



Emergency Gives Association Right of Condo Access

Water Leak Causing Damage Downstairs

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Q: Our condominium unit has been damaged by a water leak from the upstairs unit. The association has investigated the cause of the water leak and found that the seal and caulking around the sliding glass door on the upstairs balcony is defective and must be repaired to stop this leak. The association's attorney determined that the repair is the responsibility of the association. He contacted the upstairs unit owner, who does not live in the unit but rents it to short-term tenants. The upstairs unit owner refused to make arrangements to allow the association's contractor to fix the balcony because there is a steady stream of tenants using the unit over the next several weeks and months. Obviously, as the unit owner who is being damaged by this leak, we cannot wait until it is convenient for the upstairs unit owner to have this repaired. The manager told us that the association would just go in and make the repair without the unit owner's approval, but that the owner has not provided a key. Do you have any suggestions for us to resolve this problem before it causes anymore damage? **J.C. (via e-mail)**

A: The situation you describe reminds me of the principles discussed in a landmark decision of the Supreme Court of Florida in 2002. In the *Woodside v. Jahren* case, the Supreme Court cited prior decisions and noted that condominium living is unique and involves a greater degree of

restrictions upon the rights of the individual unit owners when compared to other types of property ownership. The court noted that reasonable restrictions concerning use, occupancy and the transfer of condominium units is necessary for the operation and protection of the owners in the condominium concept. Clearly, in your situation, the upstairs unit owner needs to better understand this general principle of condominium living.

As you may know, the Florida Condominium Act expressly provides that 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 any portion of the unit that is to be maintained by the association, or as necessary to prevent damage to the common elements or to a unit or units. You explained that the source of this leak has been determined to be an association repair responsibility, and therefore, the statute would apply to that situation. In my opinion, it does not matter that the upstairs unit owner has tenants or guests or any other, similar, situation that makes it inconvenient for the association to access the unit and the balcony.

As a practical matter, the association should write to the owner and demand access to the unit to repair this leak. If the unit owner does not reply

and allow access, the association could simply knock on the door and attempt to gain voluntary access from any tenant or occupant. Given the nature of this issue, including water damage, potential mold, and additional damage to the common elements and to your unit, it may be reasonable for the association to hire a locksmith to gain access to the unit, as this may very well qualify as an emergency that would justify accessing the unit even when the owner has refused to give permission. However, this type of entry should never be performed without consultation with the association's attorney, who may recommend seeking a court injunction, as an alternative, and depending on the exact facts of the case.

Because of difficulty in reaching absentee owners, and because of potential emergency situations, many associations have requirements in their governing documents that unit owners provide keys to the association. While any such requirement is better placed in the declaration of condominium, since declaration provisions are clothed with a presumption of validity, there is ample support in state arbitration decisions that a board-made rule requiring each unit owner to give a key to the association is reasonable and enforceable.

One important, related point is that an association that holds keys to all units, or that accesses any unit, must be sure to take reasonable steps to protect the property of the unit owner. The keys must be kept in a secure place with formal procedures and controls to make sure the keys are not misused. In addition, whenever an association accesses a unit, it is advisable that more than one person access the unit and, in certain cases, depending upon the work that is to be done in the unit, careful notes or pictures should be taken to document who entered the unit, what was done, and any notable conditions or findings within the unit. Obviously, if an association enters a unit, especially when the unit owner has instructed them

not to enter, there is always a risk that the association might be accused of causing damage to the unit.

Q: I am a newly elected treasurer of a homeowners' association, charged with the responsibility of collecting payments for assessments. Recently, an owner, who is delinquent for his most recent regular assessment, as well as a recent special assessment, rendered one payment insufficient to cover both assessments. How should I apply the payment?

J.L. (via e-mail)

A: Since your association is a homeowners' association, it is governed by Chapter 720 of the Florida Statutes, commonly (although not officially) known as the Florida Homeowners' Association Act. The Act provides that any payment received by an association shall be applied first to any interest accrued on the delinquent account, then to any administrative late fee, then to any costs and reasonable attorney's fees incurred in collection, and then to the principal of the delinquent assessment. Please note that administrative late fees and interest must be specified in the governing documents for your association in order for the association to have the right to charge for same.

There is no guidance under the Act on how to apply payment as between two assessments, although the general practice is to apply payment toward the older assessment first. Therefore, in your situation, you should apply the payment first to any interest accrued, then to any authorized administrative late fee, and then to any costs and reasonable attorney's fees incurred in collection. Once those amounts are paid, you should apply payment to the delinquent assessment that came due first, with any remaining amounts being applied towards the principal or second assessment.

Mr. Adams concentrates his practice on the law of community association law, primarily representing condominium, co-operative, and homeowners' associations and country clubs. Mr. Adams has represented more than 600 community associations and serves as managing shareholder of the Firm's Naples and Ft. Myers offices.

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