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COMMUNITY UPDATE

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RESTRICTIVE ENDORSEMENTS *in* COMMUNITY ASSOCIATIONS

A call for legislative action to prevent disastrous consequences of *St. Croix Lane Trust*

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Assessments are the lifeblood of condominium associations. For most condominium associations, assessments represent the sole source of funds used to operate and maintain the communities they serve. A recent opinion from Florida's Second District Court of Appeal creates potential for legal troubles for associations collecting assessments. As explained in more detail below, the Florida Legislature needs to take action to clarify that the statutory construct of accord and satisfaction does not apply to disputed assessment payments.

In *St. Croix Lane Trust & M.L. Shapiro, Trustee v. St. Croix at Pelican Marsh Cd'm. Ass'n., Inc.*, 144 So.3d 639 (Fla. 2nd DCA, Aug. 8, 2014), the appellate court addressed the Florida Condominium Act "allocation of payment" statute, §718.116(3), and how the concept of accord and satisfaction in §673.3111 can interact with §718.116(3).

The facts of *St. Croix Lane Trust* are as follows: association demanded owner pay $38,000 in past due assessments. The owner (St. Croix Lane Trust, by and through its attorney) tendered a check to the association in the amount of $840 together with a letter which states (in material part):

> Regardless of intent, negotiation of the enclosed check shall be deemed an acceptance of the offer of settlement made herein, and shall be in full and final satisfaction of all claims against the Trust and the property.

Relying on protection of §718.116(3)(reproduced below) the association negotiated the $840 check. The *St. Croix Lane Trust* Court held that if a check is tendered for less than the total amount of a disputed claim, then acceptance creates an accord and satisfaction of the disputed debt if the payment is accompanied by a restrictive endorsement. The *St. Croix Lane Trust* Court literally invoked the saying "you cannot have your

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cake and eat it too"[1], and that if the association wanted to retain the right to pursue the debt assessment debt asserted, then the check should not have been accepted.

§718.116(3) states:

> Assessments and installments on assessments which are not paid when due bear interest at the rate provided in the declaration, from the due date until paid. The rate may not exceed the rate allowed by law, and, if no rate is provided in the declaration, interest accrues at the rate of 18 percent per year. If provided by the declaration or bylaws, the association may, in addition to such interest, charge an administrative late fee of up to the greater of $25 or 5 percent of each delinquent installment for which the payment is late. **Any payment received by an association must be applied first to any interest accrued by the association, then to any administrative late fee, then to any costs and reasonable attorney's fees incurred in collection, and then to the delinquent assessment. The foregoing is applicable notwithstanding any restrictive endorsement, designation, or instruction placed on or accompanying a payment.** A late fee is not subject to chapter 687 or s. 718.303(4).

Practitioners familiar with collecting condominium assessments may take exception with the holding in *St. Croix Lane Trust* in that it appears to conflict with *Ocean Two Condominium Association, Inc. v. Kliger*, 983 So.2d 739 (Fla. 3d DCA 2008). In *Ocean Two* the Third District Court of Appeal held that an association failed to accept partial payments during a dispute over unpaid assessments. The *St. Croix Lane Trust* Court recognized the *Ocean Two* opinion, but held that was distinguishable based on the assertion that the debt *Ocean Two* was not disputed. The asserted distinction is incorrect. In *Ocean Two*, the court specifically referenced that the owners (the Kligers) disputed debts owed to the Ocean Two Condominium Association, Inc. Specifically, the *Ocean Two* Court stated:

The problem that arose in this case is a common one, unfortunately. For one reason or another, a unit owner falls behind in payment. If efforts to resolve the problem are unavailing, the condominium association-usually through a management company-turns the matter over to the association's attorneys for the imposition of a lien and the commencement of a lien foreclosure action. **If, as here, the unit owners wish to dispute part of the association's claim (interest and attorney's fees, for example), and to pay the undisputed monthly maintenance amounts, there is evidently a misapprehension by some management companies and associations that they should reject any such partial payment.** Apparently the reason-not recognized in the condominium statute-is that the association's claim will be waived or impaired if a partial payment is accepted after "it's been turned over to the attorneys."

In holding that the Ocean Two Condominium Association wrongfully failed to accept a tendered partial payment, the court specifically referenced the legitimate purpose of §718.116(3) by stating:

> No such prejudice or jeopardy can occur under the statute, however, because it specifically provides that the payments will be applied on account, without prejudice to the association's and unit owner's respective positions, even if the unit owners place a "restrictive endorsement, designation, or instruction ... on or accompanying the payment."

Accordingly, the *Ocean Two* Court held that the Condominium Act protects against concerns of accord and satisfaction by referencing that restrictive endorsements cannot abrogate the manner in which partial payments are applied.

Regardless of whether *St. Croix Lane Trust* is correct in distinguishing *Ocean Two*, the Florida Legislature should take action to clarify the meaning and purpose of §718.116(3).

Specifically, the Legislature should expressly state that the dictates of §718.116(3) supplants statutory and common law accord and satisfaction as to the payment of assessments. If the Legislature fails to take this action, there will be an ever-growing trend of associations refusing to accept partial payments in fear of being held to have agreed to a lesser amount than is alleged owed. Those refusals to accept partial payments will lead to elevated debts owed by owners, and, inevitably, to an explosion of collection litigation with association counselors relying on *St. Croix Lane Trust* in explaining why partial payments were not accepted, and owner counselor asserting *Ocean Two* for the proposition that the collection litigation is improper due to the fact that the association failed to accept partial payments. Allowing this uncertainty created by *St. Croix Lane Trust* prejudices both associations and owners alike.

Legislative action to address the uncertainty caused by *St. Croix Lane Trust* is the fundamental method of dealing with the accord and satisfaction dilemma, but what should associations do until such time as the Legislature addresses this issue? To start with, associations need to be vigilant in looking for restrictive endorsements accompanying partial payments from owners. Any partial payment which is accompanied by correspondence (whether on the check or in a letter or other correspondence accompanying the partial payment) which either disputes the remaining debt owed or states (in some form or fashion) that the payments tendered shall constitute complete settlement of the debt, should be immediately turned over to the association's attorney for determination of the correct course of action.

Many associations use a "lock box" system with their banks to deposit assessment payments. In the lock box system, a bank accepts checks from owners and automatically deposits same into the association's account. Given *St. Croix Lane Trust*, there is understandable concern regarding use of the lock box system for assessment payment deposits. There is an argument to be made that the use of a lock box system would not trigger an accord and satisfaction defense by an owner. In order to establish an accord and satisfaction defense, the owner must show:

(1) an existing dispute between the parties regarding the proper amount owed from one party to the other;

(2) a mutual intent to effect a settlement of the existing dispute by a superceding agreement; and

(3) the debtor's tender and the creditor's acceptance of performance of the new agreement in full satisfaction and discharge of the prior disputed obligation.

When an association, by and through its board of directors, manager, or attorney receives a payment accompanied by a restrictive endorsement, under the *St. Croix Lane Trust* reasoning, makes the conscious decision to negotiate the check, the elements for accord and satisfaction can be said to have been satisfied. However, in the case of a lock box, it is entirely possible that neither the association's board of directors, manager, or attorney will have no knowledge of any accompanying restrictive endorsement prior to the check being deposited by the bank. There is caselaw authority which suggests that the lack of a person or entity to have an opportunity to decide whether to negotiate a payment abrogates the "acceptance" element of accord and satisfaction. *See Vitality Systems, Inc. v. Sogeval Laboratories, Inc.*, 2009 WL 2147005 (M.D. Fla. July 16, 2009)(holding that wire transfer to plaintiff's account did not satisfy the acceptance element of accord and satisfaction because the plaintiff did not have an opportunity to deny the wire transfer before it reached the plaintiff's account). Although this legal argument exists, there is no direct caselaw in Florida on this issue with respect to disputed assessment payments, and therefore, associations should proceed with caution regarding lock box usage until the accord and satisfaction issue is dealt with by the Legislature.

[1] *St. Croix* at 642 (quoting *The Burke Co. v. Hilton Dev. Co.*, 802 F.Supp. 434, 439 (N.D.Fla.1992).

NEWS

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Recent News from our Collection & Foreclosure Department

Every now and then we'd like to include snapshots of issues confronted by the attorneys and paralegals that handle collections and foreclosures for community associations throughout the state. Some of you may have experienced the same type of problem with respect to a delinquency. Remember, every case deserves its own analysis in light of changes in collection strategies and legislative enactments.

Pushing a foreclosure results in movement in probate.

Unit owner died in 2013 with no living relatives. In a 49 unit condominium with a budget requiring $750 quarterly payments, the lack of cash flow hurt. A will had been deposited with the probate court, but the personal representative made ***no effort*** to initiate a probate action. Since there was no mortgage encumbering the property, the Association decided to file a foreclosure action in an effort to either sell the property itself or push the personal representative to initiate and complete a probate action. The three charitable organizations identified in the owner's will were named and had the personal representative replaced. Since we were aggressively pursuing foreclosure, the new personal representative rushed to complete the probate action. The probate court authorized the sale of the property and the **Association recovered over $18,000.00 representing 100% of its unpaid assessments, late fees, interest, costs, and legal fees**.

When the bank gives up, the Association should take action.

Here the Unit owner died in 2007. No probate estate or will was ever located. The only two heirs abandoned the property. The first mortgagee (bank) obtained a final judgment of foreclosure, but subsequently vacated the judgment and voluntarily dismissed its case. Now the unit was in limbo - the Association waited so long for the mortgagee to complete its foreclosure for nothing. The Association decided to foreclose against the property taking title to the unit and quieting title to the property. ***The bank didn't act in the foreclosure and quiet title action, effectively disposing of the bank's mortgage on the property and allowing the Association to obtain title insurance to sell the property.*** The Association is currently renting the property and can keep the proceeds of a future sale.

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