Community Association Management *Insider*®

OCTOBER 2009

INSIDE THIS ISSUE

Association Seeks Removal of 44-Year-Old Couple

The Fair Housing Act allows communities intended for those over 55 to discriminate against young potential renters. At least 80 percent of units must be occupied, it states, by a person older than 55.

One Florida condo association of a 55-and-over complex is trying to get rid of a couple, both of whom are 44. According to the board of directors, the rules are clear. The age restriction is on the application, and the governing documents say that the complex is an "adult community."

PRODUCED IN CONSULTATION WITH

community ASSOCIATIONS INSTITUTE

FEATURE

Collect Rent from Delinquent Members' Tenants

An increasing number of associations are dealing with weakening finances because a percentage of their members are unable to pay their assessments on time. The economic situation is grim. According to data from the Equifax Credit Bureau, high U.S. unemployment keeps pushing up the rate of mortgage delinquencies, which in turn drives personal bankruptcies and home foreclosures. August marked the fourth consecutive monthly increase in delinquencies, and the report showed an accelerating pace. By comparison, 4.89 percent of mortgages were 30 days past due in August 2009, while in August 2008, the rate was 3.44 percent, Equifax data showed.

As a result of hard times, some of your economically distressed members may have decided to lease their home to tenants to help cover their expenses. At the same time, the landlord-member may have made paying assessments a low priority and may have become delinquent. With the help of attorney Tom Fier, we will discuss how an association might collect rent directly from the tenant to pay any delinquent assessments.

(continued on p. 2)

HIRING & FIRING

Supreme Court Ruling Benefits Associations with Unionized Labor

A U.S. Supreme Court ruling in 14 Penn Plaza LLC v. Pyett from earlier this year may have a significant impact on how your association or management company handles future labor disputes with unionized employees. According to New York attorney William Hummell, a partner at Kucker and Bruh LLP, employers of union employees can now enforce the alternative dispute resolution or arbitration provisions in their collective bargaining agreement rather than have an employment issue, such as a discrimination claim, resolved through protracted federal litigation.

In a case that Hummell handled, a unionized doorman brought an age discrimination claim in federal court. Hummell, who represented the owner, asked the court to have the dispute handled in arbitration,

(continued on p. 5)

Community Association Management Insider (ISSN 1537-1093) is published by Vendome Group, LLC, 149 Fifth Avenue, New York, NY 10010-6823.

Volume 9, Issue 4

Subscriptions/Customer Service: To subscribe or for assistance with your subscription, call 1-800-519-3692 or go to our Web site, *www.vendomegrp.com.* Subscription rate: $337 for 12 issues (plus $17 shipping/handling). **To Contact the Editor:** email *eyoo@vendomegrp.com.* Call: Eric Yoo at (212) 812-8435. Fax: (212) 228-1308.

To Place an Advertisement, Please email Joyce Lembo, *jlembo@vendomegrp.com,* or call (212) 812-8971.

Collect Rent (continued from p. 1)

Check Governing Documents for Additional Collection Powers

Standard collection powers in typical governing documents allow an association to impose late fees, apply interest to outstanding balances, impose liens for past-due assessments, and grant the association power to foreclose on the association liens.

Many community association documents will allow for further collection powers such as suspension of use and services. An association may suspend a delinquent member's right to vote, to use a recreational facility, or to use some services paid for as a common expense, such as Internet or cable.

One special collection power is the assignment of rent to the association. Rent assignments allow an association to demand that a tenant of a delinquent owner submit all monthly rental payments to the association until the member's delinquency is paid in full. Without this clause or some other language in the governing documents allowing for a "rent assignment," an association would have to go through a court procedure and basically sue the member, get a judgment, and obtain a court order to collect the rent from the tenant, say Fier.

Your association can pursue only those collection remedies that are permitted under your governing documents. If your documents do not contain a provision for an assignment of rent, you can amend your governing documents to include one. You can use our Model Bylaw: Create Right to Collect Delinquent Assessments Directly from

MODEL BYLAW

Create Right to Collect Delinquent Assessments Directly from Tenants

Here's a model bylaw that you can adapt and use to create the right for your association to collect rent directly from a delinquent member's tenant. Check with your attorney before adapting this bylaw for use at your community.

LIABILITY FOR ASSESSMENTS

When a Member who is leasing his or her Unit fails to pay any Annual Assessment or other Assessment or any other charge to be paid by the Member to the Association pursuant to this Declaration for a period of more than thirty (30) days after it is due and payable, then the delinquent Member hereby consents to the assignment of any rent received from the Tenant during the period of delinquency, and upon request by the Board, Tenant shall pay to the Association all such rent until all unpaid amounts owed by the Owner to the Association have been paid in full. All such payments made by Tenant shall reduce, by the same amount, Tenant's obligation to make monthly rental payments to Member. The above provision shall not be construed to release the Member from any obligation, including the obligation for Assessments, for which he or she would otherwise be responsible.

Tenants to amend your governing documents to allow for this specific collection power.

Add Assignment of Rent Clause to Lease Addendum

Some governing documents say that if a member is leasing his home, the member has to include a clause in the lease that states that the tenant has to abide by the governing documents. And the tenant will sign that he has received a copy of the governing documents. This, in effect, will put the tenant on notice of the assignment of rent provision.

A clearer way to put the tenant on notice is to not only amend the governing documents, but also require a lease addendum to the lease between the member and his tenant that includes this assignment. The lease addendum creates a contractual relationship among the member, the tenant, and the association that is helpful in the event assessment payments from the owner fall behind schedule. For an example of a clause to add to your community's lease addendum, see Model Contract Language: Add Assignment of Rent Clause to Members' Lease Agreements.

MODEL CONTRACT LANGUAGE

Add Assignment of Rent Clause to Members' Lease Agreements

Here is model language to add to a lease between a member and his tenant. You can add this language with a lease addendum. An addendum states additional terms, conditions, and rules that are incorporated into the lease between the tenant and the member. The following clause puts both the tenant and member on notice of the association's right to collect rent from the tenant if the member is delinquent. Be sure to show this clause to your association's attorney. State law may dictate changes and deletions.

ASSIGNMENT OF RENT

If at any time during the term of the lease, including any extension or renewal thereof, Landlord becomes delinquent in the payment of any amounts owed to the Association, the Association, at its option, may demand and receive payment from Tenant of all such amounts due or becoming due, up to an amount sufficient to pay all sums due from Landlord to the Association, and any such payment from Tenant to the Association shall be deemed to be a full and sufficient payment of rent to Landlord in accordance with the Lease, and Tenant shall be discharged from any obligation to pay such amounts directly to Landlord so long as such payments are made to the Association, until Landlord's delinquency to the Association has been fully cured. Furthermore, Landlord and Tenant agree that if Tenant receives a bill from the Association containing the amount of any such delinquency, it shall be conclusive proof of the amount owed to the Association and may be relied upon by Tenant in paying said delinquency to the Association in lieu of rent to Landlord.

Collecting Tenant Rents Through Receivership

In some special cases, associations have been collecting rents directly from tenants through a court-sponsored receivership process. A receiver is an independent third party, unrelated to the association or the member, appointed by a court to take possession and control of the property. If the property is already rented when the receiver takes possession, the receiver is typically able to collect rent directly from the tenant that would otherwise have been paid to the member.

Collecting rents through receivership has been gaining popularity in states such as Florida where foreclosure rates and the number of absentee owner-members are high. In these special instances, a bank has commenced foreclosure proceedings against a member but not taken possession of the unit, the association has filed a lien against the delinquent member for past-due assessments, the delinquent member has declared bankruptcy, and the member has a renter in the unit and is collecting rent.

A South Florida court decision from earlier this year has opened the doors for financially distressed condominium and homeowners' associations to collect all rents due from tenants occupying units that are under foreclosure. The attorneys in this case asked the court to appoint a receiver to collect rents from tenants whose landlords have stopped paying maintenance fees while under foreclosure by the association.

Under the receivership program the association itself does not go into receivership. The receiver is appointed by the court for only those units that are currently under foreclosure by the association, or which may become under foreclosure in the future, and which are occupied by a tenant paying rent. Until this case was

(continued on p. 4)

Collect Rent (continued from p. 3)

decided, the receivership approach was largely viewed as a legal remedy available only on a unit-by-unit basis. However, such legal fees and costs on a unit-by-unit approach were prohibitive for already distressed associations.

In this case, the attorneys argued that the receivership law should be interpreted more broadly and thereby provide the court with the authority to appoint a receiver to collect rents on an ongoing basis from all absentee owners who fail to pay maintenance fees—in one blanket approach. The judge in this case agreed and appointed a receiver to collect rents from all the condominium units currently under foreclosure or units that would go into foreclosure in the future where the owners have failed to pay their maintenance assessments.

The dire economic situation in South Florida has made blanket receivership a viable remedy. "Although the receivership option has been available to associations pursuant to Florida statutes for years, associations generally have not elected to use this option because the attorney's fees and costs on a per-file basis are prohibitive and impractical, and the process is time consuming," explains David Arnold, a co-founder and partner at Association Law Group, which handled the case. In this case, the association had been struggling for over a year because many of the condominium units were owned by absentee investors who stopped paying their association fees. In fact, 95 percent of the 61 units are owned by investors and almost half are facing foreclosure. The association should have been collecting $11,000 in maintenance fees each month, but that amount was down to $3,000 per month.

Insider Sources

David C. Arnold, Esq.: Partner, Association Law Group, 1666 Kennedy Causeway, Ste. 305, North Bay Village, FL 33141; *www.associationlawgroup.com.*

Tom Fier, Esq.: Law Offices of Tom Fier, 675 Mariners Island Blvd., Ste. 106; San Mateo, CA 94404; *www.tomfier.com.*

For more information, visit:

www.communityassociationinsider.com

Search Our Web Site by Key Words: lease addendum; assignment of rent; receivership; delinquent assessment

Q & A

The INSIDER *welcomes questions and comments from subscribers. You can submit your questions through the "Ask the Insider" feature of our Web site,* www.communityassociationinsider.com.

Using "Project Approved" Signs to Encourage Compliance with Architectural Review Committee Guidelines

Q Over the years, we have had issues with association members who have made modifications to their homes without obtaining the necessary approval from the association. Also, as a result, suspicious members regularly make calls to the management office to ask if particular neighbors have been granted approval by the architectural review committee for whatever project the neighbor happens to be working on. Can you recommend any efficient way to put association members on notice of approved projects in the community?

A One Colorado association has come up with a simple way to put an end to these types of phone calls and encourage members to abide by architectural review committee rules before they start a construction project. In this community, homes where construction has been approved by the association feature yard signs declaring: "Project Approved, Architectural Control Committee."

These signs are similar to the signs construction companies place on properties when new windows are being installed or a roof is being replaced. Once members get used to seeing the signs, they will immediately know when they see illegal construction, thus reducing inquiries to the office. A lack of a sign indicates that there is no association approval for the project.

Also, with such a clear indicator of approved projects, there is a strong disincentive for members to try to avoid going through the project approval process. Instead of worrying only about association staff enforcing the review committee guidelines, a violating member will know that the entire community knows of his infraction.

Hiring & Firing

(continued from p. 1)

but the judge denied the request. In the meantime, a similar case made its way through the court system to the U.S. Supreme Court. Hummell was able to postpone the judgment of his case until the Supreme Court made its decision.

Pyett Case Overview

In Summer 2003, three night security employees in a large New York City office building found themselves in new positions after the owner retained a new security subcontractor for some of the duties previously handled by the incumbent contractor. The new company, a non-union entity, was affiliated with the incumbent contractor, a unionized business. As part of the new arrangement, the employer reassigned the employees to different nonsecurity positions as night porters and light-duty cleaners.

The workers, all over 50 years old and with decades of seniority, found that their new jobs were more physically demanding and less financially rewarding. Unhappy, they looked to the union to address their grievances. The three employees affected by the change were subject to a multi-employer collective bargaining agreement (CBA) negotiated by Local 32BJ of the Service Employees International Union (SEIU) with the real estate industry in New York City.

Following the employee protest, a grievance was filed under the CBA. The grievance alleged that the CBA was violated by an improper transfer and reassignment arising from the new subcontract, and subsequently, by the company's denial of a handyman assignment, resulting in a loss of pay and overtime. The grievance alleged as well that the workers were the victims of age discrimination.

Soon after arbitration began, the union had second thoughts and told the employees that their transfer and discrimination claims would not be advanced by the union because the union had approved the new arrangement. Instead, only the handyman assignment and the overtime issues would be pursued by the union.

The employees sued the owner in court, alleging age discrimination under federal, state, and city law. Eventually, the labor arbitrator rejected the CBA issues pressed by the union regarding the handyman assignment and overtime. The owner then moved to dismiss the employee's litigation, or alternatively, compel arbitration. In moving to compel, the company contended that the CBA's arbitration provision provided the exclusive means to address the individual discrimination claims presented by the workers, and that the employer had provided substantial monetary benefits for the unionized workforce in the negotiations leading to the provision.

The U.S. Supreme Court, dividing along ideological lines, ruled that a union contract forfeiting members' right to bring workplace discrimination claims in court is enforceable. Justice Clarence Thomas wrote for the 5-4 majority and stated, "We hold that a collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate Age Discrimination in Employment Act claims is enforceable as a matter of federal law."

Arbitration of Federal Discrimination Claims

As a result of the ruling, associations and management companies may avoid spending a fortune fighting a discrimination claim made by a union employee. Before this ruling, although arbitration was always an option in such disputes, it was never required, nor was it the sole choice.

"Prior to Pyett, courts were permitting the individual to demand arbitration and denying that same right to the employer who had negotiated for it under the collective bargaining agreement. So the employee had a choice, but the employer had none. And every time one of these labor issues arose, whether it was a bogus issue or not, employers were stuck in a complex federal lawsuit in front of a jury," says Hummell.

Insider Source

William Hummell, Esq.: Partner, Kucker and Bruh LLP, 747 Third Ave., 12th Fl., New York, NY 10017; *www.kuckerandbruh.com.*

For more information, visit:

www.communityassociationinsider.com

Search Our Web Site by Key Words: arbitration; unions; collective bargaining agreements

RECENT COURT RULINGS

➤ Insurer Not Required to Defend Against Member's Personal Injury Claim

Facts: A member was injured as a result of exposure to unsafe sanitary conditions in the community swimming pool. Specifically, the member contracted a viral infection from contaminants in the swimming pool's water. The viral infection was identified as the coxsackie virus, which was contracted from ingesting the community's swimming pool water. According to an expert's report, proper chlorination of swimming pool water is an effective way to kill harmful microbes, including the virus that caused the member's injury.

The member sued the association for damages, and the insurer then asked a judge for a ruling without a trial stating that it had no duty to defend the association against the member's lawsuit. The insurer relied on the language of the association's policy. The policy contained a pollution exclusion that stated that the insurance did not apply to "bodily injury which would not have occurred but for the discharge release or escape of pollutants at any time." The policy defined "pollutant" to mean any solid, liquid, gaseous contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste.

Ruling: The Florida district court granted the insurer's request for a judgment without a trial in its favor.

Reasoning: As defined under the plain language of the policy, the meaning of the term pollutant includes contaminant. And the court stated that cases from its jurisdiction have ruled that similar pollutant clauses encompass microbes such as the ones that injured the member. The evidence showed that the substance in the swimming pool was a viral contaminant and a harmful microbe. Therefore, the pollutant exclusion applied in this case.

■ First Specialty Ins. Corp. v. GRS Mgmt. Assocs., August 2009

➤ Member Must Pay Association's Attorney Fees

Facts: A member obtained the approval of the association to build a house, a retaining wall, and a barn on his lot located in the community. The governing documents require that work on any construction projects must be completed within a year of approval. Even so, two years after approval, the member still had not begun construction of the house, and the association gave the member notice that it would begin mediation proceedings to resolve the construction delays. The member did not heed the notices, the mediation proceedings fell through, and the association sued the member, requesting an injunction to require him to stop construction on the improvements on his lot and to substantially build the house within the year. The association requested further that if the member did not substantially build the house within the year, then the association would have access to the member's property and would be able to tear down the improvements on his lot.

The trial court, in its ruling, provided specific deadlines for the member to meet. If the member did not meet these deadlines, the association was allowed to come onto the property and demolish the half-completed structures. The court also awarded attorney fees to the association. These orders were made pursuant to California state law, which states that in an action to enforce governing documents, the prevailing party shall be awarded its attorney fees. Because the association did not receive the exact injunction it requested, the member appealed the attorney fee award.

Ruling: A California appeals court agreed with the lower court's decision to award the association with attorney's fees.

Reasoning: The appeals court ruled that the trial court's ruling embodied the association's "main" litigation objective. The association clearly received a more favorable judgment at trial, one that contemplated demolition. And the court stated that even after the modified injunction, demolition of the member's structures remained a substantial possibility.

■ Nellie Gail Ranch Owners Assn. v. Colombo, September 2009

➤ Roofing Company May Be Liable for Defective Roof

Facts: A few months after an association completed a roofing project, a member wrote a letter to the association board stating that she had a water moisture

problem inside her second-story bedroom window as a result of the new tile roof. She also reported several broken roof tiles. Six years later, the buildings in the association suffered numerous roof leaks. And the following spring, the association hired a roofing consultant who found multiple causes for the leaks and multiple types of roof defects. The association filed a construction defect lawsuit against the roofing manager, roofing company, and roofing supplier involved in the project.

The trial court granted a ruling without a trial in favor of the roofing manager and roofing company. The trial court ruled in favor of the roofing company based on a four-year statutory time limit within which a construction defect lawsuit could be brought against it. The association appealed.

Ruling: A California appeals court reversed the judgments in favor of association.

Reasoning: The appeals court denied the roofing company's argument that the association was on notice of a roof defect at the time of the member's letter to the board. This letter described a water moisture problem inside a window as a result of the tile roof. The letter also reported several broken roof tiles. The trial court could not say, as a matter of law, that a water moisture problem inside a window as a result of the tile roof, in just one unit of a 61-unit complex, along with a report of several broken roof tiles, constituted sufficient damage to give the association notice that remedies against the roofing company had to be pursued. If the court were to find in favor of the roofing company, that would have forced property owner associations to conduct extensive investigations for possible defects based on any report of a small problem. The appeals court declined to impose such a burden.

- Creekridge Townhome Owners Assn., Inc. v. C. Scott Whitten, Inc., September 2009

➤ Member Prevented from Conducting Renovations Without Obtaining Permits

Facts: A condo association's governing documents required members to obtain a permit before starting any renovations in their units. This rule was implemented to ensure that: (1) contractors were aware of the association rules so as not to disrupt other members; (2) all renovations were compliant with building codes; (3) contractors were registered with the city; and (4) contractors possessed sufficient insurance to cover potential damage to any of the units.

A member did not believe that he was a member of the association and therefore was not bound by its governing documents. As a result, he did not obtain the appropriate permits on the numerous occasions he renovated his unit. The association's legal counsel sent the member three separate letters reiterating the permit requirement rule, and the letters also sought to perform an inspection of the renovations already completed to ensure that they met local building codes. The first of the letters imposed a $100 fine for violating the permit rule with an additional $10 per-day fine until the member submitted to an inspection of his unit. The member refused inspection.

The association sued and asked the court to declare that the member was prevented from conducting any further renovations without first obtaining a permit. The trial court ruled for the association, and the member appealed.

Ruling: An Ohio appeals court agreed with the lower court's decision.

Reasoning: The member tried to argue that the regulation requiring board approval in order to make improvements to his unit was arbitrary. The court found that the rule was not arbitrary, because there was a rational relationship between the rule and the safety and enjoyment of the property owners. The members of the association share the same plumbing and electrical systems, so renovations in one member's unit have the ability to affect other units. Also, certain improvements, such as new floor installation, can cause noise disturbances to downstairs neighbors. The court found that the permit rule was in place to prevent issues that may arise among members living in such close proximity to one another.

The court also found that the lower court's ruling was proper because otherwise the association may have been irreparably harmed. The permits ensure that contractors maintain liability insurance to protect all members. Poor workmanship in one member's unit has the ability to affect other members' units that share plumbing and electrical lines. Thus, preventing the member from further renovating his unit without the required permits was necessary to protect the association.

- Acacia on the Green Condo. Assn. v. Gottlieb, September 2009

Community Association Management *Insider*

VENDOME GROUP LLC 149 FIFTH AVE NY NY 10010

Presorted Standard
U.S. Postage
PAID
Permit No. 1906
Southern, MD

Open to Read Your Latest Issue