claims . . .*

The Court held that, notwithstanding the provisions of the Condominium Act regarding application of payments, upon deposit of the check an accord and satisfaction occurred and the payment was deemed full and final satisfaction of the association's disputed claim. The Court determined that the situation was controlled by Section 673.3111, Florida Statutes, which provides that, with limited exceptions, a claim is discharged if the party or person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim. This is more commonly referred to as the law of accord and satisfaction. The Court held that the provisions of the Condominium Act only address the hierarchy or manner of applying a payment, but do not trump or overrule the law of accord and satisfaction.

In light of the conflict between the Second and Third District Courts of Appeal in the *St. Croix Lane Trust* and *Ocean Two Condominium Association* cases, *St. Croix Lane Trust* was appealed to the Florida Supreme Court. On January 20, 2015, the Supreme Court declined to hear the appeal. Therefore, we recommend that associations continue to be vigilant in not accepting or depositing partial payments which contain, or are accompanied by, any restrictive endorsement, notation or instruction as doing so may result in the association waiving all rights to the remaining amounts owed. Such waiver of the ability to pursue the remaining amounts owed could have a substantial adverse impact upon the association.

For example, in *St. Croix Lane Trust* the association claimed it was owed over $38,000 and the payment which was held to be full and final satisfaction of the debt was only $850.00. Instead, associations should return any instruments with, or accompanied by, a restrictive endorsement, notation or instruction to the owner, with a demand for payment in full.

The lesson to be learned is that unless this issue is addressed by the Florida Supreme Court in another case or by the Florida Legislature by amending the applicable statutes, associations must be careful not to deposit any partial payment containing or accompanied by a restrictive endorsement, designation or instruction as that may very well preclude the association from any right of recovery of the remaining amount due.

AUTOMATIC STAY PROTECTS AGAINST THE SUSPENSION OF USE RIGHTS By: Allison L. Hertz, Esquire

Once any type of bankruptcy petition is filed by a debtor, an automatic stay is established by the bankruptcy court. The stay is put in place for a certain period of time in order to give the debtor a chance to catch his or her breath, by preventing collection attempts by creditors. This means that an association cannot pursue the collection of delinquent assessments, or take any other adverse action against the delinquent homeowner for the non-payment of assessments, until the automatic stay is lifted by the bankruptcy court. In our experience, the bankruptcy court will view the suspension of use rights (including the deactivation of bar codes) for failure of the homeowner to pay assessments or other monetary obligations due to the Association as adverse action against the debtor for the non-payment of a debt, and a violation of the automatic stay. If the bankruptcy court finds the association's actions to be willful, the court will likely sanction the association.

Therefore, we frequently advise our clients to reinstate the rights of unit owners (and their family members, guests and tenants) who are still protected by the automatic stay. However, please note that protection under the automatic stay and being discharged from bankruptcy are two different things, and the automatic stay could be lifted sometime before the debtor is actually discharged from bankruptcy. That is why it is important for associations to be kept up-to-date by counsel concerning the rights and obligations of the association to the homeowner, and vice versa, in the complicated creditor/debtor relationship established by the filing of a bankruptcy by an owner.

BOARD MEMBER CERTIFICATION :

Peter Mollengarden, Esq. and Allison Hertz, Esq. were recently invited to present a Board Member Certification course to over 50 Board Members and property managers at a private community in Boynton Beach. Board members of both condominium and homeowners associations should be aware that within one year before or 90 days after being appointed or elected to the Board of Directors, each Board member must attend a Board Certification Course and obtain a Certificate. The Certificates are valid for the uninterrupted tenure of the Board Member. In lieu of attending a course, a Board member may sign a document indicating that he/she has read the governing documents of the Association, that he/she will uphold the documents and policies of the Association and that he/she will faithfully discharge his/her fiduciary duty to the membership, but we always suggest that Board members attend a course on an annual basis to keep current on the law that applies to the community. Our Firm is pleased to provide the course to other communities in Palm Beach County. Please contact Rhonda Ugowski at 561-653-2918 or rugowski@r-mlaw.com for details.

Traps for the Unwary: Six Questions to Ask Before Considering a Debt Collection Company for Collection of Delinquent Assessments

By: Mark G. Keegan, Esquire and Allison L. Hertz, Esquire

Is your association using, or considering using, a debt collection company as opposed to a licensed Florida attorney to assist in recovering delinquent assessments? Over the past several months, several prospective (now current) firm clients asked us for help in resolving situations that arose when the debt collection company retained by the association did not deliver as promised. Common themes have emerged from these experiences, which led us to develop several questions that any board must ask before signing a contract with a debt collection company.

1. Is the debt collection company a law firm? Can they represent our association in court?

No. Debt collection companies are not law firms, they cannot file assessment lien foreclosure actions in court or, for that matter, file any action in court. After that, the debt collection company must engage one of their "network" attorneys to foreclose the lien or pursue other legal action against the homeowner.

2. Who selects, controls, and pays for an attorney to represent the association?

The debt collection company, not the association. In every debt collection company contract we reviewed, the association has no say in selecting the attorney who will represent it. Instead, the debt collection company will select the attorney from its list of "network" attorneys, all of whom compete for business from the debt collection company, which naturally raises the question from the association's view of where the attorney's loyalties lie. This concern is particularly applicable where the interests of the debt collection company and association are not aligned. **Tip**: If your association is considering using a debt collection company, insist that the board (not the debt collection company) maintain control over both the selection of and instructions given to the attorney who will represent the association.

3. If the debt collection is selecting, controlling, and paying for its "network" attorney to represent my association, where do the attorney's loyalties lie?

Every Florida licensed attorney is bound by the Florida Bar's Rules of Professional Conduct, one of which mandates that "Loyalty and independent judgment are essential elements in the lawyer's relationship to a client." Comment to Rule 4-1.7. In a typical association/attorney relationship, where the board selects and controls the association's attorney, this question never presents itself because there is no "middleman" between the board and the attorney. However, where the debt collection company is selecting, controlling and paying the attorney and is otherwise acting as the "middleman" between the association and the attorney, clients have raised concerns about how the "network" attorney can ethically represent the association while also answering to and taking instructions from the debt collection company. It is because of this ethical quagmire that we do not represent debt collection companies, do not seek business from debt collection companies, and certainly are not "network" attorneys for any debt collection companies.

4. Why does your debt collection company charge more than a Florida licensed attorney for the same task?

Several clients who were previously engaged with debt collection companies were shocked to learn that the debt collection company, which is neither a law firm licensed and regulated by neither the Florida Bar nor a management company, charges much more than a licensed Florida attorney for the same task! For example, we recently reviewed one debt collection company contract for a prospective association client that was looking for guidance on how to escape from the grips of the debt collection company. For example, this particular debt collection company charged the unit

owner $500 for what is typically called an "Initial Demand Letter," which letter must be sent to the owner before a lien may be recorded in the public records. Conversely, most law firms charge anywhere from $150 to $250 for the same service, except the service is provided by a licensed Florida attorney. How is it possible that non-lawyers charge hundreds of dollars more than licensed Florida attorneys for the same service?

5. Are there really no out-of-pocket costs to the association?

Although most debt collection companies claim that the association will not incur any out-of-pocket costs, our review of several debt collection company contracts reveals that this statement is not entirely true, particularly where an association desires to terminate its relationship with the debt collection company. The tricky part is that terminating the collection company as to a certain account and moving it to an attorney firm may trigger payment of the collection fees by the association. Again, this is why it is so important for the association to carefully review any proposed debt collection contacts with independent legal counsel before the agreement is signed, otherwise an association may be the bottom line is that the board has an obligation to act in the best interests of the association and employing a collection company that will charge unreasonable fees, which may become the responsibility of the association, does not appear to be in the best interest of the community as a whole.

6. Is the debt collection company really looking out for my association?

The goal of any debt collection company is simple: to collect as much money as possible and to in turn generate a profit for the debt collection company's owners. Similarly, boards of directors should be aware that the debt collection company may not be representing the association's interests on other matters, such as mortgage foreclosures and bankruptcies.

For example, if a mortgage foreclosure action is almost complete, it may not be necessary for the collection company to take the next step in its collection process. However, the collection company is not bound by the same ethical standards that bind every licensed Florida attorney. It would presumably want to charge its fee, so it may proceed without caring about how much is ultimately due by the homeowner. Similarly, if a homeowner files bankruptcy, and an automatic stay is put in place, the association would be precluded from taking action to collect or enforce the debt. However, in our experience, boards are not informed by their collection company on bankruptcy issues, most likely because the companies are not attorneys and cannot provide legal advice. Unfortunately, however, not being informed could result in sanctions imposed by the bankruptcy court. That is why we recommend that counsel for the association remain involved in these matters even if the delinquent account is turned over to a collection company.

RM News...

ACHIEVEMENTS

RM prides itself in recognizing demonstrated abilities, talents and strengths and believes in providing professional growth opportunities and challenging roles that reward its employees for their dedication and hard work. In keeping with that vision, RM is pleased to announce the following accomplishments:

Yelizaveta B. Herman, Esq.

Yelizaveta B. Herman, ("Liz") has practiced commercial litigation with RM since shortly after the inception of the law firm. We are so proud to announce that she has recently been promoted to Senior Associate. In addition to her complex legal work, she continues to chair various committees with the Palm Beach County Bar Association and the Palm Beach Chapter of the Florida Association of Women Lawyers.

NEW TEAM MEMBERS

We have recently expanded and have been quite fortunate to find professional and talented employees to join the ranks of an already amazing team!

Lisa Reves, Esq.

Lisa Reves, joined our firm as our newest attorney on November 17, 2014. While Lisa just recently graduated NSU Shepard Broad Law Center (Nova Law) and was sworn in to the Florida Bar, she brings a wealth of land use experience being the Project Manager at a prominent land use and planning firm in Palm Beach County from April 1998, until she left to go to law school in 2011.

Lisa's role here at RM will be different than a typical first year attorney. Her primary function will be to continue to develop our land planning and construction litigation practice areas while also handling some of these matters herself, as she has done in the past, before various local governments. We are so excited to have her as part of our team!

RM ATTORNEYS SELECTED FOR INFORMAL VOTERS PROJECT

We are pleased to announce that two RM attorneys have been selected for the Informed Voters Project ("IVP"). The IVP was started in Florida by Florida Supreme Court Justice Barbara Pariente, with the assistance of several other well-known legal names on a national level, including former United States Supreme Court Justice Sandra Day O'Connor, to educate voters nationwide, on a non-partisan basis, of the importance of electing highly qualified judges in judicial races. The speakers in this program are specially trained for this purpose, and include judges and leading lawyers in the legal community. Palm Beach County participants were personally selected, screened and approved for the IVP by Justice Pariente. Both RM Senior Associate Liz Herman and RM Managing Shareholder Dan Rosenbaum were selected by Justice Pariente to be speakers in the IVP.

In addition to the speaking engagements on this subject that will be offered to our clients, charitable and civic groups, community associations and managers, RM has been approved by the Florida Department of Business and Professional Regulation in Tallahassee to present this one hour course for credit to the community association managers. We are proud of our commitment to the IVP, honored by the appointments of two our attorneys to the IVP and look forward to sharing this experience with you.

We are proud to have such a strong group of team players!

Hi, I'm Rhonda

It is so hard to believe that 2015 is already here! And, with the start of every New Year, there always comes New Year's Resolutions. Mine, as usual, are always the same - Diet and Exercise. I'll do great for the first few weeks, looking stylish in those new exercise clothes, but then, I don't know what happens to me! Some experts say New Year's Resolutions are "designed for failure", while others say it's hard to keep them because "change of any kind is difficult".

According to www.statisticbrain.com, only 8 percent of people ever achieve their New Year's goals. That's out of the 45% of Americans who actually make New Year's Resolutions! I really don't like those odds at all! So, I searched a little deeper for more of a sure thing and guess what I found? Corporate New Year's Resolutions and/or goals, are almost always achieved if an annual marketing plan has been prepared with clear, concise goals and a plan to attain them.

That is exactly what Rosenbaum Mollengarden PLLC has done this year! And, the very first goal I personally am involved with, is increasing education for Association Board of Directors and managers. I am thrilled to tell you we already have classes and events booked through May, 2015, with more being added each week.

Please go to our website and check out our calendar for upcoming events. We currently have scheduled Board Member Certification classes, Lazaro Gonzalez from the Division is scheduled to present a class at Building Managers International on our behalf on Condominium Elections and Financial Reporting, Presentation Dynamics, Inc. is scheduled to present a class next month called "How to Practice Safe Stress", Servpro is scheduled to present a class on Restorative Drying for Water Damages, we have a Technology Round Table scheduled in April, the list goes on and on and, that's in addition to our monthly mini-trade shows at the North Palm Beach Country Club, private classes we schedule for Association Boards, and, CondoFest 2015! Please make it a point to stop by our booth number 72 at CondoFest and mention this newsletter to have your name entered into a special raffle prize drawing!

We would love to have you join us at any of our upcoming events. We also have a list of current courses we offer on our website. Remember, if you have a group of 10 or more, we can arrange a private class just for you! And, I'm in charge of scheduling those.

Just remember, I'm Rhonda, and even through I'm still working on my personal New Year's Resolutions of Diet and Exercise, and I did buy two new exercise outfits, I'm putting all my time, energy and effort into ensuring that Rosenbaum Mollengarden PLLC achieves their 2015 goal of increasing education for Association Board of Directors and managers. I like those odds a lot better!

For upcoming events visit our events calendar at **http://www.r-mlaw.com/events_calendar.cfm**

For Legislative updates visit: **http://www.r-mlaw.com/rm_news.cfm**

ROSENBAUM MOLLENGARDEN PLLC

ATTORNEYS AT LAW

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