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TORTIOUS INTERFERENCE CLAIMS
Against Community Associations

By: J. Kevin Miller, Esq.

What is tortious interference and what does it mean to a community association? The tort of intentional interference with a contractual or business relationship, also known as a tortious interference claim, is a cause of action recognized by Florida law which could impact community associations. The elements of this type of claim are:

- the existence of an advantageous business relationship, typically between two parties, under which the plaintiff has legal rights;
- an intentional and unjustified interference with that relationship by the defendant, who is not a party to the original business relationship; and
- damage to the plaintiff as a result thereof.

The day to day operation of a community association is filled with circumstances and opportunities that could give rise to an intentional interference claim for the unwary association. A review of the existing case law in Florida illustrates that most commonly these claims arise out of prospective contractual relations or existing employment contracts. The following are some examples of how an association might face such a claim.

Community Association Manager, John Smith, enjoys a well-deserved reputation as one of the pre-eminent on-site managers within your town. Your current association manager's contract expires next month, and she has no intention to sign a contract extension because her long planned and well-deserved retirement is within reach. Mr. Smith's reputation precedes him, and your current manager recommends him highly as her successor. Your board president contacts Mr. Smith regarding his interest in leaving his current association for yours. Some informal negotiations continue within the days to come, and when salary is discussed, Mr. Smith becomes very interested in the more lucrative position with your association. Your board president extends an offer to Mr. Smith and within two weeks Mr. Smith is happily your new association manager. Some weeks later, your new registered agent, Mr. Smith, is served with a complaint naming your association as defendant and alleging that your association intentionally interfered with the contractual relationship between Mr. Smith and his former employer.

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TIDBITS
Did You Know

During the course of litigation and sometimes arbitration, the parties take part in a formal process of obtaining information from one another known as "discovery". Discovery can take various forms, as follows:

- **"Interrogatories"** are written questions which must be answered under oath by the party on whom they are served within thirty days.
- A **"deposition"** is an oral examination of a party or witness under oath before a certified court reporter who records all of the questions and answers. The questions and answers may be later transcribed for review by the parties and for presentation to the court.
- A **"subpoena"** will be issued to any non-party witness who is scheduled to be deposed. A subpoena will be served on the witness by a certified process server in a manner similar to the service of a complaint. Failure to appear at a deposition or for testimony at trial in accordance with a duly issued subpoena may subject the witness to sanctions for contempt of court.

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Tortious cont.

What now is your association's liability to Mr. Smith's former employer? The answer to that question is, as it is with most answers to legal questions, *that depends*.

The foregoing fact scenario is incomplete with respect to several important facts. Firstly, what knowledge did your association have regarding Mr. Smith's contract with his now former employer? If the association did have knowledge concerning the contractual relationship, what did it know and did it rise to the level of *intentional interference*? What are the potential damages? Unfortunately, regardless of what the facts are or are not, all parties concerned will likely have a different interpretation of the facts. Further, those facts are probably only going to become more clear, as will an understanding of the association's potential liability and exposure to damages, after litigation ensues, the discovery process commences, and any number of depositions are taken. All of which, regardless of liability for your association, will necessarily require representation by counsel and the accumulation of legal fees.

It is easy to imagine a number of similar scenarios. For example, the association hires a favorite security guard for full-time employment.The association contracts for services from a large corporation that provides security services to businesses and community associations and currently the security guard works two nights a week for the association. The association subsequently faces litigation with the security guard's former employer, again claiming intentional interference with an employment contract.

However, there need not be an employment contract or even an existing contract to establish a claim for intentional interference with a contractual or business relationship. An association may face such claims for intentionally interfering with potential contracts.

In the case of *Barnett and Klein Corporation vs. The President of Palm Beach – A Condominium, Inc.,* 426 So.2d 1074 (Fla. 4th DCA 1983), a condominium association was sued for alleged interference with a unit owner's lease of his unit to a prospective tenant. In this case, the court found evidence that a condominium unit owner entered into a contract to lease his unit to a prospective tenant. The contract between the owner and the tenant was frustrated solely and exclusively because of the unjustified action of the condominium association in denying approval of the lease. The unit owner suffered damages (loss of rental income) as a result of the association's action, and thus the final elements for a tortious interference with a contractual relationship claim was established.

In that case, the association's unjustified action was in its enforcement of a board rule, specifying that unit owners who held title prior to March 12, 1979 could lease their units once a year, whereas unit owners who took title after that date were limited to one rental every two years. The court found that where the association's bylaws stated that all rules and regulations "shall be equally applicable to all members, and uniform in their application and effect," it could not simultaneously enforce a house rule inconsistent with this provision of the bylaws.

Restrictions on leasing agreements and rights to approve both unit owners and tenants for occupancy are commonplace for most associations. Consequently, community associations must be cautious in any decision not to approve a unit owner or tenant for occupancy. Further consideration should be given to any existing or proposed restrictions concerning approval for occupancy and criteria for making such determinations. Otherwise, the unwary association may find itself in the unenviable position of defending its actions through litigation.

TIDBITS Cont.

- A **"request for production"** is a written request from one party to another, seeking documents and things which are relevant to the lawsuit or which may lead to relevant evidence. A response is required within thirty days of service.
- A **"request for admissions"** is a discovery tool by which one party serves a series of statements upon the other and asks such party to admit or deny the statements. If a party fails or refuses to admit any fact which is ultimately shown to be true, the answering party may be held liable for the opposing party's attorneys' fees incurred in proving such fact. If a party fails to respond to a request for admissions within thirty days, the facts contained in the request will be deemed admitted for purposes of trial.

So You Want To SERVE ON THE BOARD OF DIRECTORS

By: Guy M. Shir, Esq.

So you want to serve on your association's board of directors, but you are told you don't qualify for board membership. Well, you ask yourself, how can that husband and wife serve together? How can that tenant serve on the board of directors?

Serving on an association's board of directors is both a function of its restrictive covenants, as well as the Florida Statutes. Section 617.0802(1) of the Florida not-for-profit Statute provides that directors for not-for-profit corporations, like associations, must be natural persons who are 18 years of age or older, but need not be residents of the state or members of the corporation unless the articles of incorporation or bylaws so require. Moreover, the association's articles of incorporation and bylaws may require additional qualifications for directors, but may not prohibit any member of the association from serving on the board.

As applied to condominiums, the Division of Florida Land Sales, Condominiums, and Mobile Homes has interpreted Florida Statutes with regards to membership on the board of directors. Section 718.112(2)(d)3, Florida Statutes, provides that the members of the board of administration shall be elected by written ballot or voting machine and that any owner or other eligible person desiring to be a candidate for the board of administration must give written notice to the association not less than 40 days before the scheduled election.

Prior to 1998, the Division of Land Sales interpreted the statutory provision "any owner" to mean that every unit owner in a condominium had the right to be a candidate for the board and prohibited residency requirements for board membership. In the matter of *Hollybrook Golf and Tennis Club Condominium, Inc.*, Declaratory Statement, Docket No. DS96193, September 26, 1996, the Division declared that under Section 718.112(2)(d)3, Florida Statutes, and Florida Administrative Code Rule 61B-23.002(5), (9), every unit owner has a right to be a candidate for a position on the board of directors.

However, in 1998, the Florida Condominium Act was amended to add that, "in order to be a candidate for the board, a person must meet the requirements set forth in their declaration and must be eligible to vote in the jurisdiction of his or her residence. This provision shall also apply to any person designated by a corporation as a board candidate. Therefore, a person who has been convicted of any felony by any court of record in the United States and who has not had his or her right to vote restored pursuant to law in the jurisdiction of his or her residency, is not eligible for board membership." After this 1998 amendment, many communities rushed to add as many restrictions to board eligibility as possible, including residency requirements, prohibitions against delinquent owners serving on a board, as well as prohibitions against spouses serving simultaneously on the board.

Within a year of the 1998 amendment, the Statute was once again changed. As the Statute now reads, any unit owner desiring to be a candidate for board membership may serve on an association's board of directors. No longer is a potential candidate restrained from running for the board of directors by the provisions of the association's declaration of condominium, as long as he or she is an owner at the condominium. The only exception is if the person has been convicted of any felony by any court of record in the United States and has not had his or her right to vote restored pursuant to law in the jurisdiction of his or her residence. The Statute does not address membership by tenants or other non-unit owners.

In addition to the Statutory requirements and prohibitions to serving on the board of directors, one should look to the association's declaration for any restrictions or requirements regarding non-owners seeking to serve on the association's board of directors. For example, if the governing documents don't specify that a member of the board must be a unit owner, then non-owners, such as tenants, can serve on the board. Currently, any documentary restrictions against spouses serving together on the board cannot be enforced since they are both eligible to serve on the board, pursuant to s.718.112(2)(d)3. Obviously, there is often the perception that they will create a voting block, but most members are sensitive to this possibility and won't elect spouses to a board simultaneously. It is important to note that if spouses did serve simultaneously on a board, they would have two votes as members of the board of directors, but still have only one vote with respect to their unit, when voting on matters brought before the association. The dual vote would only apply in their capacity as board members.

So good luck on serving on your association's board of directors. While it can be thankless, it can also prove to be a worthwhile experience in serving your community.

CASENOTES

Who's GRANDFATHERED IN Anyway?

In the case of *Gulf and Bay Club Condominium Association, Inc. vs. Diamantino Assuncao And Rose Assuncao,* Arbitration Case No. 02-4468, the owners, Mr. & Mrs. Assuncao, wanted to renovate their dining room floor and replace the existing tile with new tile. They wrote a letter to the Association in August 2001, informing it of their intention but did not receive permission from the Board before starting and completing the re-tiling. The Association petitioned for the removal of the new tile and won.

The dining room had originally been built by the developer with vinyl flooring but that was replaced with tile in 1988 or 1989. At that time, the Declaration of Condominium did not prohibit tile floors. However, in March 1995, the Association properly amended its Declaration to prohibit tile or other hard floor coverings in the units, except in the foyer, bathroom, kitchen and hallway. The amended provision specifically stated that existing tile flooring would be allowed to remain (or "grandfathered in") but did not address whether it could be replaced with new tile.

In October 2002, the Association again amended that provision to specifically allow the grandfathering in of tiles which existed prior to January 1, 1995, but prohibited replacing the existing tile or hard surface if the replacement did not comply with the amended Declaration provision. Of note is that the amended Declaration provision still did not allow tile in a dining room. Accordingly, new tile in the dining room was prohibited.

The owners argued that the amendment was invalid because it was more restrictive than the Declaration in effect at the time of their purchase. However, based upon the case of *Woodside Village Condominium v. Jahren,* 806 So.2d 452 (Fla. 2002), the Arbitrator ruled that since condominium purchasers are on notice that the Declaration may be amended, a properly adopted amendment can be upheld and is valid. The owners also claimed that the Declaration provision, as amended, was too vague to be enforced. However, the Arbitrator found the sections relating to the issues in controversy were not vague at all.

The Arbitrator noted that the amended Declaration should not be applied retroactively and, therefore, the 1988 tile would have been grandfathered in and the Association could not have required that it be taken out absent some special considerations. The owners argued that they were grandfathered in to put tile in the dining room; the Association asserted that only the existing **tile** was grandfathered. Under the owners' theory, they would be allowed to continuously violate the amended Declaration into the future and replace the tile at will. However, the Arbitrator ruled that applying the new amendments to the new tile is not a retroactive application. The message of this case is that only existing violations are grandfathered in when a Declaration is amended. The owner does not have the right to create new violations or to violate the amended restrictions. Thus, grandfathering in a violation is a one-time exception and not a continuing license to disregard that part of the covenants and restrictions.

Please note that, if your Association is currently amending its documents, declaration or rules, there may be instances of violations which are allowed or were allowed prior to the amendment and which may be grandfathered in. However, the existence of a pre-existing violation that has been grandfathered in does not confer "grandfathered" status upon an owner. Such an owner has no right to commit the same kind of violation into the future.

Class REPRESENTATIVE

Condominium and cooperative associations are unique entities formed and operated to advance the common interests of the unit owners residing in these communities. As such, these associations are the proper class representatives in the event of a lawsuit.

In the case of *Four Jay's Construction, Inc. v. The Marina At The Bluffs Condominium Association, Inc.,* 28 FLW D951 (Fla. 4th DCA, 2003), a contractor who installed balcony additions sued the condominium association as agent for, and as class representative of, all owners of record of all individual condominium parcels within the entire Marina at the Bluffs condominium community for breach of contract.

The trial court dismissed the complaint based on its conclusion that the individual unit owners could not be joined as a class. The appellate court, however, determined that it was appropriate to sue the association as representative of individual unit owners as a class, pursuant to Rule of Civil Procedure 1.221. Rule 1.221 recognizes that a condominium association may sue and be sued on behalf of all unit owners concerning matters of common interest including matters pertaining to the common elements, the recreational facilities and protesting ad valorem taxes.

Since Four Jay's was seeking monetary damages against the association and not against the individual unit owners, presumably there would not be a conflict with the provisions of, Section 718.199 (2), Florida Statutes, which states that, "The owner of a unit may be personally liable for the acts or omissions of the association in relation to the use of the common elements, but only to the extent of his or her pro rata share of that liability in the same percentage as his or her interest in the common elements, and then in no case shall that liability exceed the value of his or her unit."

The Fourth District Court of Appeal has certified the following question to the Florida Supreme Court for resolution of this matter:

WHETHER FLORIDA RULE OF CIVIL PROCEDURE 1.221 AUTHORIZES PLAINTIFFS TO SUE INDIVIDUAL OWNERS OF CONDOMINIUM UNITS (TO THE EXTENT OF THEIR INTEREST) AS A CLASS OF DEFENDANTS, BY SUING THE CONDOMINIUM ASSOCIATION AS CLASS REPRESENTATIVE, AS DISTINGUISHED FROM SIMPLY SUING THE CONDOMINIUM ASSOCIATION AS THE CONTRACTING PARTY, IN A CONTROVERSY CONCERNING MATTERS OF COMMON INTEREST.

THE INFORMATION SET FORTH IN THIS BULLETIN IS GENERAL AND SUMMARY IN NATURE AND IS NOT INTENDED AS SPECIFIC LEGAL ADVICE APPLICABLE TO YOUR ASSOCIATION. IF YOU HAVE QUESTIONS REGARDING THE CONTENTS OF THIS RELEASE AS IT APPLIES TO YOUR SITUATION, PLEASE CONTACT THE ASSOCIATION ATTORNEY RESPONSIBLE FOR YOUR FILE. IN ADDITION, WE WISH TO REAFFIRM THE FACT THAT THE PRINCIPLES OF LAW CITED HEREIN ARE SUBJECT TO CHANGE FROM TIME TO TIME.