Fall 2013 NEWSLETTER

PROPERTY OWNERS ASSOCIATION UPDATE

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TEXAS COURT OF APPEALS

1. ***Cavazos v. Bd. Of Governors of the Council of Co-Owners of the Summit Condos.*, No. 13-12-00524-CV, 2013 Tex. App. LEXIS 11780 (Tex. App.—Corpus Christi September 19, 2013, no pet.)**

The provision in section 81.102(a)(8) which states that an amendment to a declaration may not "alter or destroy" a condominium unit without the consent of the affected owner means not altering or destroying a physical aspect of a unit. It does not apply to an alleged ownership interest in a unit, such as the right to rent a unit.

Appellants were owners of condominium units at The Summit Condominiums. In 2011, 83% of the unit owners consented to the adoption of an amendment to the Declaration that prohibited the renting or leasing of a unit for less than thirty (30) days at a time. Appellants were the only non-consenting unit owners.

Appellants sued the Board of Governors of the Council of Co-Owners of the Summit Condominiums ("Board of Governors") claiming the adoption of the amendment to the Declaration violated section 81.102(a)(8) of the Texas Property Code which states "an amendment of the declaration may not alter or destroy a unit or a limited common element without the consent of the owners affected and the owners' first lien mortgagees." Appellants claimed that the amendment "altered or destroyed" their absolute ownership right to lease their personal property. At the conclusion of a bench trial, the court ruled in favor of the Board of Governors.

The court of appeals affirmed the trial court's ruling, finding that section 81.102(a)(8) only refers to the alteration or destruction of a physical aspect of a unit, such as the destruction of a wall, not to an alleged ownership right.

2. ***Marmic Props., LLC v. Silverglen Town-Homes Homeowners Ass'n*, No. 14-12-00312-CV, 2013 Tex. App. LEXIS 10960 (Tex. App.—Houston [14th Dist.] Aug. 29, 2013, no pet.)**

An association exercises its discretionary authority in setting the amount of the common assessment for the year that will be levied against all unit owners. An association does not exercise its discretionary authority when it charges all unit owners the same amount in common assessments. Section 202.004 of the Texas Property Code creates a presumption that a property owners' association acts reasonably when it exercises its discretionary authority in setting common assessments.

Marmic purchased seventeen (17) undeveloped lots in the Silverglen Townhomes subdivision. The subdivision is governed by a Homeowners Association ("HOA"). The HOA set a common assessment that was levied against each lot owner, whether developed or undeveloped. Marmic did not pay any of the common assessments levied against the 17 undeveloped lots. The HOA sued Marmic, seeking judicial foreclosure on the lots, the unpaid assessments, and attorney's fees. The trial court granted summary judgment in favor of the HOA.

Marmic appealed, claiming that there was a fact issue as to whether the assessments were arbitrary and capricious under section 202.004 of the Texas Property Code which provides: "an exercise of discretionary authority by a property owners' association…concerning a restrictive covenant is presumed to be reasonable unless the court determines by a preponderance of the evidence that the exercise of discretionary authority was arbitrary, capricious, or discriminatory."

The appellate court first found that the HOA was not exercising its discretionary authority when it levied the same assessment to Marmic's lots as the other occupied lots. Under the terms of the Declaration the HOA was required to levy the common assessment at a fixed uniform rate against all lots, therefore, the HOA did not exercise discretion when acting in accordance with the terms of the Declaration.

The appellate court next found that the HOA did exercise its discretionary authority when it set the amount of the common assessment, but that Marmic did not overcome the presumption that the HOA acted reasonably when it exercised its discretionary authority laid out in section 202.004 of the Texas Property Code. Marmic alleged that it overcame the presumption by pointing out that the HOA failed to present evidence on the reasonableness of the common assessments. However, the HOA was not required to present evidence of the reasonableness of the assessment in order to assert the presumption. Instead, Marmic was required to produce positive evidence to overcome the presumption. Marmic did not present any evidence that the HOA's setting of the common assessment was unreasonable. As a result, the appellate court upheld the trial courts grant of summary judgment in favor of the HOA.

3. Dennis v. Beacon Ridge Townhomes Condo. Ass'n of Owners, No. 03-11-00332-CV, 2013 Tex. App. LEXIS 9823 (Tex. App.—Austin Aug. 7, 2013, no pet.)

An association has the authority to levy assessments against owners to fund its activities, including the operation and maintenance of the common elements. An owner that purchases an unfinished unit also purchases an undivided interest in the common elements. As a result, an association may impose assessments on all unit owners, even if the unit has not yet been constructed or is not completed.

After the property had been subdivided, but before any units had been constructed, Randy Dennis purchased eight units in the Beacon Ridge Townhomes Condominium Regime (the "Regime") For a period of several months, Dennis paid the assessments levied by the Association. When Dennis stopped paying the assessments, the Association charged him late penalties and imposed liens on his properties. Dennis elected to put his property up for sale and

file suit against the Association. Dennis and the Association filed cross motions for summary judgment. The district court denied Dennis' motion and granted the Associations.

On appeal, Dennis argued that he proved as a matter of law that he was not obligated to pay the assessments or fines imposed by the Association because his units had not been constructed and the Declaration only pertains to completed and fully constructed units. For similar reasons, Dennis argued that the Association's motion for summary judgment should have been denied because there was a material fact issue regarding whether the Association could levy an assessment against him given that his units had not been constructed.

The appellate court rejected both contentions, finding that when the provisions of the owner's deed and the Declaration are read together the Association may impose assessments on an owner even if the unit has not been constructed. The appellate court found that according to the Declaration, an owner not only acquired an ownership interest in the unit, but an undivided interest in the common elements. This was reflected in the deed. The Declaration also states that the Association is responsible for the operation and maintenance of the common elements and that that Association has all the powers allowed under the Texas Uniform Condominium Act, including the power to levy assessments to fund its activities. Finally, the Declaration states that by accepting the deed, each owner agrees to pay assessments and that the owner may not waive or otherwise escape liability for the assessments by nonuse of the common elements or abandonment of the unit. Reading all provisions together, the appellate court found that the Association had the authority to impose assessments against all unit owners, even those whose units had not been constructed or completed. The appellate court upheld the ruling of the district court.