HOW A $50 FINE BECAME A $71,500 DEBT

COUNSEL'S CORNER

Dominion Estates Homeowners Association defended a lawsuit brought by Gabriele and Edward Duncan in Harris County. DEHA had asserted fines and penalties for violation of a Declaration and related Guidelines. The Duncans wanted clarification from the Court that DEHA was not entitled to receive either.

The Duncans owned a home in Dominion Estates. There were recorded restrictions which obligated each homeowner to "keep and maintain their lot, its yard and landscaping, and all improvements . . . in a well maintained, safe, clean and attractive condition." As well, the DEHA's Architectural Control Committee had adopted "Design Guidelines" which provided for fines for non-compliance.

In May 2007 DEHA sent the Duncans a letter stating that they had violated the Declaration and Guidelines, and needed to remove foil that had been wrapped around some exterior pipes. When M/M Duncan failed to comply, a second letter was issued to the same effect one month later.

At that time, a $50 fine was asserted with a statement that if the foil wasn't removed within a few more weeks, an additional fine of $50 per week would be assessed.

Evidently M/M Duncan removed the foil, but replaced it with gray tape. So, a month later DEHA sent the Duncans a third letter instructing them to remove the tape from their pipes and to pay the $50 fine. When the fine was not paid, DEHA began to assess weekly fines of $50 caused by the Duncans' failure to pay the initial $50 fine. As DEHA had promised / threatened to do.

In November 2007 the Duncans filed a lawsuit against DEHA alleging that neither the initial $50 fine nor the $50 weekly fines were authorized by the Declaration and Guidelines. M/M Duncan then challenged an additional $250 fine that was levied by DEHA against all homeowners as a special assessment for legal fees incurred by DEHA.

Later, as the Duncans attempted to sell their home they learned that DEHA had filed a Notice of Lis Pendens in the public records, effectively prohibiting them from

selling their property. At that juncture DEHA believed that the Duncans owed $4800, and the fine was increasing $50 per week.

A trial was held in October 2009. The jury offered a conflicting verdict regarding the placement of foil and tape on exterior pipes. But regardless, the jury concluded that DEHA did not give M/M Duncan adequate notice of the implementation of the Design Guidelines before taking enforcement action. And also the jury stated that DEHA did not furnish the Duncans a reasonable amount of time to correct the alleged violations.

Further, the jury found that DEHA was not entitled to any unpaid fines and late charges.

The trial court rendered a Judgment that DEHA was not entitled to a recovery. Still, the Duncans appealed, claiming they should receive an award providing that DEHA breached the Declaration and Guidelines. It's confusing but don't forget that M/M Duncan brought this claim against DEHA. Usually it's the opposite.

On August 11, 2011, the Harris County Appellate Court reversed the trial court's judgment. In doing so the Appellate Court accepted the position asserted by the Duncans that they did not owe any money to DEHA. As well, the Appellate Court found that DEHA at least owed the Duncans the attorneys fees incurred by M/M Duncan to prove their point.

The Appellate Court instructed the trial court to hold a hearing and determine the amount of attorneys fees that should be paid by DEHA to M/M Duncan.

In the first week of May I learned that the jury in the 207th Judicial District Court had issued a verdict a few months prior allowing M/M Duncan to recover $68,000 in attorneys fees. In April the trial court added $3,500 in appellate fees for a grand total of $71,500 in attorneys fees to be paid by DEHA to the Duncans.

Not yet through with the Judgment, the trial court also tacked on an additional $25,000 for any additional appeals undertaken by DEHA. And I understand that DEHA is now considering its own appeal.

See *Duncan v. Dominion Estates Homeowners Association*; No 01-09-01086-CV; August 11, 2011. That's where you will find the Appellate decision from two years ago, reversing the trial court's judgment and providing for another hearing at the trial level. The results of the second hearing regarding attorneys fees that was just concluded, although public, is not located in a place that is easy to find on the web or in other reported services.

Lessons learned:

1. I understand why DEHA took this action. And I understand why M/M Duncan defended their position and ultimately were forced to bring a lawsuit. All of the litigants had solid business and economic reasons.

2. Even so, a $71,500 judgment based on an initial $50 fine is excessive. If DEHA isn't insured for this loss, they may need to further specially assess their members or file bankruptcy. And don't forget that in addition to the $71,500 judgment DEHA must now pay, DEHA must also pay its own attorneys whose fees may be comparable. And further, don't lose sight that if DEHA appeals and loses, DEHA might owe another $25,000 as instructed by the trial court in the second hearing.

   If that were to happen DEHA would owe the Duncans almost $100,000. All chasing a $50 fine.

3. And you are doubtless asking – how does this relate to commercial brokerage? The connection is with late charges, lease compliance and fees. An overly aggressive landlord, property manager or agent might encounter the same type of defenses as asserted by M/M Duncan: inadequate notice; improper authorization of charges; unequal enforcement of rules, policies, procedures and guidelines.

The answer is that property owners, managers and agents must use discretion in enforcement obligations, or be potentially slapped by jurors and Courts. It's not the slap that stings; it's the attorneys fees that accompany it. Particularly when you may have to pay the fees incurred by both sides.

Stuart A. Lautin, Esq.*

* Board Certified, Commercial (1989) and Residential (1988) Real Estate Law,
Texas Board of Legal Specialization

Higier Allen & Lautin, PC
5057 Keller Springs Road, Suite 600
Addison Texas 75001
P: 972.716.1888
E: slautin@higierallen.com
W: www.higierallen.com