Avatar Properties, Inc. v. Gundel, No. 6D23-170, 2023 WL 4117336 (Fla. 6th DCA 2023).

Florida Sixth DCA Holds that Definition of "Expense" in Governing Documents of Community did not Include Profit, and thus Florida HOA Act Prohibited Developer from Assessing For-Profit Membership Fee

Residents of a mixed-use retirement development in Polk County were subject to three fees collected by the community homeowner's association ("Association"): (1) fees due to the Association for common area expenses, (2) fees due to the developer for Club amenities, and (3) fees due to the developer for Club membership, regardless of whether Club amenities were available. Failure to pay any of these fees rendered properties subject to foreclosure under Chapter 720 of the Florida Statutes. A community resident brought legal action, seeking to have the Club membership fees declared illegal and returned to residents. The resident prevailed at trial and again on appeal. The Sixth District Court of Appeal, however, certified the issue to the Florida Supreme Court for a pronouncement on whether charges—which, if not paid can result in a lien on a homeowner's property—can include profit-generating fees.

Avatar Properties, Inc. (Avatar) created and developed the Solivita retirement community in Polk County, Florida. The development included both residential and commercial parcels, in addition to recreational facilities like restaurants, tennis and pickleball courts, pools and parks. These amenities were not designated as common areas but were collectively called the Club.

As a condition of homeownership in the community, purchasers agreed to become permanent Club members. This membership carried a dues requirement, separate from the fee charged to use Club amenities and owed to Avatar regardless of whether the Club amenities were available. Whereas the former went toward expenses, the latter was purely profit-generating. Homeowners were also required to pay fees to the Association to cover maintenance-related expenses. The Association maintained authority under section 720.3085 of the Florida Statutes to record a claim of lien on properties whose owners fail to pay their assessments and reserved the right to foreclose on those properties for payment. The Association collected the fees due to it and to Avatar.

One property owner brought suit against Avatar on the grounds that the Club membership fee was illegal under section 720.308 of the Florida Statutes and that fees collected under the payment scheme needed to be returned. In relevant part, this statute provides that "[a]ssessments levied pursuant to the annual budget or special assessment must be in the member's proportional share of expenses as described in the governing document, which share may be different among classes of parcels based upon the state of development thereof, levels of services received by the applicable members, or other relevant factors." The property owner argued that profit-generating fees were not expenses and thus violated the statute.

The trial court found for the property owner. On appeal, Avatar argued that its ability to levy fees was not limited by section 720.308, because Chapter 720 does not apply to commercial enterprises. Avatar based this argument on its reading of section 720.302(3)(b) which provides that the chapter does not apply to "commercial or industrial parcels in a community that contains both residential parcels and parcels intended for commercial or industrial use." Under this provision, parcels of land used for commercial or industrial purposes are exempt from proportional amenities fees for facilities that such properties typically do not use. Assessments levied to cover pool or tennis court maintenance for community residents would not be applicable to banks or pharmacies in the community, for example.

The appellate court held that the exemption for commercial properties does not create a right for entities that own such properties to charge residents unlimited assessments regardless of the limitations in Chapter 720. Further, the court held that "Avatar cannot reap the advantages of [Chapter 720] to foreclose on owners for failing to pay the Club membership fee and then change its narrative to claim that it is shielded from complying with the statute because the Club facilities, upon which the residentially imposed fee is based, are exempted as commercial property." The court also underscored that the community's governing documents clearly distinguished between Club expenses and the Club membership fee; the Club Plan defines expense broadly but not so broadly as to include profit; and "[n]othing, other than the marketplace, prevented Avatar from keeping the parcel as a true commercial operation and charging a fee for use of the amenities," like the golf courses in the community.

Avatar argued that even if the Club membership fee was levied impermissibly, it should not be required to return the money collected because the residents' payments constituted "voluntary payments" and were thus non-refundable. The court held that this defense was not available to Avatar because the payments were made pursuant to residents' purchase agreements and the defense does not apply in contracts cases. The defense also does not apply where payments are made "under compulsion or coercion."

Judge Stargel concurred, finding that the design of the Club Plan implemented by Avatar falls outside the legislative framework of Chapter 720, and the decision of the trial court must therefore be upheld. Judge Stargel dissented in agreement with Judge White in that the proper interpretation of Section 720.308, Florida Statutes, is that the legislature intended to limit incentives for developers like Avatar to keep control and management of facilities and amenities by limiting them to collection of "expenses" and no profits.

Judge White dissented with the majority, holding that as a matter of interpretation, "it is not necessary to decide the full scope of the commercial property exemption…the exemption is broad enough to exclude such commercial real property which Avatar operations from the 'community' real property which the Solivita Association operates…I also conclude that the exemption precludes construing 'the annual budget' and 'the adopted budget' to include any budget for the operation of that commercial real property."