RM 'On the Watch'

The RM Association Reporter

Spring Edition **2015**

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President's Message

Proposed 2015 Amendments to Construction Dispute Laws May Pose More Challenges to Owners

Chapter 558, Florida Statutes, the "Notice and Opportunity to Cure Statute", has been amended this year by the Florida Legislature. If the new legislation becomes law as expected, effective July 1, 2015, additional requirements will impact owners with construction disputes.

In 2003, the Legislature enacted Chapter 558 as an alternative dispute resolution statute to create mandatory procedures and obligations to resolve construction defect claims prior to a lawsuit being filed. This was done to reduce the number of construction defect lawsuits and the associated expenses. The original legislation enacted extensive procedures and requirements for associations, owners, contractors and design professionals (architects and engineers) to follow before a construction defect lawsuit can be filed. Generally, from the owners' perspective, compliance was time consuming and frustrating, with little or no value being accomplished in most instances. The construction industry, in turn, complained that the required Notices of Claim were often unclear and unsupported by the documentation required, and that they were incurring significant expense investigating construction defects that often did not exist.

It is with that background that in 2015 the Florida Legislature made further amendments to Chapter 558. The more important amendments are summarized as follows:

1. Requiring a much more detailed Notice of Claim than the existing requirements. The Notice of Claim under the new legislation must be based upon at least a visual inspection by the claimant or its agents and must identify the location of each construction defect sufficiently so the responding parties can locate the defect without undue burden. However, the claimant does not have any obligation to perform actual testing for the Notice of Claim.
2. Providing the option for either a claimant or a party against whom a claim is made, at their own expense, to obtain the other party's photographs and videos of the construction defects identified in the Notice of Claim and all maintenance records and other documents related to the discovery, investigation, causation and extent of the defects identified in the Notice of Claim, and any resulting damages. However, a party may still assert a claim of privilege which is recognized under Florida law with respect to any of the disclosure obligations.
3. Including as part of the legislative intent for the entire Chapter, that insurance companies have a role in the process of construction defect claim resolution through confidential settlement negotiations.
4. Broadening the definition of "completion of a building or improvement" to include a temporary certificate of occupancy or an equivalent authorization, so more structures are within the purview of the Chapter 558 requirements.

While as of this writing the Governor has not signed the legislation yet, and it has otherwise not become law, it is the final legislation and is expected to become law. A previous State House version of this legislation contained far-reaching monetary sanctions that could be imposed by a court after a lawsuit is filed in the event a claimant knew or should have known at the time the Notice of Claim was served, that any of the construction defects were unsupported or were frivolous. These sanctions included paying the responding parties' pre-suit attorneys' fees and costs, costs of inspection, investigation, testing and pre-judgment interest. Notably, these purposed sanctions were removed from the final legislation. However, they may be a sign of things to come.

Another bill which relates to the statute of repose for construction defect lawsuits was not passed by the Legislature. This bill would have amended Section 95.11, Florida Statutes, which determines the time period in which lawsuits for claims can be brought. This legislation would have reduced the time in which a claim for a latent defect in the design, planning or construction of an improvement to real property could be brought. This legislation was intended to reduce the time in which a latent construction defect could be brought, from the date it is discovered or should have been discovered with the exercise of reasonable diligence, to a maximum of seven (7) years after the date of actual possession by the owner, the date of the issuance of a certificate of occupancy, the date of abandonment of construction if it is not completed or the date of completion or termination of a contract between the professional engineer, registered architect or licensed contractor and his or her employer, whichever date is latest. This would have been a reduction of three (3) years from the current statute, which permits up to ten (10) years to bring this type of claim. The bill failed to pass during the current legislation session.

Chapter 558 provides an "opt-out" procedure which must be in writing and clearly expressed in a contract. However, the question of how to opt-out of the provisions of Chapter 558 should be reviewed with counsel on a case by case basis.

The conclusion to be drawn from the 2015 construction dispute legislation and legislative efforts is that construction defect claims of all types, patent and latent, need to be pursued as soon as they are discovered, and that it is very important to undertake actions to determine whether construction has been performed correctly so these claims can be timely pursued. Owners are now clearly on notice that they need to take the initiative and use the various methods available, including timely post-construction testing and professional evaluation, to make sure that the benefit of the construction bargain is obtained.

Application of Condominium and Cooperative Association Assessment Payments; Back to Normal

By: Peter C. Mollengarden, Esquire

In the last edition of On the Watch we reported about the Second District Court of Appeal decision, 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), in which the Court held that a partial payment made to the association accompanied by a restrictive endorsement, such as "Paid in Full", was an accord and satisfaction of the entire debt owed the association notwithstanding the provisions of the Condominium Act regarding application of payments. The Court determined this type of 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 commonly referred to as the law of accord and satisfaction.

The St. Croix Lane Trust decision turned the world of collecting community association assessments upside down as associations had to become extremely diligent about not accepting and depositing partial payments with restrictive endorsements such as "Paid in Full" in order to avoid inadvertently waiving the ability to collect the remaining amount(s) owed the Association. In light of the number of associations which allow owners to use direct deposit and bank "lock boxes" for payments, the St. Croix Lane Trust case created a great deal of uncertainty and angst concerning whether such payments, which typically are not reviewed by the association prior to deposit, containing a restrictive endorsement would be held to be governed by the law of accord and satisfaction.

Lo and behold, it appears the Florida Legislature has come to the rescue, at least with respect to condominium and cooperative associations. In the session of the Legislature just concluded House Bill 791 was passed by the House and Senate which amends, among other things, Section 718.116 (3) of the Condominium Act in pertinent part as follows:

> … 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 fees incurred in collection, and then to the delinquent assessment. The foregoing is applicable notwithstanding s. 673.3111, any purported accord and satisfaction, or any restrictive endorsement, designation, or instruction placed on or accompanying a payment. The preceding sentence is intended to clarify existing law …

The underlined language was added by the recent legislative amendment. Similar language was added to Section 719.108 (3) of the Florida Cooperative Act. Assuming the Bill is not vetoed by Governor Scott it will become effective July 1, 2015 and condominium and cooperative associations will no longer have to be concerned that a partial payment with a restrictive endorsement or any purported accord and satisfaction will preclude them from pursuing collection of the remaining amount(s) owed. Unfortunately, for reasons known only to the Legislature, Chapter 720, Florida Statutes, governing homeowners associations was not similarly amended leaving the impact of restrictive endorsements and any purported accord and satisfaction accompanying payments to homeowner associations still a potential problem. Stay tuned to RM On the Watch for further updates and a special edition coming out shortly reporting on the other 2015 amendments to the laws governing condominium, homeowners and cooperative associations.

5 of the Most Common Misperceptions of Community Associations - *by Allison L. Hertz, Esquire*

1. Eviction of Tenants: Contrary to popular belief (at least among condominium and homeowners association directors), there is no inherent authority of a community association to evict a tenant for violations of the governing documents, including the failure to be approved in advance of occupying the unit or lot. A community association may evict a tenant of a delinquent owner if the tenant fails to pay rent to the association after a demand is made pursuant to either the Florida Condominium Act or the Florida Homeowners Association Act. However, the authority to evict tenants for violations of the governing documents must be contained in the community's declaration of condominium or declaration of covenants. This is because only landlords generally have the statutory right to evict tenants, and a community association is not a landlord under Chapter 83, Florida Statutes, the Florida Landlord/Tenant Act. In order to remove a tenant, a community association must bring an action for injunctive relief against the owner, in court, seeking the removal of the tenant by the owner. Disputes regarding the removal of a tenant by a condominium association are not subject to arbitration before the Division of Florida Condominiums, Timeshares and Mobile Homes, but tenant disputes are subject to pre-suit mediation by homeowners associations. Associations should consider amending their declaration of condominium or covenants to specifically provide for eviction authority.

2. Lien for Enforcement of Maintenance or Damage to Association Property: An owner or his/her tenant, guest or family member damages the common elements or common area, or the owner fails to maintain his/her unit and the association must enter the unit to perform the maintenance or repair to protect the common elements or the other units. In our experience, in each of these scenarios the board of directors frequently assumes the association may record a lien against the owner's unit for the expenses incurred by the Association to maintain or repair the common elements/common area or the owner's unit. However, often time that is not the case. The lien of a community association secures the payment of assessments for "common expenses". Common expenses are defined in the association's governing documents and the applicable statute. However, other costs incurred by a community association with respect to enforcing an owner's maintenance obligations or repairing damage caused by the negligence of an owner or his/her family members or guests are not necessarily secured by a lien against the unit or lot. The community association's governing documents must specifically authorize the association to "assess" the owner for these costs, and to record a lien for non-payment. Therefore, we suggest that boards of directors carefully review their governing documents with their association counsel to determine the extent of the association's assessment and lien authority before the association incurs substantial expense to enforce the maintenance obligations of a unit or lot owner. Additionally, in the case of damage caused by the negligence of a unit or lot owner, if the governing documents authorize the association to charge the owner and/or impose a lien for such expenses, the documents will frequently provide that the association must attempt to make an insurance claim and obtain proceeds before it may assess or otherwise charge the costs to an owner.

3. Delinquency Reports: Delinquency reports are not confidential. They are part of a community association's official records, they are subject to inspection by other owners and they may (and should) be openly discussed at Board meetings when the Board is making decisions with respect to delinquency situations. Specifically, the Florida Condominium Act and Homeowners Association Act provide that an

association's official records must include a statement of the account for each owner designating the due date and amount of each assessment, the amount paid on the account, and the balance due. However, be aware that "deadbeat lists" are strictly prohibited by Florida consumer protection laws and a community association is prohibited from posting a list of delinquent owners for the purpose of enforcing or attempting to enforce the collection of assessments.

4. Election of Directors by Secret Ballot: While the Florida Condominium Act provides that elections must be by secret ballot, elections in a homeowners association are not always by secret ballot. It simply depends on the provisions of the particular homeowners association's governing documents, and governing documents must be analyzed on a case-by-case basis because they are not all the same. The Florida Homeowners Association Act provides that elections of directors must be conducted in accordance with the procedures set forth in the governing documents of the association. Therefore, each homeowners association must review its governing documents to determine if the election is by secret ballot. If the governing documents permit voting by members who are not in attendance at the meeting by secret ballot (i.e. secret ballot in advance of the election), the ballots must be placed in inner and outer envelopes and the outer envelope must be marked with the name, address and signature of the lot or parcel owner casting the ballot, like a condo-style election per a recent amendment to the Florida Homeowners Association Act. Do not assume that a homeowners association has the inherent right to conduct an election by mail-in or delivery of secret ballots by members not in attendance at the election meeting. Again, the authority to conduct an election in such manner must be set forth in the association's governing documents.

5. Access to Units/Lots: The Florida Condominium Act provides as follows with respect to access to units:

> *The association has the irrevocable right of access to each unit during reasonable hours, when necessary for the maintenance, repair, or replacement of any common elements or of any portion of a unit to be maintained by the association pursuant to the declaration or as necessary to prevent damage to the common elements or to a unit.*

The Florida Condominium Act also addresses a condominium association's authority to enter an "abandoned unit", as defined by the statute. However, the Florida Homeowners Association Act does not provide a homeowners association with any authority to enter a lot or home to inspect the property or to prevent damage to the common area or other lots. This authority must be contained in the homeowners association's declaration of covenants. Accessing or entering a lot without express authority could result in liability to the association in the form of trespass and damages. Therefore, we suggest that homeowners associations consider amending their declaration of covenants to provide the association with authority to access a lot.

Back to Basics: Condo Collections 101

By: Mark G. Keegan, Esquire

In this edition of Back to Basics, we cover the steps involved in collecting delinquent assessments and related charges in the condominium context, from the initial demand letter, through the filing and prosecuting of a lien foreclosure action, to an eventual foreclosure sale. We will address collections from a homeowners association prospective in a future issue. While this article addresses the majority of condominium collection cases that are uncontested, the introduction of any one of a number of factors can and often does operate to take any given case "off track." This article does not cover any of those situations and is not intended to be an exhaustive analysis of every conceivable occurrence, but instead provides a general overview of the steps a Florida condominium must undertake to properly pursue an uncontested condominium assessment collection case from start to finish.

Step 1: Initial Demand Letter (first 30 day notice): When we receive a ledger indicating a unit owner is delinquent, by law we are required to send an initial demand letter to the delinquent unit owner (1) containing a breakdown of the amounts due and (2) informing the unit owner of the Association's intent to record a lien if the past due balance is not paid in full within 30 days. Specifically, section 718.121(4) of the Florida Statutes provides:

> No lien may be filed by the association against a condominium unit until 30 days after the date on which a notice of intent to file a lien has been delivered to the owner by registered or certified mail, return receipt requested, and by first-class United States mail to the owner at his or her last address as reflected in the records of the association, if the address is within the United States, and delivered to the owner at the address of the unit if the owner's address as reflected in the records of the association is not the unit address. If the address reflected in the records is outside the United States, sending the notice to that address and to the unit address by first-class United States mail is sufficient. Delivery of the notice shall be deemed given upon mailing as required by this subsection.

Step 2: Record the Lien: Many delinquent owners wisely bring their accounts current after receiving the first notice. If, however, the delinquent unit owner does not bring their account current within 30 days of the initial demand letter, the next step in the process is to record a lien against the condominium unit. A lien is a document recorded in the public records that secures the debt (past due amounts) against the condominium unit owned by the delinquent unit owner. According to section 718.116(5)(b) of the Florida Statutes:

> To be valid, a claim of lien must state the description of the condominium parcel, the name of the record owner, the name and address of the association, the amount due, and the due dates. It must be executed and acknowledged by an officer or authorized agent of the association. The lien is not effective 1 year after the claim of lien was recorded unless, within that time, an action to enforce the lien is commenced. The 1-year period is automatically extended for any length of time during which the association is prevented from filing a foreclosure action by an automatic stay resulting from a bankruptcy petition filed by the parcel owner or any other person claiming an interest in the parcel.
> The claim of lien secures all unpaid assessments that are due and that may accrue after the claim of lien is recorded and through the

> entry of a final judgment, as well as interest and all reasonable costs and attorney's fees incurred by the association incident to the collection process. Upon payment in full, the person making the payment is entitled to a satisfaction of the lien.

Step 3: Send the Lien to the Unit Owner with the Intent to Foreclose Letter (a/k/a the 2nd 30 day notice): Once the Association records its lien for assessments, the next step in the collection process involves sending the delinquent unit owner (1) a copy of the lien and (2) a second notice giving the unit owner another 30 days to pay the past due balance. Specifically, section 718.116(6)(b) of the Florida Statutes provides, in pertinent part:

> No foreclosure judgment may be entered until at least 30 days after the association gives written notice to the unit owner of its intention to foreclose its lien to collect the unpaid assessments.

Step 4: File the Lien Foreclosure Lawsuit:
Assuming the unit owner has not brought their account current within 30 days of receiving (1) a copy of the lien and (2) the second 30 day notice, the Association is now in a position to file a lien foreclosure lawsuit. This step involves preparing and then filing the foreclosure complaint package at the courthouse. Since Florida law requires an Association to send two, separate notices giving the delinquent owner at least 60 total days to bring their account current before a lien foreclosure lawsuit may be filed, Associations should keep these time periods in mind when making decisions whether to pursue collections against a delinquent owner.

Step 5: Serve the summons and complaint on the delinquent unit owner: Once the Association files its lien foreclosure lawsuit, it becomes the plaintiff and must serve a copy of the summons and complaint on the delinquent unit owner, as well as any other interested persons and junior lienholders, who are collectively referred to as "defendants" in the lawsuit. Once the defendants are served with the summons and complaint, they each have 20 days to serve a response on the Association pursuant to Florida Rule of Civil Procedure 1.140(a) ("a defendant shall serve an answer within 20 days after service of original process and the initial pleading."). In most cases, the 20 days comes and goes and the defendant fails to file a response, which means the Association may then move for a default for failure to respond to the complaint.

Step 6: Motion for Default: Assuming the defendant does not file a response to the Association's lawsuit within 20 days after service of the summons and complaint, the next step is for the Association to file a motion for default. If the default is entered against the defendant, this means the defendant is deemed to have admitted all well-pleaded allegations of the Association's complaint and that the Association is ready to move forward with a motion for summary judgment. From a practical perspective, if a defendant is defaulted in this context it means they have admitted *liability* for unpaid assessments and related charges, leaving open for determination only the *amount* of damages, i.e. what sum of money the defendant is liable for.

Step 7: Motion for Summary Judgment and Hearing on the Motion:
Once the defendant has been defaulted, the Association will file a motion for summary judgment. Simply put, by filing this motion the Association is asking the Judge to rule, as a matter of law, that there is no genuine issue of any material fact, the Association is entitled to foreclose its lien for unpaid assessments, and that the defendant's condominium unit should be sold at foreclosure sale.

A motion for summary judgment is accompanied by affidavits supporting the Association's position, including an affidavit of indebtedness that is executed by an authorized representative of the Association. Often times it takes several months to obtain a hearing on the Association's motion for summary judgment.

Step 8: Foreclosure Sale: Once the Association obtains a hearing on its motion for summary judgment, and assuming the Association prevails at the hearing and the Judge enters a Final Judgment of Foreclosure in the Association's favor, the next step in the process is the foreclosure sale of the condominium unit. The foreclosure sale date will be set by the Judge at the summary judgment hearing. The foreclosure sale, which is no longer conducted on the courthouse steps but is instead conducted "online" and is open to the public, is typically scheduled anywhere between 30 and 70 days after the hearing on the Association's motion for summary judgment.

While the nuances of foreclosure sales could be discussed for weeks, in a general sense if the foreclosed property is "under water" by virtue of a first mortgage balance that exceeds the fair market price of the property, a foreclosing condominium association is almost certain to acquire the property at its own foreclosure sale subject to the unsatisfied first mortgage. With property values seemingly on the rebound, however, we hope to see more positive equity situations which usually result in a third party acquiring the property at foreclosure sale, the Association receiving payment in full, and a new owner-not the Association-occupying the property and paying assessments going forward.

Step 9: Certificate of Sale: After a foreclosure sale of the condominium unit, the Clerk of Court will issue a Certificate of Sale pursuant to section 45.031(4) of the Florida Statutes, which provides that "After a sale of the property the clerk shall promptly file a certificate of sale and serve a copy of it on each party." The Certificate of Sale is usually issued the day of the sale and identifies the winning bidder at the foreclosure. The Certificate of Sale does not transfer ownership of the property but instead starts the clock ticking on the 10 day period to object to the foreclosure sale.

Step 10: Certificate of Title: Assuming the Clerk of Court does not receive any objections to the sale within 10 days following the sale, section 45.031(5) of the Florida Statutes requires the Clerk of Court to issue a Certificate of Title to the winning bidder. The Certificate of Title acts as a deed and legally transfers ownership of the unit from the delinquent owner to the foreclosure sale's successful bidder.

RM News... By: Lourdes M. Henson, Administrator

"Busy, busy, busy and MORE busy" are the words that come to mind at any given moment, and it's great! Time at RM just seems to fly! Let's see how I can sum it up.

RM continues to grow and is being retained by a wide variety of clients including representation of new community associations, and both high-end large and small businesses and individuals, especially those with litigation of all kinds and land use matters. The firm's continuing growth is rewarding in so many ways. Aside from the business aspect there is the "employee" aspect, and our employees are very important and a truly valuable asset. RM's vision has always been to recognize unique talents, and offer its employees the opportunity to take on challenging and professional growth opportunities within RM. Changes through growth has also allowed us to expand our team. We want to acknowledge some new RM team members.

Lisa Reves is an attorney who practices in the areas of land development and environmental law, zoning, planning and land use, and governmental relations. Lisa has a high level of passion for her work as well as an extensive land use background and wide experience which she is able to apply in her day-to-day practice.

Brittany Ortman recently joined our Accounting Department. Brittany brought with her a diversified legal field work background. In the short time she has been with our firm, she has proven to be very knowledgeable in her new role.

Dale Rosenbaum's expertise and efforts are concentrated in trouble shooting and enhancing our internal technical systems. Dale came to the firm from Northrup Grumman, where he handled sophisticated defense programs. Aside from dealing with hardware and software issues as they arise, Dale undertakes technical projects such as creating an energy-charged jumbotron commercial for our firm that aired at the 2015 Winter Equestrian Festival, an event in which our firm is an annual sponsor.

We previously mentioned that Dina Rosenbaum was going to be leaving our firm after 6 years to begin law school at Nova Southeastern School of Law in Ft. Lauderdale in August 2014. Time flies and after completing two academically successful semesters, she will be coming back for the summer as a law clerk until she returns to law school for her second year. Additionally, she has accepted one of the three offers she received from her professors to assist them with summer research projects.

Also, within the past two months, two of our employees were blessed with the addition of new members to their families and we are quite excited for them! Congratulations to attorney Liz Herman and her husband Ron on the birth of their beautiful little girl Karen Mandy. We also congratulate our Accounting Department Manager Yesmin Gamez and her husband Oscar on the birth of their handsome son Gavin Noah! We know for a fact that both new Moms have their hands quite full as both have toddlers as well! We look forward to having them return to RM very soon.

In closing, it's like I said before; "busy, busy, busy" and we wouldn't have it any other way!

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Hi, I'm Rhonda

Spring has officially arrived, and it is truly a time to celebrate! The days are starting to get longer. The weather is starting to get warmer. New life is seen growing all around us. It is the season most people find themselves energized and invigorated, ready to take on new initiatives. And why not be recharged at this time of the year? The Rite of Spring delivers something exciting for each one of us, starting with Passover, Major League Baseball's opening day, Easter, the Boston Marathon, Tax Day, Earth Day, New York Fashion Week, the NFL Draft, the Kentucky Derby, and let's not forget Mother's Day. It is truly an exciting season with fresh starts and new beginnings all around us!

And, even here in Florida community association land, it is no different. Spring brings us new board members as the annual meetings have recently been conducted and new board appointments made, "snowbirds" have started migrating back north, the legislative session is well underway, board certification classes are being conducted and certificates provided, and, property managers are making their list of projects to be completed by the time the full board and owners return in the Fall. Oh, Spring is truly an exciting time, full of renewal and rebirth!

Even on a much smaller scale, here at Rosenbaum Mollengarden PLLC, it is no different. Behind the scenes, we have already "sprung" into action and started our research and writing for new continuing education classes that are of interest to associations, reviewing the results of the legislative session, summarizing the outcome of the bills enrolled that will impact Florida community associations, and scheduling the presentation of the 2016 Legal Update (after October 1, 2016). Currently we have drafts for other new classes on *Tax Deeds 101, Insurance – are you adequately covered?* and *Board Meeting Etiquette.* Oh, Spring is truly an exciting time of growth for us all!

Please, make it a point to go to our website periodically and check out our calendar for upcoming events. We would love to have you join us. Keep checking our list of the FREE CEU courses we offer as we look forward to receiving approvals on our new ones. And, don't forget, if you have a group of 10 or more, we can arrange a private class just for you! All you have to do is call or e-mail me to schedule.

Just remember, I'm Rhonda, and no matter what season it is, I am always so excited to share the great things Rosenbaum Mollengarden PLLC has to offer!

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**

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