

## 2010 Condominium Caselaw Update

The first half of the year has seen several cases of consequence.

1. Board of Directors of Warren Boulevard Condominium Association v. Milton, 927 NE 2d 176, 1<sup>st</sup> Dist, 3/31/2010.

This was a condo assessment collection case in forcible. The defendant/owner filed a jury demand. That slowed the progress of the case. The Association filed a motion for use and occupancy to be paid to it during the pendency of the case, apparently in the amount of the monthly assessment. The owner contended that use and occupancy was not appropriate in a condo collection case.

The Appellate Court held that, under Section 9-201 of the Forcible Law, the Association was entitled to payment of assessments from the owner for use and occupancy during the pendency of the case.

Comment: Left unresolved are a few questions:

a. While the Association apparently only asked for its monthly assessments, it is not at all clear that that amount is the fair value for use and occupancy. The market rent of the Unit was almost certainly higher. If the Association had asked for a market rent, would the court have allowed that?

b. In the aftermath of Rotheimer v. Arana, 892 NE 2d 1183 (1st Dist, 2008) finding that the failure of a tenant to pay use and occupancy awarded by the court does not entitle the landlord to possession of the property, how much value does a use and occupancy award have to a landlord (or by extension, to an association)?

2. Ridenour vs. Carl Sandburg Village No. 7 Condominium Association, 2010 WL 2010513 (1<sup>st</sup>. Dist., 5/19/2010)

This case dealt with the use of reserves by an association. The Association undertook a window replacement project. The windows were limited common elements (LCE). The Association, as it had in the past, intended to use the Association's reserves to fund the project. Certain owners sued, claiming that the reserves could not be used for the project as the condominium instruments governing the Association required that repairs and replacements of LCE be funded only by the owners to whose units the LCE are appurtenant.

The Declaration, in one place, allowed the Board to either pay for the repair and replacement of LCE as a common expense, or to charge it back to the LCE units affected. But in a second place, the Declaration required that units with LCE pay for the repair and replacement of their LCE "except to the extent as otherwise directed by the Board or as in otherwise provided herein..."

The Appellate Court basically ignored the “except” clause (and the initial clause allowing the Board to make a decision) in deciding that the declaration required the cost of maintenance, repair and replacement of LCE must be charged to the LCE units benefited thereby.

However, the Appellate Court then also found that since the units with LCE had X% of the association, the Association could use that X% of the reserves to fund the work, as that X% was effectively taken solely from the units with LCE at issue.

Comment: If the Court’s discussion of the documents is taken at face value, the Court may have severely restricted a board’s ability to make financial decisions about LCE and Common Elements repairs. The Court doesn’t seem to fully grasp that LCE are just a subcategory of Common Elements. And that the discretion given to the Board to decide if the repair or replacement of LCE (as just a category of Common Elements) should be funded from common expenses (or reserves) vs. being charged by to the LCE units at issue, is both intentional and consistent with the subsequent language in the “except” clause. The Court has removed certain flexibility given to the Board in the documents. I can only hope that a future court recognizes the alternative authority given to the Board on such an issue if the whole Declaration is read together.

The fact that the Court then proceeded to allow X% of the reserves to be used to pay for the LCE work does not really mitigate the poor analysis of the documents.

3. Palm vs. 2800 Lake Shore Drive Condominium Association, 2010 WL 2199890, 1<sup>st</sup> Dist., 5/28/2010

For years, the City of Chicago’s condo ordinance has had a provision requiring an association to turn over books and records to an owner on 3 day demand. Section 13-72-080 of the Municipal Code. But it has rarely been utilized by owners. Instead, owners rely on Section 19 of the IL Condominium Property Act (and that section’s predecessors) and on the IL General Not-for-Profit Corporation Act’s provisions to get books and records from an association. Mr. Palm, however, made demand under 13-72-080, and for his attorney’s fees (as permitted by the ordinance) and the association fought it.

The Appellate Court found that the ordinance was a valid use of the City’s home rule power and was enforceable, despite the similar provisions in the other statutes, as was the attorney’s fees provision.

Comment: I think the Court got this one right. And it will raise the profile of the City’s ordinance in regard to books and records.