POINTS AND AUTHORITIES

NATURE OF THE CASE

This case arises from an action by Spanish Court Two Condominium Association ("Spanish Court Two") against Lisa Carlson, an owner of a condominium unit in a condominium building located in Highland Park, Illinois. Spanish Court Two brought its action under the Illinois Condominium Property Act, 765 ILCS 605/1, *et seq.*, and the Illinois Forcible Entry and Detainer Statute, 735 ILCS 5/9-111, claiming that it was entitled to possession of Lisa Carlson's condominium unit (Count I) because Carlson failed to pay her monthly assessment fees, and for breach of contract (Count II) for failure to pay monthly assessment fees, which, according to the Condominium Declarations, are to be used for the operation, care, upkeep, maintenance, replacement and improvement of the common elements (Trial Exhibit No. 1: Article III, par. 3).

In her answer, Carlson admitted not paying her common element assessments since August 2009, but denied that she owed those assessments in light of property damage that she incurred as a result of Spanish Court Two's deliberate breach of the covenants to properly maintain and repair the roof directly above her unit which has leaked water into her unit over a period of several years and destroyed the interior walls of her unit to a significant degree (A10).

Carlson raised two affirmative defenses alleging that Spanish Court Two breached its contractual obligations, as contained in the covenants of the

Condominium Declaration, by willfully refusing to properly maintain and repair the roof and certain brick structures directly above Carlson's condominium unit.

Carlson also filed a counterclaim based on the same allegations as contained in her affirmative defenses seeking damages and/or a set-off (A10).

On November 9, 2010, the trial court granted Spanish Court Two's motion to sever the counterclaim and to strike the affirmative defenses on the ground that the affirmative defenses and the counterclaim were not "germane" under 735 ILCS 5/9-106 (A-39).

As a result of the affirmative defenses and counterclaim of Carlson being stricken, the trial court, after taking evidence, entered money judgments against Carlson on January 31, 2011 (A40) and April 21, 2011 (A41) for certain unpaid regular assessments, a special assessment for an interior patio door, late fees, attorneys fees, and court costs. The trial court also granted Spanish Court Two certain rights of possession under the Illinois Forcible Entry and Detainer statute over the condominium unit owned by Lisa Carlson (A41).

The severed counterclaim was transferred to a different division of the Circuit Court of the Nineteenth Judicial Circuit, Lake County, Illinois and is currently pending (R. C150).

The January 31, 2011 money judgment against Lisa Carlson amounted to $3,528.76 for unpaid regular monthly assessments and late fees (A40). In order to avoid eviction, Lisa Carlson paid the $3,528.76 on April 21, 2011 (A41). The

April 21, 2011 money judgment was for $4,174.48 in unpaid regular assessment, late fees, and a patio door special assessment, plus $4,784.50 in attorneys fees and court costs of $196.86 (A41).

An appeal bond of $16,000 was later approved by the trial court but Lisa Carlson was required to continue to pay her regular monthly assessments in order to avoid eviction.

The April 21, 2011 attorneys fees award was based on a provision in the Condominium Declarations and the Illinois Condominium Act allowing for the recovery of attorneys fees by a condominium association whenever an association is required to judicially collect fees (A41). Carlson disputes that she owes Spanish Court Two any monies, including attorneys fees, because Spanish Court Two is in breach of its contractual and legal obligations to repair the roof directly above her condominium unit which has significantly damaged her unit.

Carlson appeals the November 9, 2010, January 31, 2011 and April 21, 2011 orders (R. 44).

ISSUES PRESENTED FOR REVIEW

1. Whether the trial court erred by striking Lisa Carlson's affirmative defenses and severing her counterclaim before trial because the affirmative defenses put into issue the right of Spanish Court Two to take possession of Carlson's condominium unit and were therefore germane under 735 ILCS 5/9-106.

2. Whether the money judgments and possession orders of January 31, 2011 and April 21, 2011, including the award of attorneys fees and costs entered in favor of Spanish Court Two, should be reversed and the cause remanded so that Spanish Court Two's complaint may be tried in the same proceedings as Lisa Carlson's affirmative defenses and counterclaim.

3. Whether the special assessment against Carlson for an interior patio door in the amount of $1,950, was enforcible against her because two-thirds of the condominium ownership did not approve the assessment as required by the Condominium Declarations and because patio doors are not specifically identified in the Condominium Declarations or the Illinois Condominium Property Act, 765 ILCS 605/4.1 as common elements or limited common elements.

4. Whether or not Spanish Court Two could charge Lisa Carlson with late fees when the Board of Directors never, at any prior time, passed a resolution authorizing assessment of late fees against any condominium unit owner and when the Condominium Declarations and the bylaws do not authorize, or provide, for the assessment of late fees.

STATEMENT OF JURISDICTION

Illinois Supreme Court Rule 301 confers jurisdiction upon this Court. Lisa Carlson appeals from a final order entered on April 21, 2011 (A41) and interlocutory orders entered November 9, 2010 (A39) and January 31, 2011 (A40). The Notice of Appeal was timely filed on May 20, 2011 (A42).

STATEMENT OF FACTS

Lisa Carlson adopts and incorporates herein the procedural history of the pleadings and the court orders as stated in the Nature of the Case section of this brief.

After the trial court struck Lisa Carlson's Affirmative Defenses and severed her Counterclaim, the case proceeded to trial on February 8, 2011 (R. 1), March 15, 2011 (R. 82) and April 21, 2011 (R. 166).

There is no dispute that Lisa Carlson owns her condominium unit in fee simple (A02, paragraph 2 of complaint).

The only witness who testified for Spanish Court Two was Brian Beegan, a property manager with Nimrod Realty Group (R. 10, 11). Mr. Begun relied on a summary of charges allegedly owed by Lisa Carlson that was prepared by Nimrod Realty Group and identified as Plaintiff's Exhibit No. 1 (R. 14, Plaintiff's Exhibit No. 1).

Among the charges on Plaintiff's Exhibit No. 1 were regular monthly assessment fees of $224.00 and $235.75 per month (increase approved by the Board at a Board meeting as reflected in Board minutes), late fees of $25 per month, special assessments of $1,000 on February 15, 2010 and $950 on April 22, 2010 for the replacement of an interior patio door, special assessments of $197.00 per month relating to an $80,000 elevator overhaul assessment, and legal fees which had never been adjudicated by a court of law (Plaintiff Exhibit No. 1; R. 22-

24; 32-39).

Mr. Beegan admitted during cross-examination that the Bylaws, which are part of the Condominium Declarations, required that 75% of the total ownership of the common elements must affirmatively vote in approval of any supplemental assessment against any individual condominium unit in excess of $300 (R. 55-57).

Mr. Beegan admitted that the $80,000 special assessment for elevator upgrades allegedly adopted by the Board on November 22, 2010 (Plaintiff Exhibit No. 5) was never approved by 75% of the condominium ownership (R. 58, 59, 60).

Mr. Beegan also admitted under cross-examination that the special assessment of $1,950 for the patio doors located inside each condominium unit was not approved by 75% of the condominium ownership as required by the Condominium Declarations (R. 60-65). Some of the condominium unit owners, like Lisa Carlson, never received their new doors (R. 61, 90, 91), and some unit owners have resisted having the new doors put into their units (R. 61, 62).

Mr. Beegan also admitted that a late fee of $25 per month, which appeared on Lisa Carlson's summary of charges (Plaintiff's Exhibit No. 1) were not provided for in the Condominium Declarations or the Bylaws (R. 65, 66, 67). No notice was ever sent to the condominium unit owners in the building of any proposed $25 late fee to be adopted by the Board (R. 67, 68). The Board, in fact, has never adopted a bylaw or a rule that a $25 late fee is to be charged against any condominium unit owner as a penalty for paying regular monthly assessments

late (R. 68).

There are, however, minutes of board meetings reflecting that the Board affirmatively approved specific amounts of regular monthly assessments to be charged to each condominium unit owner (R. 68).

Even though the trial court had previously struck Lisa Carlson's affirmative defenses, it allowed Carlson to present an offer of proof, through her testimony, that the reason she did not pay her regular and special assessments was that Spanish Court Two refused to repair the roof directly above her unit, despite repeated requests to do so, and that water infiltrated her unit over a period of several years to the point of significantly damaging the interior walls and ceiling of her unit (R. 95-100). Carlson also testified that she viewed the special assessments as unenforceable because they had not been approved by 75% of the condominium ownership, even though two prior special assessments were approved by 75% of the condominum ownership (R. 88-95). Carlson also disputed the special assessment for a new patio door because it was not specified as a common element or a limited common element in the Condominium Declarations (R. 105).

In closing argument, Spanish Court Two took the position that dissatisfaction with a condominium association or a condominium association board, for any reason, was no defense for not paying assessments (R. 119), and that the provisions of the Bylaws of Spanish Court Two requiring a 75% for a

special assessment that exceeds $300 per unit were "trumped" by the Condominium Declarations pursuant to 765 ILCS 605/4.1.

Carlson's position at trial was that the Condominium Declarations do not include patio doors inside a condominium unit as a limited common element or common element (R. 129, 130).

Carlson also took the position that the late fees could not be charged against her because the Board never approved a late fee to be charged against any condominium unit owner in any amount, and that the Condominium Declarations Bylaws did not provide for the assessment of late fees (R. 133).

Carlson also took the position at trial that the two special assessments for the patio doors and the elevators were unenforcible because they had not been approved by the appropriate percentage of the total condominium unit ownership (R. 131-133; 137-144).

The trial court ruled that the regular assessments, late fees, and the patio door special assessment, and certain attorneys fees and court costs were to be enforced against Lisa Carlson, and ordered that she be evicted from her own condominium unit if the money judgments were not paid (R. 166-190; A41).

ARGUMENT

I

LISA CARLSON'S AFFIRMATIVE DEFENSES AND COUNTERCLAIM ARE GERMANE TO THE ISSUE OF WHETHER SPANISH COURT TWO IS ENTITLED TO POSSESSION OF THE CONDOMINIUM UNIT OWNED BY CARLSON AND SHOULD NOT HAVE BEEN STRICKEN/SEVERED BEFORE TRIAL

The legal basis of Spanish Court Two's forcible entry and detainer action is 735 ILCS 5/9-111, which creates an action for possession and forcible entry and detainer in favor of a condominium association whenever an owner of a condominium unit fails to pay his or her proportionate of the common expenses pursuant to specific provisions in condominium declarations. However, 735 ILCS 5/9-111(a) provides that possession in favor of a condominium association can only be granted "*if the court finds that expenses or fines are due to the plaintiff* . . ." 735 ILCS 5/9-111(a). See ¶5 of the complaint filed by Spanish Court Two which expressly states that the action is based on 735 ILCS 5/9-111(a).

Essential to Spanish Court Two's action for forcible entry and detainer is its allegation that Lisa Carlson breached the express provisions of the Condominium Declarations (Joint Trial Exhibit No. 1) by failing to pay her regular monthly and special assessments which are to be used for the repair and upkeep of the common elements in the condominium building. See ¶¶3, 6 and 7 of the complaint filed by Spanish Court Two (A02, A03). Recognizing that contract principles control the relationship between the parties, Spanish Court Two brought Count II of its complaint against Lisa Carson for breach of contract

alleging that she failed to pay her assessments pursuant to the terms of the Condominium Declarations.

The Condominium Declarations for Spanish Court Two, dated September 26, 1980, are covenants running with the land. See Joint Trial Exhibit No. 1; *Carney v. Donley,* 261 Ill.App.3d 1002, 633 N.E.2d 1015, 199 Ill.Dec. 219 (2d Dist., 1994). The rules of construction and enforcement for contracts govern the interpretation and enforcement of covenants contained in condominium association declarations. *Forest Glen Community Homeowners Association v. Bishof*, 321 Ill.App.3d 298, 746 N.E.2d 1285, 254 Ill.Dec. 237 (2d Dist., 2001).

There is no dispute that the Condominium Declarations in this case impose a duty on each condominium unit owner, including Lisa Carlson, to pay regular monthly assessments as long as those assessments are duly and properly established by the Board of Managers. However, there can be no dispute that any board of managers is also obligated to perform certain functions under the condominium declarations, and a board may be found to have breached condominium declarations (*Carney v. Donley, supra*), or individual board members may be found to have breached their fiduciary duties when they violate condominium declarations. *LaSalle National Trust, N.A. v. Board of Directors of the 1100 Lake Shore Drive Condominium*, 287 Ill.App.3d 449, 677 N.E.2d 1378, 222 Ill.Dec. 579 (1st Dist., 1979).

Article XIII of the Spanish Court Two Condominium Declarations (Joint

Plaintiff's Exhibit No. 1) provides that the maintenance, repair and replacement of common elements shall be furnished by the Board of Managers from the common expense fund. In other words, Spanish Court Two Condominium Declarations squarely impose an obligation on the Board of Managers to maintain, repair and/or replace deficiencies in the common elements of a condominium building.

This court in *Carney, supra,* stated, "When a controversy regarding the rights of a condominium unit owner and a condominium arises, we must examine any relevant provisions in the Act [Condominium Property Act, 765 ILCS 605/1 *et seq*.] and the Declaration or Bylaws and construe them as a whole." *Carney, supra,* 261 Ill.App.3d 1002, 1008. Section 18.4 of the Illinois Condominium and Property Act, 765 ILCS 605/18.4, provides that one of the statutory duties imposed on Spanish Court Two is "(a.) To provide for the operation, care, upkeep, maintenance, replacement and improvement of the common elements." Therefore, the Board of Managers of Spanish Court Two have both a contractual obligation and a statutory obligation to provide for the care, upkeep, maintenance, replacement and improvement of the common elements of condominium property.

Under Illinois case law, it is well established that a developer, and/or the board of managers of a condominium association, have an "absolute duty to repair the roof" if notice has been given with respect to a problem in the roof of a

condominium building. *Tassan v. United Development Company,* 88 Ill.App.3d 581, 410 N.E.2d 902, at 912, 43 Ill.Dec. 769 at 779 (1st Dist., 1980).

The relationship between and among condominium unit owners and the board of managers is essentially contractual in nature. The Illinois Condominium Property Act itself depends on specific provisions being included in condominium declarations and the proper recording of those declarations. 765 ILCS 605/4 and 605/5. Condominium owners, in one capacity or another, are essentially parties to the contractual provisions of condominium declarations.

It is fundamental contract law that no party to a contract can benefit from a contract unless he has also performed the obligations under the contract. *Kobus v. Jefferson Ice Company,* 2 Ill.App.3d 458, 276 N.E.2d 725 (2d Dist., 1971). A party to a contract is discharged from his or her duty to perform when there is a material breach of contract by the other party. A "material breach" occurs where the covenant not performed is of such importance that the contract would not have been made without it. *Dragon Construction Inc. v. Parkway Bank and Trust,* 287 Ill.App.3d 29, 678 N.E.2d 55, 222 Ill.Dec. 648 (1st Dist., 1997). The forcible entry and detainer statute provision that affords a condominium association the right to evict a condominium unit owner is based on contract. 735 ILCS 5/9-111(a) provides for a forcible entry and detainer action for a condominium association based upon the failure of a unit owner to pay his or her proportionate share of the common expenses of the property "lawfully agreed upon."

In this case, Spanish Court Two filed a motion to sever Lisa Carlson's affirmative defenses based on the provision of the forcible entry and detainer statute, 735 ILCS 5/9-106, which states as follows:

> "The defendant may under a general denial of the allegations of the complaint offer in evidence any matter in defense of the action. Except as otherwise provided in Section 9-120, no matters not germane to the distinctive purpose of the proceedings shall be introduced by joinder, counterclaim or otherwise. However, a claim for rent may be joined in complaint, and judgment may be entered for the amount of rent found due."

The Illinois Supreme Court in *Rosewood Corporation v. Fischer, et al.,* 46 Ill.2d 249, 263 N.E.2d 833 (1970) interpreted the meaning of "germane" under the forcible entry and detainer statute, 735 ILCS 5/9-106.

In *Rosewood Corporation,* the plaintiffs, certain developers and builders of residential property, sought possession of certain residential properties because the defendants failed to pay monthly installments for the purchase of those properties under certain installment contracts. The defendants stopped paying their monthly installments and alleged that the contracts were void as a matter of public policy because the plaintiffs grossly overcharged them on the basis of race. In other words, the defendants raised the defense that the installment contracts, upon which the plaintiffs based their right to obtain possession, were unenforceable and void as a matter of public policy.

The Illinois Supreme Court reversed the trial court and the appellate court and held that a defense raised by a defendant in a forcible entry and detainer

action that goes against the validity and enforcibility of the contract, upon which the action is based, is "germane" under 735 ILCS 5/9-106 and should not be severed from the action. The Illinois Supreme Court broadly construed the term "germane" in the statute with the following holding:

> "It is our opinion that the defenses going to the validity and enforcibility of the contracts relied upon by the plaintiffs were germane to the distinctive purpose of the forcible entry and detainer actions and were improperly stricken. That purpose, to repeat, is to restore possession to one who is entitled to the right of possession. 'Germane' has been judicially defined as meaning 'closely allied,' and is further defined in Webster's New Twentieth Century Dictionary p. 767 as meaning: 'closely related; closely connected; relevant; pertinent; appropriate.' Whereas here, the right to possession a plaintiff seeks to assert has its source in an installment contract for the purchase of real estate by the defendant, we believe it must necessarily follow that matters which go to the validity and enforcibility of that contract are germane, or relevant, to a determination of the right to possession." *Rosewood Corporation, supra,* 46 Ill.2d 249 at 256, 257.

After holding that the defense of unconscionability was germane to the forcible entry detainer actions brought by the plaintiffs in *Rosewood Corporation, supra,* the Illinois Supreme Court then held that the affirmative defense of unconscionability was to be litigated within the forcible entry and detainer action:

> Section 11 of the Forcible Entry and Detainer Act provided that the rules of practice and pleading in other civil cases shall apply to detainer actions, and, as previously noted, contemporaneously with the enactment of the Civil Practice Act section 5 of the detainer act was amended in terms which permits matters germane (i.e., closely allied, closely related, closely connected; appropriate) to be introduced by defendant. The fusion of the practice and procedure in suits at law and in equity accomplished by the Civil Practice Act is, in our opinion, sufficient to permit necessary equitable relief in these proceedings, rather than to force upon defendants a separate

> proceeding where the same relief will be forthcoming [citations omitted]" *Rosewood Corporation, supra,* 46 Ill.2d 249 at 258, 259. 263 N.E.2d 8833 at 839, 840.

The threshold question in this case relating to whether or not Spanish Court Two is entitled to possession is whether or not the dues charged by Spanish Court Two to Lisa Carlson are due as a matter of contract law.

This forcible entry detainer action is not the first litigation between these parties. Carlson was seriously injured on the common property of the condominium building when an elevator malfunctioned while she exited the elevator on the main floor. During the pendency of the personal injury action against Spanish Court Two, Carlson experienced significant leaking in her fourth floor unit, which is directly below the roof of the condominium building. The disrepair of the roof has caused significant water damage to the walls and other structures of her unit. She gave notice to Spanish Court Two on numerous occasions asking that it repair the roof and the brick and mortar adjacent to her unit. Spanish Court Two, despite the notices, has refused to honor its obligation, as imposed by law, to repair the roof and stop the damage.

As a matter of contract law, Spanish Court Two is not able to enforce its contract rights in order to obtain a remedy of possession if it is in breach of the covenants under the condominium declarations to properly maintain and repair a roof which has been in disrepair for several years and which has caused direct damage to Carlson's condominium unit. No party to a contract, no matter what

type of contract it is, can enforce rights under the contract if that party is in breach of a material term of the contract. There can be no more material term to the condominium declarations in this case than the duty on the part of the Board of Managers to maintain and repair a leaking roof that is damaging the interior structure of a condominium owner's unit.

The types of claims which Illinois courts have found to be germane to the issue of possession generally fall into one of four categories: (1) claims asserting a paramount right of possession; (2) claims denying the breach of any agreement vesting possession in plaintiff; (3) claims questioning the validity or enforcibility of the document upon which plaintiff's right to possession is based; and (4) claims questioning a plaintiff's motivation for the bringing of the forcible action. See *Sawyier, et al. v. Young*, 198 Ill.App.3d 1047, 556 N.E.2d 759 at 764, 765, 145 Ill.Dec. 141 at 146, 147 (1st Dist., 1990) and the Illinois case law authorities cited therein.

The affirmative defenses raised by Carlson here go directly to the enforcibility of the contract provision contained in the Condominium Declarations and are therefore "germane" to the right of possession. Spanish Court Two does not own the condominium unit, nor does it have title to the unit. This is not a case about unpaid rent under a specific lease agreement. Rather, this is a case about whether Spanish Court Two, may legally collect fees and obtain possession after deliberately and willfully refusing to discharge its statutory and contractual

obligations.

In a typical case where an owner/landlord seeks relief under the forcible entry and detainer statute against a tenant for unpaid rent and possession, any claim for money damages by the tenant against the owner/landlord is clearly not germane to the issue of possession. The landlord/owner owns the leased property in fee simple and is entitled to possession as a matter of law when rent is not paid. See *People ex rel. Department of Transportation v. Walliser,* 258 Ill.App.3d 782, 629 N.E.2d 1189, 196 Ill.Dec. 345 (3d Dist., 1994), and *Miller v. Daley,* 131 Ill.App.3d 959, 476 N.E.2d 253, 87 Ill.Dec. 51 (3d Dist., 1995).

Lisa Carlson owns her condominium in fee simple and Spanish Court Two's right to possession depends on whether Lisa Carlson is contractually obligated under the Condominium Declarations to pay her assessments. If Spanish Court Two is found by the trial court after trial to have breached its contractual obligation to repair a defective condition in the roof that has been causing damage to Carlson's unit for several years, than its material breach would bar the Association from collecting assessment dues from Lisa Carlson. In that event, Spanish Court Two is not entitled to possession and would probably be found to be obligated to pay money damages to Lisa Carlson arising from the damage to her condominium unit.

No board of managers of a condominium association has the absolute right to collect assessments. The Illinois Condominium Property Act and the Illinois

Forcible Entry and Detainer Statute allow actions for possession if the right to collect to unpaid assessment is properly grounded in contract. All condominium declarations contain reciprocal and mutual obligations on the part of condominium association boards, on the one hand, and condominium unit owners on the other hand. It is not a one-way street. This Court, in this case, should make it clear that boards of managers of condominium associations are not totalitarian regimes.

II

THE TRIAL COURT'S RULING THAT LISA CARLSON WOULD BE CHARGED $1,950 FOR AN INTERIOR PATIO DOOR INSIDE HER UNIT WAS CONTRARY TO LAW AND AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE

The position of Spanish Court Two at trial was that interior patio doors in all condominium units could be classified as "limited common elements" and their replacement, along with a special assessment for their replacement, could be mandated by simple board approval without approval of two-thirds of all the condominium unit owners.

Article XVI of the Spanish Court Two Condominium Declarations, entitled "Limited Common Elements," provides as follows:

> "Assessments: The Board may, in its discretion, assess only those owners of units to which Limited Common Elements are assigned for any expenditures made by the Board in connection with those Limited Common Elements, rather than assessing all Unit Owners. Provided, however, that if any assessment will involve an expenditure greater than $300 than such assessment must be first approved by the affirmative vote of at least two-thirds (2/3) of the Unit Owners voting at a meeting of Unit Owners called for the

purpose of approving the assessment."

In contrast, Article XIV of the Spanish Court Two Condominium Declarations, entitled "Alterations, Additions or Improvements" provides that the Board shall not approve any alterations, improvements or additions requiring an expenditure in excess of $5,000 without the approval of the Unit Owners owning more than 50% of the undivided ownership of common elements, or for an expenditure in excess of $10,000 without the approval of unit owners owning more than 75% of the undivided ownership of the common elements.

The Spanish Court Two Bylaws, which are part of the Spanish Court Two Condominium Declarations, provide in Article VI, Section 2, any supplement assessment for an individual unit more than $300 shall be subject to the affirmative vote of at least 75% of the total ownership of the common elements (Joint Exhibit No. 1).

Exhibit C of the "Declaration of Condominium Ownership and of Easements, Restrictions and Covenants for Spanish Court II Condominium Development" is the Bylaws of Spanish Court Two. Article II of the Bylaws specifically provide that a copy of the Bylaws have been attached as Exhibit C and made a part of the Condominium Declarations. The provisions of the Bylaws and the Declarations are covenants that run with the land. Joint Trial Exhibit No. 1. Brian Beegan admitted during trial that the Bylaws were part of the Declarations of the Spanish Court Two Condominium Association (R. 55).

The special assessment levied against each individual condominium unit owner of $1,950 for a patio door was passed only by vote of the Board of Managers on December 16, 2009 as reflected in minutes of the board meeting. See Plaintiff's Exhibit No. 3. Contrary to the mistaken finding by the trial court (R. 182, 183), there was no meeting of condominium unit owners where a vote was taken among condominium owners on the specific special assessment.

The trial court, believing the Bylaws to be separate from the Condominium Declarations (which they are not), found that Article XVI of the Declarations, which authorize special assessments if there is an affirmative vote of two-thirds of the unit owners in attendance at a meeting, prevailed over the Bylaws which required an affirmative vote of at least 75% of the total owners. The trial court then erroneously found that the two thirds vote provision of the Declarations was satisfied because the minutes of the December 16, 2009 Board meeting showed that some unspecified vote was taken to approve the special assessment. However, the December 16, 2009 minutes only reflect an unspecified vote of board members, and not unit owners.

The special assessment $1,950 for an interior patio door per condominium unit was never approved by two-thirds vote of the total ownership or 75% of the vote of total ownership. In fact, the special assessment of $1,950 for patio doors was never before the unit owners for a vote.

In order to charge Lisa Carlson with a special assessment, Spanish Court

Two must prove its case. Spanish Court Two failed to prove its case because it failed to prove that the special assessment was approved by any percentage vote of the total ownership of condominium unit owners as required by the Condominium Declarations and by the Bylaws.

Moreover, a patio door inside a condominium unit is not a common element or a limited common element. Article XIII of the Declarations provides that "each unit owner shall be responsible for the maintenance, repair and replacement of all glass panes in the windows and doors which serve his unit." This provision clearly distinguishes between glass doors and windows serving each condominium unit and "perimeter doors and windows" which are considered common elements under the Condominium Declarations, Bylaws and the Illinois Condominium Property Act, 765 ILCS 605/4.1(2). Contrary to the trial court's finding (R. 181, 182), patio glass sliding doors located inside each condominium unit are not specifically identified as a common element or limited common element in the Condominium Declarations, the Bylaws or the Illinois Condominium Property Act. Again, Spanish Court Two must prove its case if it wishes to enforce a special assessment and by generally throwing in patio glass doors into the definition of common elements, or limited common elements, where it is not specifically mentioned, or even contemplated, is nothing more than an excuse to exercise unchecked power.

III

THE TRIAL COURT ERRED BY ASSESSING LATE FEES AND ATTORNEYS FEES AGAINST LISA CARLSON

The uncontradicted evidence was that the Board of Managers never passed a specific resolution authorizing the imposition of a late fee against any condominium unit owner in the event regular assessments were paid late. It is also undisputed that neither the Condominium Declarations, nor the Bylaws, contain a provision specifying that a late fee will be imposed against a condominium unit owner under specific circumstances.

There is no question that the Illinois Condominium Property Act provides that any board of managers may assess late fees or penalties for late payments of assessments. However, there is absolutely no evidence, and none was presented by Spanish Court Two during trial, that the Board of Managers ever took an affirmative vote with respect to charging Lisa Carlson, or any condominium unit owner, with late fees. The Illinois Condominium Property Act specifically requires that the board convene and vote on a late fee proposal before late fees can be imposed on any condominium unit owner. Again, Spanish Court Two failed to prove its case under the law.

The trial court also erred by imposing attorneys fees on Lisa Carlson because Spanish Court Two has materially breached the provisions of the Condominium Declarations and violated Illinois law by willfully refusing to repair serious defects in the roof which have led to water infiltration and significant

damage to Lisa Carlson's condominium unit. Spanish Court Two is not entitled, under the law, to invoke a provision in the Condominium Declarations and provisions of the Illinois Condominium Property Act which allow for the recovery of attorneys fees because Spanish Court Two is in breach of contract and in violation of the law.

CONCLUSION

For the foregoing reasons, Lisa Carlson, the defendant-appellant/cross-appellee, respectfully requests that this Court reverse the money judgments and possession orders of January 31, 2011 and April 21, 2011, including the award of attorneys fees and costs entered in favor of Spanish Court Two Condominium Association, remand so that Spanish Court Two's complaint may be tried with Lisa Carlson's affirmative defenses and counterclaim in the same proceedings, and any other relief that this Court deems just.

Respectfully submitted,

DATED: October 4, 2011

_____
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APPENDIX
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