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FLORIDA SUPREME COURT SAYS EACH DEFAULT RESETS THE FORECLOSURE SUIT CLOCK

BY: CHRISTOPHER J. SHIELDS, ESQ.

On November 3, 2016 the Florida Supreme Court ruled that each monthly default on a mortgage loan payment resets the five year statute of limitations for filing a foreclosure suit.

In a long awaited decision, the case of Bartram v. U.S. Bank, N.A., concerned the impact of a lender's acceleration of the promissory note and mortgage when the lender's foreclosure lawsuit is later dismissed. The Court's holding dramatically impacts community associations since the association's lien against a delinquent owner is subordinate to any first mortgage that a lender already has on the property. Associations had been hoping that Florida's five year statute of limitations would bar and preclude lenders from having the right to foreclose any mortgage that had been delinquent for more than five (5) years. Typically, when a borrower misses a monthly payment, the lender has the right to declare the mortgage in default and accelerate the remaining payments that are owed.

In the Bartram case, the loan was made in February of 2005. Shortly thereafter, in January 2006, the borrower stopped making monthly payments and the loan went into default. In May 2006, the lender filed its first foreclosure suit. In May 2011, the Bank's foreclosure suit was involuntarily dismissed by the Court. In 2012, the bank refiled its foreclosure suit and the association asserted that the five year statute of limitations barred the bank's foreclosure suit.

The Florida Supreme Court held that the bank's previous acceleration of mortgage payments does not place future installments at issue when standard loan documents are utilized. Thus, the court ruled that the dismissal of the initial bank foreclosure action did not bar or otherwise preclude the bank from suing to foreclose based upon subsequent monthly installment defaults. According to the court's holding, each subsequent installment of the promissory note that remains unpaid and in default creates a new and separate basis upon which the lender can sue to foreclose.

The upshot is that just because an owner has been in default of his/her mortgage for more than five (5) years does not mean that the bank's five year statute of limitations has expired. The impact of this decision on community associations cannot be underestimated and especially for those associations who have been assuming that a bank would be barred on the 5 year statute of limitations and be precluded from foreclosing loans which have been in default for more than five (5) years.

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COMMUNITY ASSOCIATION SUBJECT TO THE FLORIDA CONSUMER COLLECTION PRACTICES ACT

BY: SUSAN M. MCLAUGHLIN, ESQ.

On November 9, 2016, the United States Court of Appeals of The Eleventh Circuit filed an opinion in *Agrelo v. Affinity Management Services, LLC and Marbella Park Homeowners' Association, Inc.* The Court held that an association and its manager could be liable for violations of Florida's debt collection law even though they are not covered entities under a similar federal statute.

The dispute arose when the association, without citing any specific provision of the governing documents, fined the owners of property in the community $1,000 for relocating a fence and removal of certain plants. The owners ultimately sued the association, its attorney and its management company. The owners challenged the fine and alleged that the collection efforts by the association's manager and attorney, for which the Association was vicariously liable, violated the Florida Consumer Collection Practices Act ("FCCPA").

The lower court dismissed the FCCPA claims on the basis that the fine was not a debt within the meaning of the law and the association could not be vicariously liable for the action of its management company or attorney because it was not a debt collector under the law. On appeal, the court held that the obligation to pay the fine arose from the contractual obligations under the governing documents of the association. Therefore, the fine was a debt covered by the FCCPA. The court also held, while the Association was not covered by Federal Fair Debt Collection Practices Act ("FFDCPA"), it was covered under Florida's FCCPA. One of the main differences is that provisions of the FCCPA cover all debt collection activities and not just activities of debt collectors. Therefore, a finding of vicarious liability could be appropriate. However, whether vicarious liability applies it must be decided based upon Florida's agency law principles, which issues had not been addressed in the lower court.

Essentially, the owners contended the manager and attorney were aware that the fine was not valid and pursued collection anyway via a series of demand letters. No lien was recorded but the owners also contended the attorney's threats to sue to foreclose the association's "continuing lien" unless they paid the fine and his pre-suit attorney fees was also made when the attorney knew that the association could do no such thing. While the tone of the court's opinion suggests skepticism, it did not decide the validity of the fine or whether collection efforts violated the law.

"SERVICER" OF A FIRST MORTGAGE IS NOW ENTITLED TO CLAIM "SAFE HARBOR"

BY: CHRISTOPHER J. SHIELDS, ESQ.

In October 2016, Florida Second District Court of Appeals in Brittany's Place Condominium Association v. U.S. Bank, N.A. held that "ownership" of the note and mortgage was not required in order for a foreclosing party to limit its liability and receive the "safe harbor" treatment afforded by Florida Statute Section 718.116(1)(b). Now, not even a month after Brittany's Place was decided, Florida's 5th District Court of Appeals in the case entitled Village Square Condominium v. U.S. Bank, N.A., has extended safe harbor privileges to the "servicer" of that mortgage so long as the servicer named and served the condominium association in its mortgage foreclosure action. This case continues the Florida Appellate Court's recent trend of extending safe harbor privileges to parties who have not received an assignment of the mortgage and are simply the "servicer" of the lender's loan or a party who claims they own the loan even though there is no written assignment of mortgage by the mortgagee of record.

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RETROACTIVE APPLICATION OF AMENDMENTS TO FACILITATE CONDOMINIUM TERMINATIONS HELD UNCONSTITUTIONAL

BY: SUSAN M. MCLAUGHLIN, ESQ.

In the case of *The Tropicana Condominium Association, Inc. v. Tropical Condominium LLC*, (hereinafter the "LLC") the Court held that 2007 amendments to the Florida Condominium Act, intended to facilitate terminations of older properties, could not be retroactively applied. However, an examination of facts involved leaves some hope of a work around for some condominiums seeking to adopt the current statutory formula for termination.

The 2007 amendments to Section 718.117, Fla. Stat., allow for termination of a condominium by vote of 80% of the owners so long as the plan of termination is not opposed by 10% or more of the owners. The real issue in *Tropicana* was the challenge to an amendment to Tropicana's condominium declaration, not a challenge to the statute itself, but as you will see, the court was backed into making a ruling on the statute as well.

The termination section in the original declaration for Tropicana required approval of all of the owners to terminate the condominium. The amendment at issue reduced the number of unit owners required to approve termination of the condominium to a vote of 80% of the owners without any provision also requiring that less than 10% of the owners vote to reject the plan.

The amendment was approved by the majority of the owners which was the threshold for general amendments. The problem was that the termination section in the original declaration for Tropicana also stated the termination provision could not be amended except by a vote of 100% of the owners. Thus the court held the amendment was not valid under the provisions of the declaration.

The court was then required to address the association's alternative argument which was Section 718.117, Fla. Stat. that superseded the declaration as originally recorded and as amended, because Section 718.117 specifically provided that it applied to all condominiums in existence on or after July 1, 2007. The court held this provision of the statute was an unconstitutional retroactive impairment of contracts unless the original declaration contained "Kaufman language."

"Kaufman language" refers to a provision in the declaration that incorporates future amendments to the statute into the declaration on a blanket basis or just for certain provisions of the declaration. The *Tropicana* decision also suggests that the result would be different if the termination provision had not had a specific provision requiring a 100% of the owners to approve an amendment to that section of the declaration.

(*The Tropicana* decision came of out Florida Third District Court of Appeals Case No. 3DC15-2585 which was filed on November 16, 2016 and is not final until disposition of any timely petition for rehearing.)

COURT RULES FNMA NOT ENTITLED TO A "DO-OVER"

BY: CHRISTOPHER J. SHIELDS, ESQ.

On November 23, 2016, Florida's 4th District Court of Appeals held that the word "initially" in the Florida Homeowners' Act created a condition precedent to the plaintiff lender's entitlement to claim safe harbor under Florida Statutes Section 720.3085(2).

The issue arose because FNMA did not join the homeowners association as a defendant until four (4) years after it filed its foreclosure suit.

The pertinent section of the statutory text reads as follows:

> "The limitation on first mortgagee liability provided by this paragraph apply only if the first mortgagee filed suit against the parcel owner and initially joined the association as a defendant in the mortgagee foreclosure action."

Florida's Fourth District Court of Appeals rejected FNMA's argument and held FNMA's failure to initially join the association as a defendant precluded their ability to claim the benefits under the safe harbor statute.

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In this case, one word and the placement of that one word "initially" in the statute prevented FNMA from its attempt to do a "do-over", i.e. to receive safe harbor treatment when it reforeclosed its mortgage against the previously unnamed HOA defendant.

AMENDMENT IMPOSING A TWO UNIT LIMIT IS UPHELD

BY: SUSAN M. MCLAUGHLIN, ESQ.

In *The Tropicana Condominium Association, Inc. v. Tropical Condominium LLC,* (hereinafter the "Unit Owner"), the association successfully defended an amendment limiting the right of an owner to acquire an interest in a unit if the acquisition would result in the owner having an interest in more than two units. This essentially opened the door for the association, made up of 48 owners, to oppose the attempt of the Unit Owner which had acquired more than 10 percent of the units to gain undue influence in the affairs of the association.

The Unit Owner had successfully argued at the trial court level that the amendment imposing the limitation was an undue restraint on the Unit Owner's right to acquire property or the seller's right to sell to a willing buyer ("unconstitutional restraint on alienation"). The appellate court ruled that amendments establishing restrictions of a sale of a unit are specifically authorized by Section 718.104(5), Fla. Stat. The court also found that the restriction had a negligible impact on marketability and was reasonable.

Many community associations have amended their governing documents to bar owners from holding an interest in more than two or some other specified number of condominium units or lots. The court's ruling is especially important for associations where, for instance, there are only ten units and where ownership of multiple units seriously dilutes the voting power of the other owners. A limitation on multiple unit or lot ownership also decreases the potential harm when the owner of multiple properties in the same community defaults on the duty to pay assessments. In larger associations, a two lot limit is mainly a tool for reducing the number of rental properties in the community.

DEBTOR WHO "SURRENDERS" HIS HOME IN FEDERAL BANKRUPTCY COURT IS NOT ENTITLED TO LATER CONTEST THE STATE COURT FORECLOSURE OF THEIR HOME

BY: CHRISTOPHER J. SHIELDS, ESQ.

In the case of Fialla v. Citibank N.A. the Fiallas defaulted on their mortgage and in their Federal Bankruptcy Petition, they stated they would surrender their house. Because there was no equity in the house, the Bankruptcy Trustee "abandoned" the property back to the Fiallas. Then, the Fiallas challenged the bank's mortgage foreclosure in state court.

The U.S. 11th Circuit Court at Appeals held that a debtor who promises to surrender property in federal bankruptcy court and then once his debts are discharged in bankruptcy, later breaks that promise by opposing the foreclosure in state court has abused the bankruptcy which sets the stage for the court to impose sanctions as a result of the "abuse".

If nothing else, this case's ruling will put a chilling effect on bankrupt debtors and the debtor's counsel's attempts to delay the mortgage foreclosure process.

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LENDER QUESTIONNAIRES, ESTOPPEL CERTIFICATES AND TRANSFER FEES (WHO CAN CHARGE WHOM, WHAT, WHEN AND WHERE?)

BY: JONATHAN G. SIEG and CHRISTOPHER J. SHIELDS, ESQ.

Community Associations across the State of Florida are often faced with requests from potential buyers and their lenders for the completion of questionnaires and estoppel certificates. Associations are also often called on to approve and deny sales and leases within their communities, which may require extensive application and screening process. Naturally, these responsibilities cause Associations to expend time, money and other resources. This leads to questions regarding whether Associations have a right to defray some these costs by passing them on to the borrowers and lenders and the potential purchasers and lease applicants. This article will explore the topic of when Associations may legally charge fees, how much those fees may be and the relevant differences between Condominium Associations and Homeowners Associations. It will also address how Associations should approach the answering and completion of questionnaires.

A) Lenders' Questionnaires

It is generally a prerequisite of many lenders that a lender's questionnaire be completed prior to a lender agreeing to lend to potential buyers within a particular community. This occurs in both Condominium Associations and Homeowners Associations. Guidance on this topic can be found within Chapter 718 of the Florida Statutes for Condominium Associations and within Chapter 720 of the Florida Statutes for Homeowners Associations. The good news is that, for now at least, the provisions which address lenders' questionnaires in Chapter 718 and Chapter 720 of the Florida Statutes are virtually identical and allow Community Associations to charge for the completion of a lender's questionnaire.

A Condominium Association's right to charge for the completion of a lender's questionnaire is provided for within Section 718.111(12)(e)(1), Florida Statutes, which specifies that:

> "The association or its authorized agent may charge a reasonable fee to the prospective purchaser, lienholder, or the current unit owner for providing good faith responses to requests for information by or on behalf of a prospective purchaser or lienholder, other than that required by law, if the fee does not exceed $150 plus the reasonable cost of photocopying and any attorney's fees incurred by the association in connection with the response."

Accordingly, the statute makes it clear that Condominium Associations are entitled to charge for questionnaires up to the following amounts:

1. $150.00;
2. the 'reasonable' cost of photocopying; and
3. the attorney's fees incurred in connection with the response.

With respect to Homeowners Associations, Chapter 720 of the Florida Statutes provides for similar limits to what condominium associations can charge for the completion of questionnaires. Specifically, Section 720.303(5)(d), Florida Statutes designates that:

> "The association or its authorized agent may charge a reasonable fee to the prospective purchaser or lienholder or the current parcel owner or member for providing good faith responses to requests for information by or on behalf of a prospective purchaser or lienholder, other than that required by law, if the fee does not exceed $150 plus the reasonable cost of photocopying and any attorney fees incurred by the association in connection with the response."

Therefore, like Condominium Associations, Homeowners Associations are also only entitled to charge for questionnaires up to the following amounts:

1. $150.00;
2. the 'reasonable' cost of photocopying; and
3. the attorney's fees incurred in connection with the response.

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Notwithstanding an Association's right to charge for the completion of lender's questionnaires, it is an entirely separate matter as to whether it is prudent for an Association to respond to many of the questions posed by a lender (e.g. percentage (%) of units that are owner occupied versus those that are investor owned; whether the Association has adequate reserves or carries adequate insurance). In many cases, it is better for an Association to decline to respond to certain which may lend themselves to subjectivity and potential liability exposure if the answers provided turn out to be wrong. For Condominium Associations, Section 718.111(12)(e)(2), Florida Statutes, provides that:

> "An association and its authorized agent are not liable for providing such information in good faith pursuant to a written request if the person providing the information includes a written statement in substantially the following form: The responses herein are made in good faith and to the best of my ability as to their accuracy."

As such, in all cases, it is recommended that Condominium Associations include the above underlined statement on any written responses to a lender's questionnaire.

B) Estoppel Certificates

In addressing estoppels certificates, Florida law requires both Condominium and Homeowners Associations to provide these upon request within 15 days after the date on which a request for an estoppel certificate is received. Fortunately, the statutory authority which addresses the completion of estoppel certificates is virtually identical for both Condominium and Homeowners Associations.

Section 718.116(8), Florida Statutes, provides that Condominium Associations or their authorized agents:

> "may charge a reasonable fee for the preparation of the certificate;" and
>
> "The authority to charge a fee for the certificate shall be established by a written resolution adopted by the board or provided by a written management, bookkeeping, or maintenance contract."

The corollary provision which applies to Homeowners Associations is found within Section 720.30851, Florida Statutes, which states that:

> "An association may charge a fee for the preparation of such certificate, and the amount of such fee must be stated on the certificate;" and
>
> "The authority to charge a fee for the certificate shall be established by a written resolution adopted by the board or provided by a written management, bookkeeping, or maintenance contract."

Accordingly, Condominium and Homeowners Associations may charge fees for estoppel certificates. Although the Association is ultimately the beneficiary of and the only party which is legally entitled to charge and collect the fee for responding to estoppel requests, it is often the case that Associations will agree to assign the right to receive estoppel fees to their managing agent as part the compensation package for the provision of management services. The only limitation with respect to the amount that Associations may charge for an estoppel certificate fees is that the fee must be reasonable. Here, what is reasonable is left to the discretion of an Association's Board of Directors.

C) Transfer Fees

In addition to charging for questionnaires and estoppel certificates, Associations may also charge transfer fees in connection with the Association's right to approve and deny sales and leases. For Homeowners Associations, Chapter 720 of the Florida Statutes does not prohibit, nor does it provide for, the right to charge transfer fees. However, the right to charge any transfer fee, including the right to charge and assess for resale capital contributions, must be expressly stated in a Homeowners Association's governing documents.

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In contrast, Chapter 718 of the Florida Statutes allows Condominium Associations to charge transfer fees but places a limit on the amount that Condominium Associations may charge. Specially, Section 718.112(2)(i), Florida Statutes provides that:

> "No charge shall be made by the association or anybody thereof in connection with the sale, mortgage, lease, sublease, or other transfer of a unit unless the association is required to approve such transfer and a fee for such approval is provided for in the declaration, articles, or bylaws. Any such fee may be preset, but in no event may such fee exceed $100 per applicant other than husband/wife or parent/dependent child, which are considered one applicant. However, if the lease or sublease is a renewal of a lease or sublease with the same lessee or sublessee, no charge shall be made."

As such, a Condominium Association is statutorily prohibited from charging any transfer fees unless: 1) the Association is legally entitled and required to approve transfers (i.e. sales or leases); and 2) the right to charge the fee is explicitly provided for within a Condominium Association's governing documents along with the specified amount of the fee provided that the fee does not exceed the $100.00 per applicant limitation. Thus, Condominium Associations may charge transfer fees but only if the two prong test is met.

Due to the fact that the law is constantly changing and evolving, it is always recommended to consult with your legal counsel to confirm your Association's right to charge any fee before doing so.

This newsletter is provided as a courtesy and is intended for the general information of the matters discussed herein above and should not be relied upon as legal advice. Christopher J. Shields (christophershields@paveselaw.com) is a Florida Bar Certified Real Estate Lawyer and Partner in the Pavese Law Firm and heads the Community Law Section for the Firm. Christina Harris Schwinn (christinaschwinn@paveselaw.com) is a Partner in the Pavese Law Firm. Ms. Schwinn also practices in Labor/Employment Law. Susan M. McLaughlin (susanmclaughlin@paveselaw.com) is a Partner in the Pavese Law Firm. Keith Hagman (keithhagman@paveselaw.com) is a Partner in the Pavese Law Firm. Brooke N. Martinez (brookemartinez@paveselaw.com) is a Partner with the Pavese Law Firm. Charles B. Capps (charlescapps@paveselaw.com) is a Florida Bar Certified Real Estate Lawyer and Partner with the Pavese Law Firm. Chené Thompson (chenethompson@paveselaw.com) is a Partner with the Pavese Law Firm. Kathleen Oppenheimer Berkey, AICP (kathleenberkey@paveselaw.com) is an Associate and Certified Land Planner with the Pavese Law Firm. Christopher Pope (christopherpope@paveselaw.com) is an Associate with Pavese Law Firm. Matthew B. Roepstorff (matthewroepstorff@paveselaw.com) is an Association with the Pavese Law Firm. Jonathan G. Sieg (jonathansieg@paveselaw.com) is an Associate with the Pavese Law Firm. Matthew G. Petra (matthewpetra@paveselaw.com) is an Associate with the Pavese Law Firm. Every attorney listed above is a member of the Firm's Community Association Law Section and is experienced and capable of handling all aspects of community association law, including the following:

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Visit us on the web at www.PaveseLaw.com.

Fort Myers
1833 Hendry Street
Fort Myers, FL 33901
Phone: (239) 334-2195

Cape Coral
4632 Vincennes Blvd.
Suite 101
Cape Coral, FL 33904
Phone: (239) 542-3148

West Palm Beach
4524 Gun Club Rd.
Suite 203
West Palm Beach, FL 33415
Phone: (561) 471-1366

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