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An Overview of Two Common Homeowners Association Litigation Matters

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Introduction

When a community association becomes involved in litigation, whether it be a lawsuit in district court for unpaid assessments, or a complicated covenants enforcement matter in circuit court, counsel has certain expectations and needs from the client in to assist in representing the association's interests adequately. This memo seeks to provide you with some of those general expectations for each type of lawsuit.

The Pink House – a Story

You are serving as the Homeowners Association President when you get a call from the management agent, who has been getting calls all morning from neighbors about the new paint on the house at 101 Dawn Place (fictional address). The house is pink. Not pink-tinged, not a little bit pink but, really pink. Of course, the owner of the

pink house also has not paid her monthly assessments.

Why File a Lawsuit?

Negotiations, hearings, fines have not worked – the owner really likes pink. The owner also has no interest in paying her monthly dues. The Board calls a meeting to discuss how to proceed on both issues. Half of the Board is very concerned about the attorneys' fees that will be incurred to pursue these matters. The other half of the Board wants to make an example out of the pink house owner. Ultimately, the biggest problem is that a pink house changes the architectural scheme of a community and the Board has a duty to not allow that to occur. The Board has to make a business judgment weighing the cost of litigation against its fiduciary obligations to protect the architectural scheme of the community. Several members of the Board are upset about the unpaid monthly assessments and

do not want that to get lost in the shuffle. Ultimately the Board decides to bifurcate the issues and file two separate lawsuits, one in General District Court and one in Circuit Court.

Two Lawsuits – Why?

The Board wants to collect the monthly dues the owner of the pink house owes quickly. The General District Court (“GDC”) has a much faster docket and cases can be heard in as fast as three (3) months. But GDC does not have the judicial authority to order a homeowner to change something about their home. The relief that the Association seeks is called injunctive relief. The power to issue injunctive relief belongs to the Circuit Court. The Circuit Court dockets are much longer and much slower-moving. The Board authorizes the Association’s counsel to file a lawsuit against the owner of the pink house for unpaid monthly assessments in GDC in an effort to obtain a faster judgment. The Board authorizes the Association’s counsel to file a lawsuit against the owner of the pink house to obtain injunctive relief in Circuit Court.

How Long Will it Take?

From start to finish, the GDC case could take as short as three (3) months but as long as eight (8) months depending on the jurisdiction. From start to finish, the Circuit Court case could take as short as eight (8) months and as long as eighteen (18) months.

How Much “Work” Will be Required of the Board and/or Management Agent During the Litigation?

Unpaid Assessments: The amount of work to prepare for the GDC matter will likely be minimal as there is very little discovery in GDC. Not only are cases heard more expeditiously in these courts, but there are less procedural requirements, so they are generally generate less in legal fees than suits in circuit court.

In Virginia, the court generally orders that the parties file pleadings – a Bill of Particulars by the Plaintiff and an Answer and Grounds of Defense from the Defendant. The purpose of these pleadings is to give the parties notice of the basis of the claim and possible defenses that the owner has to the claims. In order to file the Bill of Particulars, counsel will need certain information regarding the owner’s account, which generally includes prior letters that were sent to the owner regarding the delinquency, any responses from the owner, and a current statement of account. The documents that are attached to the Bill of Particulars are often used as exhibits at trial, so having them sooner is always helpful. The attorney for the Association will undoubtedly need to conduct some significant investigation of the defenses put forth in the Answer and Grounds of Defense in order to prepare for trial.

Maryland does not have the same system. Instead, the owner must notify the GDC of their “intention to defend” against the lawsuit by the date set forth on the district court summons. If a notice of intent to defend is not received on or before the

deadline, then counsel may request that the court enter a judgment. If the owner does indicate their intent to defend against the lawsuit, Maryland rules allow only a limited amount of discovery at the district court level, but these procedures are rarely used by the defendants. An in depth discussion of discovery procedures are discussed below in the section on Circuit Court proceedings and should be applied similarly in a GDC case if discovery is requested.

In both Virginia and Maryland, counsel will need someone from the association to be available to testify at trial. If the association has a management company, we generally request that someone from the management company serve as a witness. Otherwise, a Board member will need to be present at the trial to testify about the validity of the statement of account and the association's governing documents.

Pink House: The amount of work to prepare for the Circuit Court is significantly more involved than that of the GDC. Likely the Board will need to appoint a member of the Board to work with the attorney to provide responses to discovery, give depositions (if necessary), and to provide testimony at trial. In addition, the management agent will need to work closely with the attorney because the management agent is generally the custodian of records for the Association. The records are a crucial element of the litigation as there are any number of procedural steps, both in the Virginia/Maryland statutes and in the individual Associations' document that must be followed.

As in the unpaid dues case above, the owner of the pink house likely filed an Answer and Grounds of Defense. The attorney for the Association will undoubtedly need to conduct some significant investigation of the defenses put forth in the Answer and Grounds of Defense in order to prepare for trial.

The judiciary has become more and more inclined to wait for the Associations and the Owners to attempt to settle covenant enforcement matters. Therefore, a representative from the Board of Directors and/or the property manager may need to be present during mediation, if the Board and the owner of the pink house opt to engage in mediation prior to trial.

Defenses Raised by the Pink House Owner/TRIAL

Unpaid Assessments: The owner of the pink house is a bit eccentric. Her Answer and Grounds of Defense contains assertions that she has written checks for the monthly dues every month. She states that she has paid the dues. The Association goes through all of their bank deposit statements, the correspondence file, and every possible place that the checks could possibly have ended up. The property manager has literally looked everywhere and is quite upset at the idea that the checks could have gone missing.

At trial, the attorney for the Association asks the property manager about the general record keeping practices, i.e., what happens when a check comes in, how are the deposits made to the bank, who enters the payments into the accounting system, etcetera. The

attorney asks the property manager whether or not there is any record of the checks being sent to the Association. The property manager, of course, says no.

The owner of the pink house did get an attorney. After direct examination, in which the owner of the pink house states many times that she “writes a check to the Association every single month,” the attorney for the Association has the opportunity to cross examine her. The attorney for the Association asked one question, “After you wrote the checks to the Association every month, did you mail them or take them to the property managers office yourself?” The owner of the pink house was so surprised by the question that she answered “no, I thought the property manager was supposed to come collect it!”

The judge awarded a verdict for the Association with the attorneys fees requested.

Pink House: In her Answer and Grounds of Defense, our pink house owner raises a number of defenses including, selective enforcement and waiver.

Selective Enforcement: During the course of the litigation, the owner of the pink house states that the Association is “picking on her” and requests information on all of the other covenant enforcement actions that the Association has brought against other owners in the community. This Association has not been hugely active in the past with regard to covenant enforcement matters. There have been a few hearings and fined a few owners. Of course, no one else has painted their house pink.

The attorney for the Association requests that the owner of the pink house provide information pertaining to other violations in the neighborhood that have not been enforced by the Association in her estimation. The owner of the Association does provide a few pictures of houses where some home maintenance needs to be performed, where the trash cans were left outside, and where a commercial vehicle is being parked in the yard.

Waiver: During the course of the litigation, the owner of the pink house goes out into the neighborhood and takes pictures of several other homes within the community that are beige in color but with a bit of a pinkish tinge if the sunlight is exactly right. In addition, she takes pictures of other pink houses around Fairfax, Arlington, and Alexandria. The owner of the pink house provides the photographs and states that all of the pictures are of homes within the neighborhood and therefore, the architectural scheme of the community allows pink house.

In a deposition, the pink house owner admits that several of the pink houses in the pictures are not within the community. Further, she admits that the other pictures show homes that are painted beige and they only look pink when the sun is setting.

Trial: At trial, each side presents their cases and each attorney presents numerous objections to the other parties’ evidence. The judge is an individual who clearly wants all of the information in front of him and therefore overrules most of the objections and all the information and testimony comes into evidence. The Association’s portion of

the case takes about 2.5 hours and the Defendant's portion of the case takes 3 hours because of all the extraneous information she wants to put before the judge.

After reviewing all of the information, the judge gives his ruling: Selective enforcement does not apply because the Association is enforcing on cases where there is a chance that the architectural scheme of the community might be changed. Waiver does not apply because there are no other pink houses in the community. The Association's enforcement case was proper because the pink house was a violation of the covenants in that the color was not pre-approved and is not reasonable in light of the scheme of the community. The judge ordered the owner of the pink house to fill out an architectural modification request form with an approved color and submit it to the Board in the next 14 days. Once the color is approved, the owner of the pink house has 45 days to have the house repainted. In addition, the judge ordered the owner of the pink house to pay the \$900.00 in fines that have accrued. Further, the judge did award the attorneys fees in this matter although, reduced the amount by 25 % stating that he wished that the attorneys had mediated this matter.