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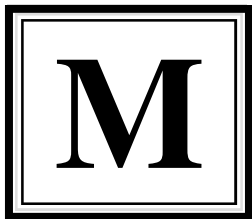
In This Issue:

How Associations Can Survive in Tough Economic Times

Should the Association File a Defamation Lawsuit?

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MULCAHY LAW FIRM, P.C.

3001 East Camelback Road
Suite 130
Phoenix, Arizona 85016
Phone: 602.241.1093
Toll Free: 877.206.7164
Fax: 602.264.4663
www.mulcahylawfirm.net

Beth Mulcahy, Esq.
Kristen L. Rosenbeck, Esq.
Laura Pilar Mensah, Esq.

E-mail:
bmulcahy@mulcahylaw.net
info@mulcahylaw.net

How Associations Can Survive in Tough Economic Times

by Beth Mulcahy, Esq.

Unfortunately, many community associations have been deeply impacted by the tough economic situation in Arizona over the past year and may be faced with the following challenges due to the poor economy:

- Owners not paying assessments in a timely manner or at all;
- Owners filing bankruptcy or losing their home at a Trustee's Sale;
- Owners abandoning their lots/units prior to a Trustee's Sale;
- Banks owning lots/units and not paying assessments or maintaining the lots/units;
- Squatters living in vacant homes or units; and
- Associations not having enough money to pay their vendors or their bills.

Community associations must now look for practical and creative ways to provide the usual and customary services to their association membership as they monitor and evaluate their diminishing sources of revenue.

Set forth below are helpful suggestions for your board to consider during these difficult economic times:

- Re-evaluate your budget. Temporarily delay improvements which are not safety related.
- Make cost saving service adjustments. For instance, decrease the number of pools which will be open or heated, cut back community activities, and look for ways to decrease management costs such as "a la carte" service agreements.
- Make modifications to insurance coverage if possible, such as temporarily increasing your deductibles.
- Consider implementing an "amnesty program" to bring in delinquent assessment fees without penalty (late fees) if paid within a specific period of time - for example 60 days.
- Find qualified volunteers. Request help – "We need your help!" Make sure proper insurance is in place and waivers are signed if volunteers help with landscaping, pool maintenance, electrical repair or entertainment.
- Communicate with your membership: Keep the information lines open via email blasts and an updated community website. Publish the fact that the board is aware of the economic downturn and the ensuing pressure and stress this brings.
- Sell the idea of being approachable and willing to work with whoever finds them self in a tough economic situation.
- Decrease or eliminate paper communications.
- Let association members know the door is open for opportunity, communication and suggestions.

Should the Association File a Defamation Lawsuit?

by Beth Mulcahy, Esq.

Discussions of controversial community association issues can turn into insults, name-calling and allegations of evil intent. They are not uncommon forms of expression for an owner expressing dissatisfaction with board policies and the directors who adopt them. These verbal assaults can be sharp-edged, may be inaccurate and are typically intensely personal. But are they also defamatory? Directors sometimes think so, and seek to file suit against the offending owner to halt their tirades.

continued

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Should the Association file a Defamation Lawsuit? *continued*

Answers

by Beth Mulcahy, Esq.

Demands for legal action usually come in response to something an owner writes rather than to a public statement made. It is flyers, e-mail communications circulated within the community or a website established by a dissident owner to tell “the truth” about how the association is being mismanaged that typically trigger the calls from directors asking our firm to file a defamation law suit on their behalf. The desire to fight back is understandable; no one likes to be called names, have their intelligence questioned or their motives questioned. However, the legal framework makes it very difficult for directors however wronged they may feel, to win a defamation claim.

The Legal Framework

To understand how difficult it is to win a claim, it is helpful to understand some of the legal distinctions and standards of proof the court will make and require. First, there is a difference between slander, which is spoken, and libel, which is written or otherwise communicated in a permanent form – the e-mail messages noted above, statements carved in the clubhouse wall, spray-painted on a door or plastered on a billboard.

Courts also distinguish between defamation claims filed by “private persons,” and claims filed by public figures, which are far more difficult to prove. That distinction is important because courts in many jurisdictions have held that association directors, by virtue of their leadership role in the community, inject themselves voluntarily into public debates, and so qualify as “limited public purpose” figures. As a result, in order to prove defamation, directors must show not only that statements are untrue (the base-line requirement for private individuals), but also that the statements were made maliciously – that is, that the individuals responsible knew the statements were false or made them with “reckless disregard” for their truth. Additionally, the evidence directors present to prove malice must be “clear and convincing.”

That is a tough legal standard – not as tough as “beyond a reasonable doubt” (required in criminal cases), but much higher than the “preponderance of the evidence” standard applied to other civil claims. “Preponderance of the evidence” requires only that the scales tip, however slightly, more one way than the other. It does not have to be a lot — 51 percent will do. Beyond a reasonable doubt pushes the scale to 95 percent, while “clear and convincing” falls somewhere in between – around 75 percent.

For an owner fighting a defamation claim, truth is an absolute defense, but they do not have to prove that the statements were absolutely true – only that they were “substantially” true — or that they were not aware the statements were untrue, or had no reason to question their veracity. Under this legal framework, it is much easier for an owner to deny allegations of malice than it is for directors to prove them.

How much damage was caused?

Simply proving that statements were libelous or slanderous isn’t enough; directors pursuing a defamation claim must also prove that they have suffered “actual damages.” These may include monetary damages or harm to their personal reputation, personal humiliation, mental anguish and suffering or physical suffering.

Establishing monetary losses will be particularly challenging. It is rare that “damage” from defamatory statements would spread beyond the boundaries of the community association. Allegations about poor decision-making or poor business judgment are unlikely to affect a board member’s sales at his/her retail store, or lead to a demotion or the loss of a job.

Non-monetary claims are more subjective and somewhat easier to establish. Directors might claim, for example, that statements caused them emotional distress, forcing them to seek therapy for anxiety or medical treatment for insomnia or stomach ailments. But how much long-term psychological damage did the accusations of mismanagement or stupidity really cause? How much weight or sleep did you lose, how much was attributable clearly and exclusively to the defamation, and how much compensation should you receive? Judges and juries are likely to be skeptical in their judgments and stingy in their awards.

Concern about the constitutional right of free speech will make judges in particular wary of suits that seem designed to quash dissenting views or that might have that effect. For all of these reasons, directors seeking to pursue a defamation claim face a steep uphill legal climb. These actions should not be undertaken lightly and usually, they should not be undertaken at all.

Beyond Reasonable Criticism

The only exception to that advice is if the offending statements involve criminal activity of some kind — for example, allegations that a board member has stolen funds or committed fraud. These statements go far beyond anything that might be construed as reasonable criticism; their truth could be established easily (either the money was stolen or not); the owner responsible would be hard-pressed to argue convincingly that they had no reason to question the truth of the allegations they made; and the reputational and professional damage to the directors targeted could be considerable. But even in the most dysfunctional associations, the statements likely to offend board members rarely rise (or descend) to this level, and a libel action is unlikely to be the most effective response.

Encourage Open Discussion

The angry outbursts that make directors feel defamed usually come from owners frustrated because they have not had an opportunity – or don’t think they have had an opportunity – to express their views, air their criticism, or offer their suggestions. Responding by suing these owners is not only likely to be futile; it is likely to backfire, sending a message to all owners, not just

Answers

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the offending ones, that the board does not tolerate criticism or dissent. This is precisely the opposite of the message that boards should try to convey.

Creating an atmosphere that encourages open discussion, including criticism, can go a long way toward defusing tensions before they erupt in angry accusations and personal verbal attacks. Scheduling periodic open forums where owners can discuss their concerns, setting aside a designated time for owners to speak at board meetings and creating an "owners' corner" on the association's website are some of the strategies boards can use to encourage input from owners and to make them feel their opinions are welcome and valued.

Develop a Thick Skin

If a director decides that he/she has been defamed and insists on suing the owner or owners responsible, should the association pay the legal bills? The answer is not clear. You

could argue that this is really a personal battle, which the offended board member—who, perhaps, is too easily offended—should fight and fund alone. However, you could also argue, reasonably, that the action is related to service on the board and thus should be an association expense. The safest course in this case would be to have the full board of director's vote on and approve the expenditure of funds.

However, you do not want to get to this point in the first place; with only very rare exceptions, boards simply should not pursue defamation claims. Like elected officials in the public sector, association directors must accept criticism—even nasty, uncivil and unfair criticism—as part of their job.

Answers

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MULCAHY LAW FIRM, P.C.
3100 East Camelback Road,
Suite 130
Phoenix, Arizona 85016
Please allow 3 weeks for delivery

Beth Mulcahy is the founding attorney and partner of the Mulcahy Law Firm, P.C. Beth's legal practice focuses exclusively on the representation of over one thousand (1000) community associations throughout the State of Arizona.

After receiving a Bachelor of Arts degree in Political Science from Marquette University in Milwaukee, Wisconsin, Beth earned her *Juris Doctor* degree from Marquette University Law School where she was on the Dean's List and a member of the Marquette University Law Review. A native of Wisconsin, Beth is licensed to practice law in the State of Wisconsin and the State of Arizona.

As the former editor/author of a weekly question and answer column in *The Arizona Republic*, Beth addressed hundreds of questions on association governance. In her three years with the paper, she became known for providing information and answers that communicate a clear understanding of the subject matter. Beth's *Answers* publication and periodic legal seminars on community associations continue to provide education and information for the industry. She has also published articles in *Managers Report* magazine, Community Association Institute's (CAI) *Journal of Community Association Law*, *Strictly Legal* newsletter, *Common Ground* magazine and *Arizona Community Association Journal*. Beth is a member of the National and the Central Arizona Chapters of CAI, a nonprofit organization supporting the interests of community associations and the Arizona Association of Community Managers.

Beth regularly speaks on the topic of community associations for seminars, conferences and workshops at state and national levels.

E-mail: bmulcahy@mulcahylaw.net

Kristen L. Rosenbeck graduated from Valparaiso University with a Bachelor of Arts degree in Biology where she actively supported her school as the Student Body President. Kristen graduated in the top third of her law class receiving her *Juris Doctor* degree from Marquette University in Milwaukee, Wisconsin in 2001. She maintains licenses to practice law in both the State of Wisconsin and the State of Arizona.

Kristen's legal practice focuses on the interpretation and enforcement of association documents and guidance on state and federal laws. She represents associations in general counsel matters, bankruptcy, collection of delinquent assessments and enforcement actions. Kristen also provides representation to office condominiums. Kristen is experienced in litigation and transactional law.

Kristen is a member of the National and the Central Arizona Chapters of CAI, a nonprofit organization supporting the interests of community associations, and the Arizona Association of Community Managers.

E-mail: krosenbeck@mulcahylaw.net

Laura Pilar Mensah graduated Magna Cum Laude with a Bachelors of Business Administration from the University of San Diego. She received her *Juris Doctor* degree from The University of Texas School of Law where she was an active member of several legal societies. Laura completed a graduate Portfolio Program in Dispute Resolution and is a certified mediator. Laura is licensed to practice law in the State of Arizona.

Laura is an associate attorney with Mulcahy Law Firm, P.C. and her practice focuses on the representation of community associations with an emphasis on litigation, enforcement of restrictive covenants and collection of delinquent assessments. Laura is experienced in arbitrations, litigation and transactional law.

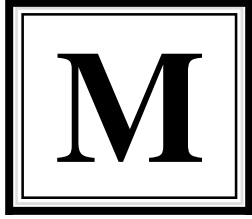
E-mail: lmensah@mulcahylaw.net

Answers is not intended to offer specific legal advice or responses to individual circumstances or problems. If legal advice is required, please consult individually with the Mulcahy Law Firm, P.C.

Questions may be directed to **Beth Mulcahy, Esq.**

Phone: 602.241.1093 ♦ Fax: 602.264.4663

E-mail: bmulcahy@mulcahylaw.net



MULCAHY LAW FIRM, P.C.

3001 East Camelback Road,
Suite 130

Phoenix, Arizona 85016

Phone: 602.241.1093

Fax: 602.264.4663

ANSWERS

for Community Associations

MULCAHY LAW FIRM, P.C.

Did You Know?

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Bank Owned Properties Must be Maintained

With the economic downturn, many homes are being turned over or reverting back to the bank. The bank holds the responsibility to pay assessments from the date the Trustee's Deed is recorded and forward. The bank must also maintain the property from the date the Trustee's Deed is recorded forward. If your association has bank owned properties that are not being maintained we suggest the following:

Our firm suggests placing a lien against banks once the bank is thirty days delinquent in the payment of assessments.

Contact the "Property Preservation Contacts" (see information below) and register complaints of derelict properties with the code enforcement division in your municipality requesting that banks maintain their properties. To obtain code enforcement phone numbers for municipalities see our updated *Resources* Mulcahy Cheat Sheet© online at www.mulcahylawfirm.net.

You may also contact the following Property Preservation contacts to see if the property is on their "list" to maintain:

Safeguard Asset Management Services: 800-852-8306

Field Asset Services: 800-468-1743

Squatters will be removed by the companies.

Realtors may also have an obligation to keep the lots/units maintained. Consider contacting the realtor listed on the "For Sale" sign to see if they can assist in getting the property cleaned up.

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