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COMMUNITYUPDATE

INSIGHTS, ANALYSIS & IDEAS FOR COMMUNITY LEADERS SINCE 1980

TAKES A SECOND TO SAY GOODBYE

But how long do you have to wait for an employee to vacate the premises?

Many associations provide on-site housing for employees, whether they are community association managers or maintenance personnel. While the benefits and convenience to the association of providing such housing are obvious, there are a number of not so obvious legal issues that an association should be aware of and proactively address when the association provides employee housing.

By James Robert Caves, III
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The first legal issue an association must consider is the tax consequence to the employee receiving housing. For the purposes of federal income taxes, employer provided housing is a taxable benefit. However, the Internal Revenue Code provides an exception and states that the value of employer provided housing shall be excluded from the gross income of the employee when the housing is provided by the employer as a condition of employment. As such, when an association is drafting its employment agreement with an employee who shall be provided housing, the association should state in the employment agreement that the acceptance of housing is a mandatory condition of employment and being provided for the convenience of the association, as long as such statement is in fact true.

In addition to the tax consequences of association-provided housing, there are a number of other issues which should also be prospectively addressed in the written employment agreement. When the association provides employee housing, it must understand that it is becoming a landlord in addition to an employer. Accordingly, the association must understand its rights and responsibilities with respect to the employee following the termination of their employment with the association. The Landlord Tenant Act, Chapter 83, Florida Statutes, provides that when a dwelling is provided as a condition of employment and there is no agreement as to the duration of the tenancy created, the duration of the tenancy is determined by the period for which wages are payable. For example, if an employee is paid on a weekly basis, then the tenancy is considered week to week and a

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FLORIDA SUPREME COURT DECIDES HOA CONSTRUCTION DEFECTS CASE

By Sanjay Kurian, Esq. | Skurian@bplegal.com

Says Construction Defect Law Should Not Apply to Defective Infrastructure Improvements Discovered Prior to Effective Date of New Law

The Florida Supreme Court ruled in favor of the Lakeview Reserve Homeowners Association, Inc. ("Association") this summer in a major case involving common area defects and implied warranties for home buyers in communities governed by homeowners' associations. CALL filed an Amicus Curiae brief ("friend of the court brief") on behalf of the Association and we are all pleased that the Court's decision was consistent with the arguments set forth in our amicus brief.

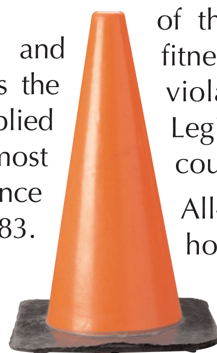
Here is some background on the case:

- Lakeview Reserve Homeowners Association, Inc. ("Association") sued Maronda Homes, Inc. ("Maronda") for breach of the implied warranties of merchantability, which is also referred to as the implied warranty of habitability.
- The case involved defects in the common areas including the roadways, drainage systems, retention ponds and underground pipes.
- The trial court ruled in favor of Maronda, and the Association appealed to the Fifth District Court of Appeals. The Fifth District Court of Appeals reversed the trial court's decision and ruled in favor of the Association. Maronda then filed an appeal to the Florida Supreme Court.
- While the Florida Supreme Court case was pending, the Legislature, during the 2012 Legislative session, adopted HB 1013, creating Section 553.835, Florida Statutes, which states that there are no implied warranties for "offsite improvements." Section 553.835 states that it applies retroactively to pending cases, as well as to future cases.

The opinion recounts at length the procedural and factual history of the underlying case as well as the status of the law regarding common law implied warranties. It is the Supreme Court's most comprehensive recitation of this area of the law since Gable v. Silver in 1972 and Conklin v. Hurley in 1983.

The opinion's takeaways are as follows:

- The Lakeview Reserve Association has standing to present a claim for breach of implied warranty under section 720.303(1), Florida Statutes;
- The Supreme Court approved of the reasoning of the underlying opinion;
- The Supreme Court approved and adopted the "essential services" test to determine "whether a defect in an improvement beyond the actual confines of a home impacts the habitability and residential use of the home";
- The Supreme Court found that although the infrastructure improvements were not physically attached to the home the "component parts provide essential services that directly affect the habitability of the homes…such improvements provide immediate support to the residences. Thus the implied warranties of fitness and merchantability extend to the defects alleged in this case";
- The Supreme Court also said that section 553.835 cannot constitutionally be applied retroactively to Lakeview Reserve's cause of action for breach of implied warranty;
- Lakeview Reserve had a vested right in its cause of action for breach of common law implied warranty;
- Retroactive Application of Section 553.835 would offend due process;
- Section 553.835 violates the Constitutional right of access to the courts "because it attempts to abolish the common law cause of action for breach of the implied warranties for certain injuries to property;
- Notes that the intent of section 553.835 was, per its own terms, to "place limitations on the applicability of the doctrine or theory of implied warranty of fitness and merchantability" which was "a clear violation of separation of powers because the Legislature does not sit as a supervising appellate court over our district courts of appeal."



All-in-all this was as good a decision as could be hoped for on the homeowners' side, as homeowners and homeowners' associations should have protections via implied warranties.

continued from page 1 EMPLOYEE

week's notice is required in the event that employment is terminated and the right to occupy the dwelling is thereby similarly terminated. However, when the wages are payable on a monthly basis or no wages are payable, then the tenancy is considered a month to month tenancy and the Landlord Tenant Act requires that at least fifteen days' notice be provided when the tenancy has been terminated.

However, Section 83.46(3), Florida Statutes (2012), further provides that rent is due the day after the employee ceases employment with the association. Accordingly, while the association may be required to give the employee notice of the termination of the tenancy in the dwelling unit provided by the association incident to employment, once the employment has been terminated the former employee would be liable for rent during the notice period. The association and the employee may enter into different terms as part of a written employment agreement regarding the duration of the tenancy, rent owed following the termination of employment and notice required. Given the specific nature of the rights and obligations created in the statute and the ability of the association to have different terms pursuant to a written employment agreement, it is crucial that an association that intends to provide housing incident to employment, address these issues in its written employment agreement.

In addition to the foregoing issues concerning tax consequences and post-employment termination occupancy, an association intending to provide housing to an employee should also consult its insurance professionals to ensure that the association has the proper insurance coverage. In addition to any worker's compensation insurance coverage which may be required by law, the association should also confirm that its general liability policy and any other property policy sufficiently protect the association with respect to the association-owned dwelling occupied by an employee. Further, the association should also address in writing with the employee which party is responsible for insuring the contents of the dwelling. To the extent that the association requires the employee to carry such insurance, it should request that the employee provide a copy of the policy so the association can confirm that the appropriate coverages are in place.

While there are clear conveniences to the association having an on-site manager, or other employee, reside at the community, as we have seen there are a number of legal considerations the association must consider when providing employee housing. As is the case in so many areas, it is always in the association's best interest to proactively address these issues in writing rather than have to responsively deal with these issues as they arise after the fact.

Employment Contract

THE PARTIES TO THIS AGREEMENT ARE:

(hereinafter referred to as "the Company"

AND

Employee's Personal Details:

(The employee shall be responsible

First Name(s):

Surname:

continued from page 4 MOLD

Among other things, the law requires mold assessment or remediation professionals to possess at least a two year degree in microbiology, engineering, architecture, industrial hygiene, occupational safety, or a related field. The education must be obtained from an accredited institution. Mold assessors and remediators must carry general liability and errors and omissions insurance coverage in the amount of not less than one million dollars. The law also requires that all contracts for mold assessment or remediation services to be in writing (which includes electronic versions) and the contracts must be signed, or otherwise authenticated by the parties, in order to be valid.

There are several exemptions in the law regarding the requirement of licensure for mold remediators and assessors. These include:

- A residential property owner who performs mold assessment/remediation on his or her own property.
- A person who performs mold assessment/remediation on property owned or leased by that person, the person's employer or an affiliate of the employer, as long as the person are not engaging in the business of performing mold assessment for the public.
- A full time employee engaged in routine maintenance of public and private buildings who does not otherwise hold himself/herself out for hire.
- Division I and Division II Contractors licensed under Chapter 489 of the Florida Statutes.

Given the expertise required to deal with mold and the benefits of dealing with a licensed professional, homeowners should not attempt remediating mold in their homes or property when the affected area and damage is substantial and should always seek the services of a licensed mold remediator.

MOLD Remediation

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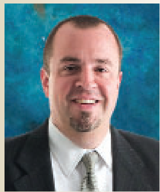
IF YOU LIVE IN FLORIDA, THERE WILL ALWAYS BE MOLD IN YOUR HOME. The presence of mold in the air is normal. However, homeowners should avoid conditions which allow mold to grow and multiply indoors. If this happens, the risk of potential health problems increase and building materials, furniture and other household goods may be damaged.



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The key to avoiding mold is water or moisture. Without water, mold does not grow, multiply or spread. In Florida, all it takes is for water to stand for 24 hours for mold to take hold. Preventing any type of water intrusion or excessive moisture is key. Given Florida's tropical weather, this is sometimes not possible. All indoor mold should be removed as soon as possible. Who should do the cleanup of the mold depends on various factors. Among them, the size of the mold problems, the location of the mold and the amount of damage caused.

If the areas affected by mold is less than 10 square feet (roughly 3 feet by 3 feet), you may be able to handle the job yourself. However, when dealing with extensive water damage and mold growth, the best advice is to engage the services of a mold assessor and/or a mold remediator. In Florida, these professionals have to be licensed. Senate Bill 2234 (227), which became effective on July 1, 2010, provides for licensure and regulation of mold assessors and remediators.

"Mold Assessment" is the process performed by a mold assessor that includes the physical sampling and detailed evaluation of data obtained from a building history and inspection to formulate an initial hypothesis about the origin, identity, location and extent of amplification of mold growth of greater than 10 square feet. "Mold Remediation" is defined to mean the removal, cleaning, sanitizing, demolition or other treatment including preventive activities of mold or mold contaminated matter of greater than 10 square feet that was not properly grown at that location.

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