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REMOVAL OR EVICTION OF TENANTS BY COMMUNITY ASSOCIATIONS

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THROW THE RASCALS OUT! This is often the first reaction by board members when tenants violate the governing documents of the association or otherwise make themselves unwelcome. However, Florida law does not permit this approach. There are specific procedures that must be followed in order to evict or otherwise remove a disruptive tenant and the person or entity seeking such eviction or removal must have the legal authority to do so.



Under Florida law, owners and tenants have different property rights. The Florida Statutes provide condominium and homeowners' association owners with an exclusive right to possess their property. In *Kittel-Glass v. Oceans Four Condominium Association*, 648 So.2d 827 (Fla. 5th DCA 1995), the Court held that an association could not permanently enjoin an owner from entering their unit. Conversely, the tenant is not afforded such right by the law. The tenant enjoys a limited interest in the property, and may be removed by the landlord or through action by the association.

The Florida Statutes also provide that each tenant of a condominium or homeowner association shall comply and be governed by the declaration and the documents of the association. Therefore, it is not a coincidence that most frequently associations desire to remove a tenant for being a nuisance or disruptive behavior in violation of the governing documents.

If the tenant is disruptive, it is important for the association to document the tenant's violations and send notice to the owner/landlord requesting that the tenant comply with the governing documents. Swift, aggressive action by the association will make the most dramatic impact on the owner and may deter the tenant from committing such violations.

If the tenant continues to commit violations that are not serious, proceeding with removal or eviction may not be worthwhile. If the tenant's lease or rental agreement is soon expiring, the association may simply disapprove a renewal. However, the association should be aware that pursuing this option may depend on the terms of the rental agreement and the right of the association to approve or screen tenants. Maintaining screening authority in the governing documents may become crucial at this time because, without it, associations may not disapprove renewals.

If the tenant is committing serious violations or the association does not maintain screening authority, the association may be required to take further action. Unlike other disputes, Florida law prohibits arbitrators for the Division of Florida Land Sales, Condominiums, and Mobile Homes from hearing cases regarding the eviction or other removal of a tenant. Consequently, the association is required to file an action in circuit court.

Chapter 83, Florida Statutes, Part II, provides the statutory authority of a landlord to evict a tenant from a residence. "Landlord" is defined by the statute as "the owner or lessor of a dwelling unit". "Tenant" is defined as "any person entitled to occupy a dwelling unit under a rental agreement". It is clear from these terms that an association is not entitled to evict a tenant since it is not a "landlord" as defined by the statute (provided that the association is not the owner of the rented property). In order for the association to exercise eviction rights,

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HOMEOWNERS' ASSOCIATION PRESUIT MEDIATION REQUIREMENTS

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New presuit mediation requirements for homeowners' associations were adopted during the 2007 Legislative Session. The new law amends the petition for mediation provisions contained within §720.311, F.S., which requires mandatory mediation for certain disputes (e.g. covenant enforcement, use or changes to common areas, etc.) between a homeowners' association and a member before the dispute can be filed in court. The effective date of this new law is July 1, 2007. The new law eliminates much of the burdensome requirements of the petition for mediation process. The highlights of this new law are as follows:

- The aggrieved party no longer has to file a petition for mediation with the Division of Land Sales, Condominiums and Mobile Homes. Instead, an aggrieved party must now serve upon the responding party a written offer to participate in presuit mediation. The form of the written offer must be strictly adhered to. A sample written offer is contained within the new statute.
- The written offer, which must be sent via certified and regular first class mail, informs the responding party of the dispute and offers presuit mediation as an avenue to resolve the dispute.
- The aggrieved party suggests the use of one of five certified mediators to mediate the dispute. The responding party is given the option of selecting one or more of the five certified mediators. If the responding party agrees to attend mediation with one or more of the five suggested mediators, the mediation must be scheduled within 90 days, unless extended by mutual written agreement.
- Both parties are likewise required to prepay one-half of the mediator's estimated fees.
- The aggrieved party is authorized to immediately proceed with the filing of a lawsuit against the responding party if the responding party: (1) fails to respond to the written offer to mediate via certified and regular first class mail within 20 days of the date of the mailing; (2) fails to agree to one or more of the five suggested certified mediators; or (3) fails to prepay one-half of the mediator's estimated fees.

- The new law also states that persons who refuse to participate in the entire mediation process may not recover attorney's fees and costs in subsequent litigation relating to the dispute.
- The new law allows the prevailing party in any subsequent arbitration or litigation proceeding to recover costs and attorney's fees incurred in the presuit mediation process.

Overall, the changes made to §720.311, F.S. will prove very beneficial to homeowners' associations. The new law will dramatically accelerate the presuit mediation process. Additionally, the new law will provide homeowners' associations a quicker and less expensive path to the courts by providing a smaller procedural hurdle to jump over. If you have any questions concerning the new requirements mandated by §720.311, F.S., you should contact your legal counsel to guide you through the process. ■





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USE OF ELECTRONIC MAIL

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The use of electronic mail, or "e-mail" as it is affectionately known, has skyrocketed in recent years in both residential and commercial settings. In fact, e-mail has become the standard and accepted mode of communication in the business environment. The same is true in the condominium and homeowners' association context.

Obviously, using e-mail in a commercial environment requires caution. How often, for example, have you been one of many recipients of an e-mail and responded to all the recipients instead of just the sender? At the very least, this can be embarrassing. At worst, it can constitute defamation and subject the sender to civil liability. The use and retention of e-mail correspondence has also become an interesting issue among associations and their respective Board Members. Very often, unit owners and homeowners contact the association through e-mail. Similarly, board members use e-mail to communicate with the association's attorney, other board members and owners, and as a means of providing notice of board meetings and membership meetings. A common question arises as to whether these "e-mails" become official records of the association that any owner may access.

Both the Florida Condominium Act (Chapter 718, Florida Statutes) and the Homeowners' Association Act (Chapter 720, Florida Statutes) provide that owners have the right to access the association's official records. To do so, an owner must submit a written request to the Board (which request may be in the form of an e-mail). Upon receipt of the written request, the Board must provide the owner access to the records within five (5) business days. If the association fails to provide such access within ten (10) business days, there is a rebuttable presumption that the association willfully failed to provide access and the owner may then have a cause of action for monetary damages of up to \$500.00.

There are, however, certain documents and records that an owner may not access. For example, any record protected by the lawyer-client privilege as described in Section 90.502, Florida Statutes and any record protected by the work-product privilege. These include, but are not limited to, any record prepared by an association attorney or prepared

at the attorney's express direction which reflects a mental impression, conclusion, litigation strategy, or legal theory of the attorney or the association and was prepared exclusively for civil or criminal litigation or for adversarial administrative proceedings or which was prepared in anticipation of imminent civil or criminal litigation or imminent adversarial administrative proceedings until the conclusion of the litigation or adversarial administrative proceedings. Thus, any e-mail protected under the attorney-client or work product privilege is not available to the owner for inspection.

What about e-mails between the Board and/or its Manager or Management Company? The Florida Statutes provide owners the right to inspect any records relating to the operation of the association that are not barred by the attorney-client privilege or work-product privilege while litigation is pending; information obtained by the association for approval of the transfer of units; and unit owner medical records. None of the exceptions are presumably applicable here with regard to e-mails by and between the association and its Manager. By analogy to other areas of law (relating to evidence and discovery) a Court or arbitrator would likely find that records maintained on a computer data-base, still constitute "official records".

While there does not appear to be any Florida case law or opinions relating to whether e-mails are official records of associations, a legal opinion released by the Division of Land Sales, Condominiums, and Mobile Homes ("Division") concluded that:

Condominium owners have a right to inspect e-mail correspondences between the Board of Directors and the property manager as long as the correspondence is related to the operation of the Association and does not fall within one of the three statutorily protected exceptions. Letter through J. Sue Richards, Chief Assistant General Counsel, DBPR, to Robert Badger, Supervisor, Bureau of Customer Service (March 6, 2002).

Thus, it appears that as long as the nature of such e-mails deal with the "operation of the association", they will have to be produced as part of an owner's request to access the official records. ■

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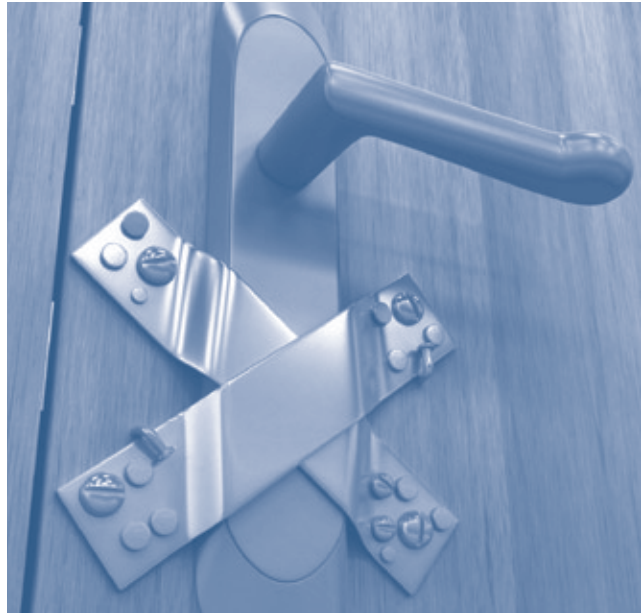
it must be given such authority by the governing documents to the extent that it "steps into the shoes of the landlord". If this authority is given to the association, it may act to evict tenants in accordance with the statutory authority given to landlords.

If the association is without the power to effect evictions under Chapter 83, the association may be required to file an action in circuit court against the landlord. This action is not an eviction, but is an action for injunctive relief requesting that the landlord comply with the governing documents and remove the tenant. If the court grants the association injunctive relief, the landlord will be required to evict the tenant under Chapter 83.

However, Chapter 83 may not provide community associations with a practical solution for removal of a disruptive tenant for several reasons. Section 83.56, Florida Statutes, requires that the tenant be given notice of any violation of the rental agreement, after which the tenant has a reasonable opportunity to cure his/her noncompliant conduct. Further, the right to bring an eviction action under Chapter 83 rests squarely with the landlord or his agent and only with the association if provided by the governing documents. Finally, even if these obstacles are overcome, the time period involved in getting an eviction action to the hearing stage may make it an impractical vehicle for removing an unruly or disruptive tenant from the property.

In cases where the tenant's conduct constitutes a criminal offense, such as public intoxication, harassment, or other conduct that amounts to a breach of the peace, the association should not hesitate to contact local law enforcement. While local law enforcement is not available to enforce the association's pet restrictions and other internal rules, it is available to handle breaches of the peace and, in all such situations, the appropriate authorities should be called.

In summary, there is no satisfactory one-size-fits-all solution to remove a disruptive tenant. Additionally, in some situations, there is no satisfactory solution at all. The association must be prepared to explore the various options available depending upon the factual context of each particular disruptive tenant. ■



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