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COMMUNITY UPDATE

INSIGHTS, ANALYSIS & IDEAS FOR COMMUNITY LEADERS SINCE 1980

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What Are They and Where Can I Find Them?

Since 1992, all condominium "disputes" (as that term is defined in the law) have been initially adjudicated through the State's mandatory, non-binding arbitration program. The purpose of the statutorily-mandated arbitration procedure is to provide a more informal and cost-effective forum for resolution of routine condominium disputes (elections, records inspection, use restrictions, and material alterations to name a few). About 500 cases per year are adjudicated through that program, with decisions rendered by State-employed arbitrators.

Accordingly, a substantial number of arbitration decisions have been rendered by the Division of Florida Condominiums, Time Shares and Mobile Homes (the "Division") over the past 24 years via Division arbitrators. Some of the decisions are simply summary rulings and do not tell you much about the underlying case. Others contain lengthy recitations of the facts and the legal opinions of the arbitrator.

It is important to understand that just like the opinions of our local trial judges, arbitration decisions are not afforded the same weight of "law" when compared to appellate court decisions. In fact, arbitration decisions are not binding on the parties themselves as there is a right to have the subject dispute heard in court. In my experience, some arbitration decisions are extremely well written while others are (in my opinion) not properly decided. Associations (or, actually, their attorneys) do need to be aware of these arbitration cases because if there is a dispute about a matter and it ends up in arbitration, the Division arbitrators usually follow their previous rulings and holdings. As such, it is very important to be familiar with prior arbitration decisions. Some judges will at least consider what an arbitrator has said on a particular issue, on the other hand, some won't.

Until approximately 2008, the Division published an "Index" of their various arbitration decisions. These Indexes can still be found by accessing the Division's website (http://www.myfloridalicense.com/dbpr). For post 2008 decisions, paid legal research subscriptions are generally required (and even then the decisions are not always easy to find). I have also found that, occasionally, customary search engines will locate a case if you know its name, but you can't really search "issues" like you can via the paid legal research subscription services. Since there is no one place to find everything, I recommend you start your search with the index, then do a free online search and finally a paid legal search such as Weslaw or Nexis.

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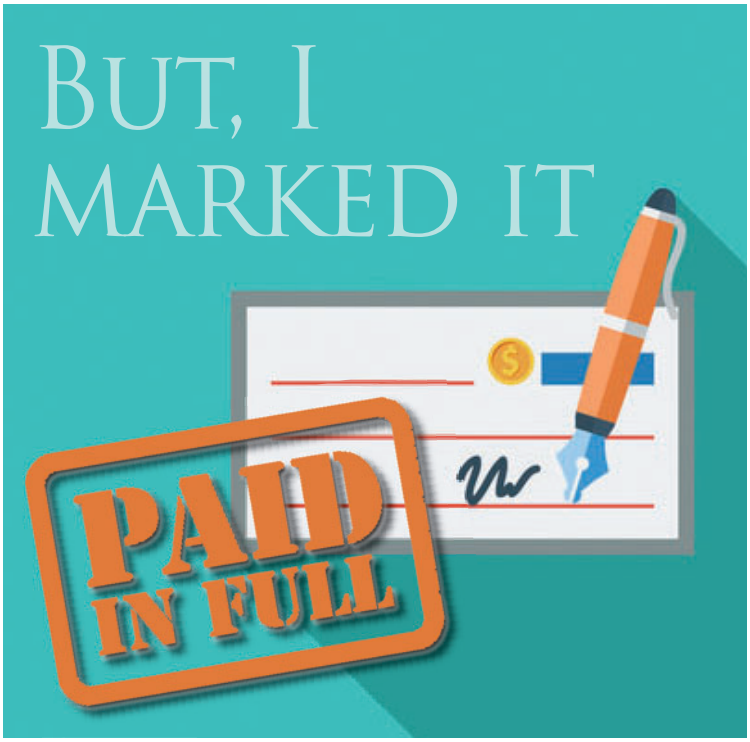

What do we do with a check marked "Paid in Full"?

The Second District Court of Appeal issued a decision in *St. Croix Lane Trust & M.L. Shapiro, Trustee v. St. Croix at Pelican Marsh Condo. Ass'n., Inc.*, 144 So. 3d 639 (Fla 2d DCA 2014), that rejected Florida Statute §718.116(3) Fla. Stat. (2011), which states in part, "*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.*" The Court reasoned that the Association can either reject the payment, or if they accept it, they are simply accepting a settlement.

In *St. Croix*, the Association was foreclosing a Claim of Lien for assessment against a condominium unit. A third party purchased the unit at the Association's foreclosure sale after the Association decided not to bid. After the Certificate of Title was issued, the Association sent a demand to the Trust to pay all of the amounts due from the previous owner, which totaled more than $36,000.00. After the Association filed a Claim of Lien against the property, the attorney for the Trust sent an $840.00 check and wrote:

"At worst[,] my client only owes the pro rata first quarter assessment for the period of its ownership. However, in a good faith effort to resolve this matter I have enclosed herewith a check in the amount of $840.00 payable to your Trust Account for the full January 1, 2012 assessment. Be advised and warned, this check is tendered in full and final satisfaction of all claims made against the Trust and the property for the amounts demanded in your May 7, 2012 correspondence. 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 as more particularly set forth in your May 7, 2012 correspondence."

The association's counsel responded with their position and that they would apply the money as a partial payment. After depositing the funds, the association threatened to file the lien foreclosure given there remained a balance. The Trust however sued first seeking clarification from the court as to what was actually owed. The trial court entered summary judgment finding that the association's acceptance of the partial payment did not create an accord and satisfaction. The Second District Court of Appeals reversed, holding that despite the Condominium Act's specific allocation language, "when the Association negotiated the Trust's check that was tendered in full and final satisfaction of the Association's disputed claim, an accord and satisfaction resulted." In others words, on appeal, the owner prevailed.

In rendering its decision, the *St. Croix* Appellate Court rejected the finding in *Ocean Two Condo. Ass'n v. Kliger*, 983 So. 2d 739 (Fla. 3d DCA 2008), labeling as dicta the reinforcement of an association's duty to apply a partial payment noting the Legislature in providing language regarding restrictive endorsements concerned itself with a restriction on the method of allocation rather than overriding the law of accord and satisfaction.

However, don't lose hope…

After the ruling in *St. Croix*, the Legislature amended §718.116(3) Fla. Stat. (2015), to enforce the order of priority set forth in the statute by adding language specifically aimed at issues of accord and satisfaction ("*notwithstanding s. 673.311, any purported accord and satisfaction*").

After the amendment, the Second District Court of Appeal heard another case (*Madison at Soho II Condo. Ass'n, Inc. v. Devo Acquisition Enter., LLC*, 198 So. 3d 1111 (Fla. 2d DCA 2016) where accord and satisfaction was an issue and through their ruling overturned *St. Croix*.

In *Madison*, the association had sent a demand for delinquent

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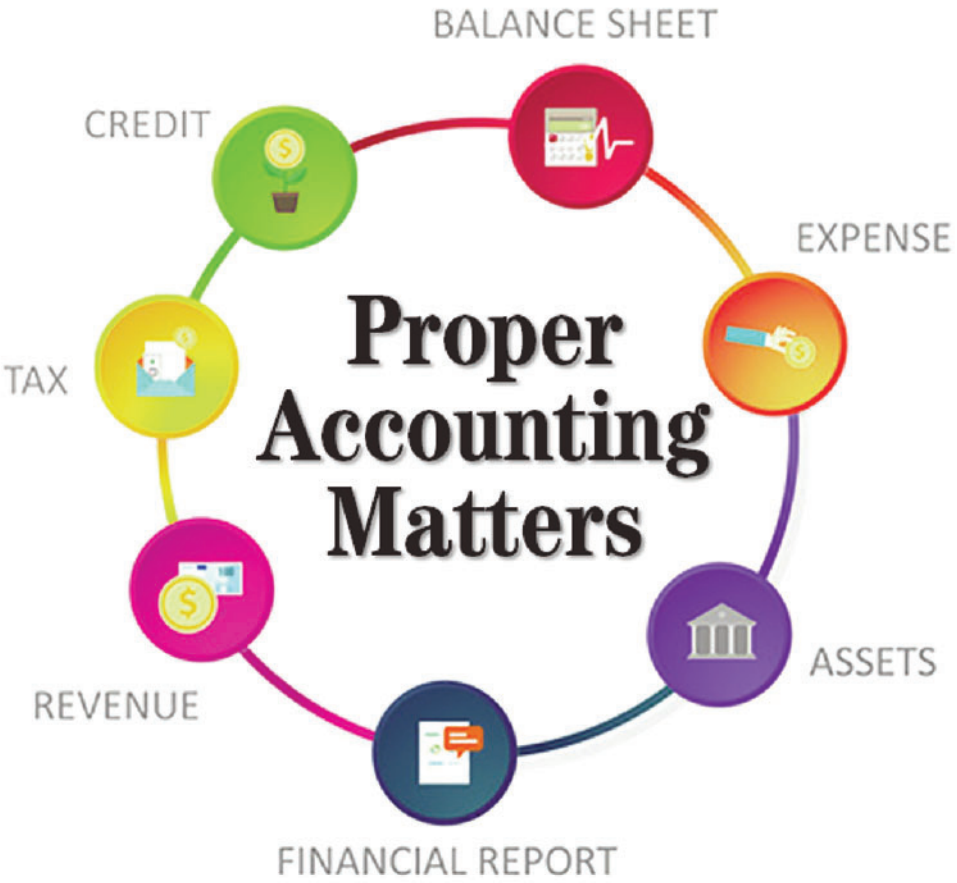

Occasionally, an appellate case is issued which, to the detriment of the association involved, serves as a valuable lesson on "why" doing things the right way matters. In *Jenkins v. Plaza 3000, Inc.*, 134 So. 3d 1127, (Fla. 4th DCA 2014) an association sued an owner for lien foreclosure and money damages. The owner defended the action and filed a counterclaim against the association for slander of title, asserting that the association did not keep accurate records of assessments and interest accrued. The trial court dismissed the owner's counterclaim but also refused to grant foreclosure, an equitable remedy (allowing for the sale of the property), because the association did not properly account for assessments and interest levied upon the owner. The trial court did enter a judgment however in the association's favor for money damages. On appeal, the Court stated that the trial court's denial of foreclosure was proper, but reversed the judgment for money damages in favor of the association, and reversed the dismissal of the owner's slander of title counterclaim because the association failed to meet its burden in proving the proper amounts the owner was indebted (OUCH!).

We all should learn from Plaza's mistake. Proper accounting is of utmost importance, and failure to follow the applicable statutes regarding assessment accounting can produce disastrous results for your associations. With the foregoing in mind, I offer the following guidelines for assessments accounting:

- Neither Chapter 718 nor Chapter 720, Florida Statutes, makes any distinction between regular and special assessments for the purpose of accounting. They are both simply assessments, and must be kept as part of one accounting ledger based upon the date which each assessment (or installment thereof) comes due. You must keep one comprehensive ledger for all assessments attributable to each unit or parcel.
- Any payment received by an association must be applied first to any interest accrued, then to any administrative late fee, then to any costs and reasonable attorneys' fees incurred in collection, and then to the oldest delinquent assessments (or installments thereof). Partial payments for assessments which contain restrictive language (e.g. "payment in full settlement" on or accompanying a partial payment should be discussed with the association's attorney prior to depositing it to make sure all of the Association's rights are protected.
- Interest may only be charged on delinquent assessments, not on attorneys' fees, late fees or prior interest charges. Sometimes in the accounting process, interest is calculated improperly on one or more of these items. You should take steps to see that this error is avoided.
- An administrative late fee may only be charged if authorized in the declaration or bylaws. If authorized, an administrative late fee not exceeding the greater of $25 or 5% of the assessment installment may be charged. Note that this means that only one late fee may be charged to a single pay special assessment. Only one late fee may be assessed for the delinquent payment of a single assessment or for any installments thereof.
- Once an owner's account has been sent to the association's legal counsel for collection, you should not provide the owner with the total amount owed to the association. This information should be supplied only by your attorney's office so that all charges, including attorneys' fees and expenses can be included in the amount furnished.

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Did you know?

THIS IS THE LAST PRINT EDITION OF OUR COMMUNITY UPDATE.

In keeping up with changes in technology and its effects on how people receive their information, we are going DIGITAL. Everyone who receives a print copy of our Community Update whose email is on file, will receive an email every week with a link to our digital newsletter. If you are not certain if your email is on file, please email us and we can check. If you ever want to refer back to a newsletter (whether the current edition or an old one) that is easy to do as we have put them all on our website (**www.bplegal.com/publications**) in searchable format.

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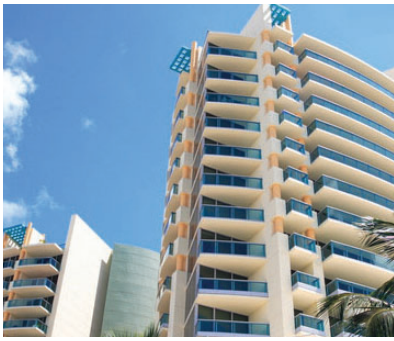
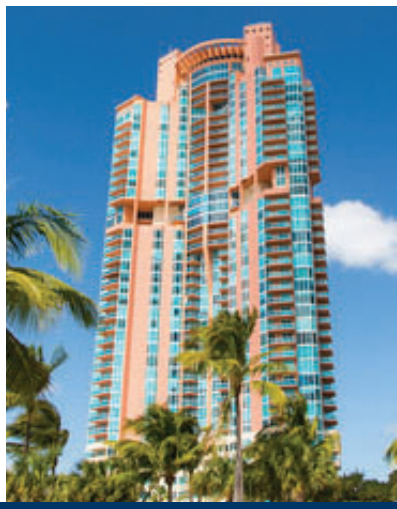
assessments. The unit owner sent a "proposed offer for Accord and Satisfaction" for a significantly lower amount. The association rejected the offer and filed a lien foreclosure; but nonetheless deposited the owner's check. The trial court issued its ruling before the Legislature amended §718.116(3), Fla. Stat. and thus pursuant to *St. Croix* granted the owner's Motion for Summary Judgement.

During the appeal however, the Condominium Act was amended resulting in the Appellate Court reversing in favor of the association and noting that the Legislature in amending the statute "intended to clarify existing law" such that restrictive endorsements are not automatically binding on an association.

In the end, with some exceptions, an association is permitted to accept a payment that does not pay all of the assessment delinquency even if the owner included a restrictive endorsement with the payment.





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