OVER 65 YEARS EXPERIENCE

PAVESE LAW FIRM | COMMUNITY ASSOCIATION NEWSLETTER

WINTER 2017

A POTPOURRI OF RECENT CONDOMINIUM ARBITRATION CASES AND DECISIONS

BY: CHRISTOPHER J. SHIELDS, ESQ.

A. Pre-arbitration Demand Notice Defense Decisions.

In the condominium realm and for those matters which are required to be arbitrated, the first step before any arbitration action can be filed is for the association to demand of the other party to comply and cure their default within a reasonable period of time or the association will file an arbitration claim. However, it is absolutely imperative that the pre-arbitration demand notice provide timely opportunity for the other party to cure their default and at the same time, not be overreaching or make demands that the law forbids. Perhaps no other event can be more upsetting than for the association's arbitration claim to be dismissed based upon failure of the association to provide a lawfully acceptable pre-arbitration demand notice.

For example, in the case of Beach Harbor Club Association v. Kampmann, in a dispute involving a boat slip appurtenant to a unit, the failure of the association to identify and serve all co-owners of the unit was grounds for dismissal. In the case of Dere v. Pheasant Run at Rosemont Condominium Association, Inc., where the association's pre-arbitration demand letter also demanded accrued attorney's fees, the arbitrator found the association's demand overreaching as the association was not yet entitled to collect prevailing party attorney's fees prior to: 1) the arbitration suit being filed and 2) the association actually prevailing in said arbitration. So the association's pre-arbitration demand letters need to be tempered to specifically request all that the association is lawfully entitled to but be careful not to demand more than the law so entitles. By the same token, any time the pre-arbitration demand letter is considered to provide the other party an insufficient opportunity to change their behavior and cure their default, the association risks that the arbitrator will dismiss the arbitration claim simply due to the fact that the pre-arbitration demand letter did not provide the other party sufficient time to avoid the suit from being filed. By the same token, a long passing of time or a delay between the pre-arbitration demand letter and the later-filed suit runs the risk that the arbitrator may dismiss the action as being stale. And, there are cases which are dismissed each year simply due to the fact that the arbitration claim which was later filed demanded relief beyond that which was originally demanded in the pre-arbitration demand letter. See Dewerth v. Sea Colony Neighborhood Association, Inc.

So, the lesson to be learned is that any demand letters including any pre-arbitration demand letters are carefully drafted to avoid the arbitrator later dismissing the association's claim simply on procedural grounds.

And, to make matters even worse, if and when the association's claim is dismissed based simply on procedural grounds alone, the association runs the risk that the other party is then considered the prevailing party and is then entitled to recover prevailing party attorney's fees and costs.

CONTINUED ON NEXT PAGE

B. Suspension of Voting Rights.

In the recent case entitled Calvert Applegreen Condominium Association, Inc., the arbitrator ruled that to properly suspend the voting rights of an owner (presumably as a result of the owner being delinquent in the payment of any monetary obligation for more than ninety (90) days pursuant to F.S. 718.303(5)) the Association was required to identify specific unit owners to be suspended, both in the notice of the board meeting and the meeting itself. Of course, this ruling goes against commonly held practice by many associations only identifying particular units but not necessarily naming delinquent owners or publishing and identifying names of delinquent unit owners. In any event, effective July 1, 2017, the Florida Legislature has also created additional procedural hurdles that condominium associations will need to navigate in order to property suspend a delinquent unit owner's voting rights. First, under the new law, a condominium association may only suspend voting rights if the delinquent amount is more than $1,000 and more than ninety (90) days delinquent. Additionally, proof of such monetary obligation must be provided to the unit owner thirty (30) days before the suspension can take effect. So this is an additional procedural step that condominium associations will need to comply with before they can suspend a member's voting rights. Note, these two new additional requirements do not apply and are not required in order for a condominium association to suspend a delinquent unit owner's or their tenants, etc. use of the common recreational facilities pursuant to and in accordance with Florida Statute 718.303(4). Presumably, for whatever reason, the legislature is more concerned with protecting a delinquent unit owner's right to vote as opposed to their right to use the common facilities.

C. Board Resignations.

In the case of Sanville v. Venetian Management Association, Inc., where two (2) board members left the board meeting and may have verbally resigned, verbal resignation was not considered to be legally effective. The resignation must be tendered in writing. Any subsequent appointments to fill these alleged vacancies were ruled to be ineffective.

D. Proxies / Limited Proxies.

The statutorily prescribed limited proxy form in the condominium context provides that the proxy is valid only for the meeting for which it is given and any lawful adjournment but in no event for more than ninety (90) days from the date of the original meeting for which it is given. So, it is possible that at a properly noticed and convened meeting, the members could vote to adjourn the meeting to a new time, date and place. However, in the recent case of Holcomb v. Oakland Grove Village, Inc., the association's board apparently anticipating not achieving a strong turnout and not achieving a quorum, decided to cancel the upcoming membership meeting at which certain Bylaw amendments were to be voted upon. The board rescheduled the membership meeting that following month. The arbitrator ruled that the proxies originally provided for the first meeting and submitted at the second meeting were invalid where the first meeting was cancelled before it was ever convened.

E. Official Records.

In the case entitled Dexter Holdings, Inc. v. Long Beach Resort Community Association, Inc., where the association refused to download the requested records on a thumb drive supplied by the unit owner, as demanded, but otherwise offered access to the requested financial records, the association did not violate the owner's right to access to the association's financial records.

In the case of Herrera v. The Arbors Condominium Association, Inc., the arbitrator ruled that the association's failure to maintain a record that it was required to maintain was tantamount to a willful denial of access to records. Now, it is not unusual for members to demand access to a record that does not exist and that technically falls outside of what is enumerated under Florida Statute Section 718.111(12) as being an "official record". Typically, we have maintained that the association is not obligated to "create" a document that neither exists nor is obligated to keep or maintain and this case does not change our legal opinion. However, as in this case where a record, such as board meeting minutes are misplaced by the association, and then later found and then offered to them for inspection, the Association was considered to have intentionally blocked access to the records and can be fined. In the party seeking access to the records does not have to prove that the association is intentionally blocking access as the mere failure to properly maintain a required document was and is considered tantamount to willful denial of access to the records.

CONTINUED ON NEXT PAGE

In the case entitled Lovejoy v. Lands End Condominium Association, the case decided that the purpose of statutorily exempted leasing records from any other owner's right to inspect was to protect the privacy of unit owners and their tenants. Under the statute, information obtained by the association in connection with the approval of a lease of a unit is considered exempt and the association is required to keep this information confidential and no owner is entitled or permitted to inspect or have access to that information.

Interestingly enough, the arbitrator ruled that "all facts obtained in connection with the lease of the unit" extended the terms of the lease itself and held that the terms of the leases of other units was exempt from disclosure to other unit owners and regardless whether or not the terms of those leases revealed confidential information of either the unit owner or the tenant.

F. Board Member Qualifications / Eligibility.

It seems that not a day goes by where I do not remind an association client that unit owners elect the directors and the directors elect the officers. So the ruling in the case of Wilson v. Bayberry Homeowners Association, Inc. comes as no surprise. In this case, the state arbitrator ruled that notwithstanding a bylaw provision to the contrary, a board member cannot be removed as a board member for missing three (3) consecutive meetings, as such would infringe on the ability of unit owners to elect persons to the board. Essentially, the arbitrator found the bylaw provision unenforceable as it would have allowed the board to remove other board members and change the makeup and outcome of any election. As such, if a board member is not able to perform their duties on the board, they should be privately asked to resign but unless they are willing to resign, only the unit owners may recall and remove them from the board.

SEXUAL HARASSMENT COULD BE 2017's HOTTEST TOPIC

BY: CHRISTINA HARRIS SCHWINN, ESQ.

Do community associations and property management firms need to be worried about sexual harassment? Yes, and it happens all of the time.

The only reason there is so much focus on this issue is because as each day goes by, more and more women are coming forward about their own experiences with sexual harassment and making allegations against powerful and prominent men. These women are getting plenty of press time because the men are prominent. While these men would probably prefer that their accusers shut up, it's not likely to happen.

Property management firms are employers and community associations can be a joint employer under the law if the property management firm assigns staff to provide on-site services or if directors or officers provide direction and control over the assigned employees. Both community association and property management companies can be held liable for the sexual harassment of an employee by a community association board member or officer. When an employee complains about a board member or officer making inappropriate comments of a sexual nature, the property management company has a duty to investigate and put a stop to the behavior which could mean that the property management company may have to terminate the contract with the community association to avoid being liable if the community association's board refuses to take action to address and remedy the situation.

What Constitutes Sexual Harassment?

Stated simply, sexual harassment is defined as unwelcome sexual advances, requests for sexual favors, or other physical or verbal conduct of a sexual nature that affects, explicitly or implicitly, the terms and conditions of one's employment.

Quid Pro Quo harassment means this for that. For example, have sex with me or you're fired. Employers are strictly liable for sexual harassment of the quid pro quo type.

Hostile Environment Harassment involves conduct of a sexual nature short of quid pro quo that is pervasive and it affects an employee's terms and conditions of employment. An example of this type of harassment includes a male employee or board member constantly making sexually charged remarks to a female employee, commenting on body parts or

CONTINUED ON NEXT PAGE

making physical gestures of a sexual nature.

While most complaints are filed by women, men are sexually harassed as well, but rarely complain.

Does Personal Liability Attach? It can.

Sexual harassment offenders can be held personally liable for their conduct depending upon the nature and severity of the harassment even when there is no employment arrangement between the harasser and the victim. Whether liability attaches will depend upon the facts. Community association boards of directors are responsible for the administration and management of their communities and need to take an active role when their directors, members or officers cross the line in their relationships with those who provide services to the association under property management contracts and other vendor contracts as well.

Power

Sexual harassment is about power, it is not about sex. Many times the reason that the individual who is being harassed will not come forward about the sexual harassment is out of fear of retaliation.

Work Environment

Employees have the right to work in an environment that is free of sexual harassment and every employer should strive to provide a work environment that is free of sexual harassment. In order for an environment to be free of sexual harassment, there needs to be a conversation about it and training. Employees need to know policies prohibiting sexual harassment and management needs to enforce the policies uniformly and quit attacking the victim. Sexual harassment is wrong and it should never be condoned or tolerated.

Despite the fact that employers covered by Title VII and the Civil Rights Act of 1991 are required to have a sexual harassment policy, many don't, but they definitely should as the law requires it.

Next Steps

If your property management company has not conducted sexual harassment training in the last year, it would behoove your company to do so in 2018 and have the company's sexual harassment policy reviewed and updated if necessary. If your company does not have a sexual harassment policy, it would behoove your company to retain counsel to draft one.

In 2018, resolve to be prepared and take steps to eliminate or prevent sexual harassment from occurring at your workplace.

THE TOWING OF VEHICLES

BY: MATTHEW G. PETRA, ESQ.

From time to time it may be necessary for a community association to tow a vehicle within its community. However, the towing of a vehicle requires consideration of the association's own governing documents, as well as state and local law. It is not an action that should be treated lightly. Furthermore, towing should not be the only action that the association considers when making its decision on how to act with respect to an improperly parked vehicle.

An association's governing documents will, very probably, contain a provision that addresses improper parking, such as parking a vehicle on a street overnight. Some governing documents also discuss an association's procedures for towing a vehicle, and this language needs to be carefully considered. It is possible that an association's governing documents provide for the amount of notice that must be given before a vehicle is towed, as well as the method of providing notice. While an association's governing documents may give it the ability to tow a vehicle, they may also restrain the association in the manner this act is carried out; regardless, the governing documents should be diligently adhered to when towing a vehicle.

CONTINUED ON NEXT PAGE

Keep in mind, however, that even if an association's governing documents provide for the ability to tow a vehicle, it is not without substantial risk because associations must also comply with Section 715.07 of the Florida Statutes, sometimes referred to as the "towing statute." While this statute specifically mentions condominium associations, it is still applicable to other types of community associations as well. The towing statute contains very strict guidelines for towing by community associations, and if an association does not meet all of the requirements, it will be open to financial liability. Subsection (4) of the towing statute states: "When a person improperly causes a vehicle or vessel to be removed, such person shall be liable to the owner or lessee of the vehicle or vessel for the cost of removal, transportation, and storage; any damages resulting from the removal, transportation, or storage of the vehicle or vessel; attorney's fees; and court costs."

In addition to the governing documents and the towing statute, each association should consider its own local ordinances. Local ordinances may require the association towing a vehicle to maintain a significant amount of information related to the tow. Local ordinances may also require that the tow operator, when towing from private property, obtain the signature from, and verify the identity of, the property owner or authorized representative who requests the tow. Furthermore, a local ordinance may also impose fines and other penalties upon persons who improperly cause a vehicle to be towed.

It is for these reasons that the towing of a vehicle is very risky. As an alternative, an association may wish to impose fines or perhaps the suspension of common area use rights against an owner or tenant as a means of enforcing its parking restrictions. This may be enough to force compliance and without the risks involved when a vehicle is improperly towed.

UNDERSTANDING THE UNINTENDED IMPACT OF MRTA ON HOA GOVERNING DOCUMENTS

BY: CHRISTOPHER J. SHIELDS, ESQ.

Florida's Marketable Record Title Act ("MRTA") Chapter 712, Florida Statutes was originally created in 1963 to help title examiners of real property determine and eliminate old title considerations from affecting the marketability of real property transfers.

As such MRTA is used to eliminate older title considerations which arose at least thirty years prior to the root of title. So why does this matter and why does every residential HOA community need to be concerned? Unfortunately, MRTA has an unintended impact on HOAs by extinguishing HOA covenants and restrictions that are recorded more than thirty (30) years earlier. Obviously, this is a major concern for every HOA and in an effort to save residential HOA restrictions and covenants from expiring, the Florida legislature enacted a special procedure which allows residential HOAs to legally preserve their covenants and restrictions but in order to preserve the deed restrictions or declarations of covenants and restrictions, a notice of preservation must be timely recorded in the county's public records. To accomplish this, the statute requires the HOA's board of directors to file a notice to preserve the documents and restrictions but only if the notice of preservation is first approved by 2/3rds of the board of directors at a board of directors meeting where members of the HOA were informed. The notice of preservation must be mailed to each owner giving at least seven (7) days in advance of the board meeting and if approved by the board, the notice of preservation must be recorded in the clerk of court's office in the public records before these restrictions and covenants expire.

Today is December 5, 2017. As such, if your HOA declaration was recorded prior to December 5, 1987, your declaration has already been extinguished by operation of law. You just do not know it yet. If your HOA declaration has been extinguished, there is another procedure to "revitalize" restrictions which have expired but that process is far more cumbersome and expensive process and requires a membership vote. Therefore, if you are on the board or managing an HOA, it is important that you act now to avoid your covenants and restrictions from being extinguished.

CONTINUED ON NEXT PAGE

Moreover, the fact that an HOA's restrictions have been amended subsequent to the original recording date or even amended and restated, and/or the fact that the terms of your covenants and restrictions state that they automatically extend in perpetuity, will not prevent HOA covenants and restrictions from being legally extinguished under MRTA.

Finally, MRTA only impacts HOA covenants and restrictions. It has no impact on condominium declarations that may have been recorded and created more than thirty (30) years ago. However, if your condominium is a member of another association, typically referred to as a commons, recreation, or neighborhood association, these type of associations covenants and restrictions are affected by MRTA and will extinguish unless these covenants and restrictions are preserved within thirty (30) years of their recorded date or later revitalized after the thirty (30) years has run. This is not a topic or matter to be taken lightly.

If you have further questions or want more information on this topic please feel free to contact us. Do not take MRTA and its effects lightly.

HOLIDAY DECORATING

BY: CHENE' M. THOMPSON, ESQ.

Decorating for the holidays can be one of the most enjoyable times of the year. Many people recall days spent with family and friends trimming a tree and putting up lights. Living in a condominium or homeowner's association doesn't change that desire and for the most part a homeowner is free to decorate the inside of his or her residence as they see fit. However, living in an association can present challenges with outdoors decorations or those decorations located on the "common areas". There are cases where the association and an owner ended up in court over respective displays of holiday spirit. Regardless of the decorating inclinations, an association should look to its governing documents for guidance.

When it comes to decorating for any holiday throughout the year, most associations should have rules related to when displays can go up, when they must be brought down, the size, type and location of the decorations. It is common for owners to place decorations on their front lawn, but they would not be allowed to encroach on the common areas. Similarly, in a condominium setting, an owner may have a holiday wreath or other similar decoration on her door, but cannot place a blow up Santa in the hallway immediately outside. Also, one owner's decorations cannot be an unreasonable source of annoyance to another. This is one of those times when beauty is truly in the eye of the beholder as decorations, and an individuals' tolerance for them, varies widely from person to person. For example, I have seen large outdoor displays that are noisy and draw a lot of traffic, but were warmly embraced by the immediate neighbors as part of the holidays. Conversely, there was a case where a simple wreath made out of beer cans drew national attention and objections from the neighbors.

'TWAS THE NIGHT AFTER THANKSGIVING

BY: CHENE' M. THOMPSON, ESQ.

Twas the night after Thanksgiving,
when all through the HOA, no one was home, not a car in the driveway.

Where were all the people, all the tots on their bikes?
Why, off to the mall to get more holiday lights!

The Treasurer and CAM remarked with great glee,
this would be the most festive event "Just wait and see!"

The decorating committee with hearts all aglow,
began lighting and trimming the palms in a row.

By the time they were through, not a tree was left dark,
then they all smiled wide with a volunteer's heart.

At the President's door there arose such a clatter,
she immediately jumped up to see what was the matter!

Why it was Mr. Fritz and Mrs. Bell-Shew,
wondering who paid for the decorations and could they be sued??

Shortly thereafter, a few doors down,
a neighbor put the largest nativity scene in town.

It was 19 feet tall, and just as wide,
with a number of live animals milling about inside.

The Board ran to the Declaration, the Bylaws, the Rules!
Surely there must be something restricting these fools!

Call our lawyer they said, and do it quick,
before they inflate a 20 foot St. Nick!

Good news from the lawyer! Your cause is not lost –
he can get the animals to leave for a minimal cost.

Just remember, the rules for decorating must be uniformly applied,
and no one is above the law, all must abide.

Avoid decorating with a religious theme,
but it's OK to splurge on the sparkle and sheen.

Boards treat your residents equally, as you would like to be treated
. Residents treat all Board Members nicely, as if you were seated.

Remember it's the holidays! No time for a fight.
Best of luck to you all and to all a good night!

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. Christopher L. 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. Matthew G. Petra (matthewpetra@paveselaw.com) is an Associate with the Pavese Law Firm. Alexander J. Menendez (ajm@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:

- Planning, Drafting, and Creating the Community Projects
- Developer Representation and Regulatory Approvals, Vendor Contract Review and Preparation
- Turnover from the Developer
- Construction Defect Litigation
- Covenant Interpretation and Enforcement
- Amendments of Governing Documents
- Collection of Assessments, Liens, and Foreclosures
- Insurance and Maintenance/Repairs/Replacement and Reconstruction Issues
- HOA Pre-Suit Mediation, Arbitration, and Litigation

Please feel free to contact them via the e-mail addresses listed above.

In addition, Pavese Law Firm is a full service law firm consisting of over twenty-three (23) lawyers.

We are a full service law firm and capable of handling all of your legal needs

Firm Practice Areas include:

Agricultural
Banking and Finance
Bankruptcy
Business and Taxation
Civil Litigation
Community Association
Construction
Employment
Environmental and Water
Estate Planning, Probate and Trust
Family
Land Use and Local Government
Real Estate

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

PAVESE LAW FIRM