No. 2-11-0473

IN THE

APPELLATE COURT OF ILLINOIS

SECOND JUDICIAL DISTRICT

SPANISH COURT TWO CONDOMINIUM ASSOCIATION,

Plaintiff-Appellee/
Cross-Appellant,

vs.

LISA CARLSON,

Defendant-Appellant/
Cross-Appellee.

Appeal from the Circuit Court of the Nineteenth Judicial Circuit
Lake County, Illinois, Chancery Division
No. 10 LM 301
The Honorable Michael J. Fusz, Judge Presiding

REPLY BRIEF OF PLAINTIFF-APPELLEE/ CROSS-APPELLANT

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Oral Argument Requested

POINTS AND AUTHORITIES

ARGUMENT

In responding to that portion of the Brief of Plaintiff-Appellee/Cross-Appellant that was addressed to cross-appeal issues, Defendant-Appellant/Cross-Appellee, Lisa Carlson ("Carlson") contended that: i) the arguments raised by the Spanish Court Two Condominium Association (the "Association") in its cross-appeal had not been raised at the trial court level and, thus were waived (Reply and Appellee Brief, pp. 8-9); ii) if not waived, the special assessment had not been "mandated by law"; iii) there was no evidence in the record that the special assessment was for repair, replacement or restoration; iv) the costs associated with the elevator and fire-alarm special assessment that the trial court declined to award were not part of the routine annual budget; and v) a change in the Association Declaration moots these issues in any event. These arguments are repudiated by reference to the Record and applicable law, as follows.

I. THE ASSOCIATION AND CARLSON EACH ADDUCED EVIDENCE AND/OR ARGUMENT REGARDING THE CROSS-APPEAL ISSUES AT TRIAL

At the trial of this matter – the transcriptions of which are contained in Volume II of the Record on Appeal, together with the trial exhibits – the Association made arguments regarding, adduced evidence demonstrating, and/or the Court acknowledged that: i) the special assessment was for the *replacement* of the fire alarm panel and upgrades to elevator (R. T000050, ll.18-20; T000103, ll.16-17 and Trial Exhibit 4; T000123, ll. 6-7; T000125, ll.8-10) ii) the special assessment was included in, and ratified with, the annual budget (R. T000045, ll.11-12; 000153, ll.17-20; T000183, ll.17-24); and the special assessment was to "upgrade the elevator(s) and fire alarm *to code*" (Trial Exhibit 5) (emphasis added).

Also at the trial of this matter, Carlson took issue with whether the inclusion of the special assessment in the budget constituted sufficient notice of action relative to a special assessment (R. T000139, ll.7-15) and raised questions about whether she received the budget (R. T000103, ll.16-23). Thus, it cannot be fairly argued by Carlson that these issues were waived by not having been addressed at the trial court level, *contra* Haudrich v. Howmedica, Inc., 169 Ill. 2d 525 (1996), which explained that the reason for the waiver policy includes that the opposing party would likely be prejudiced otherwise "since he may have been able to present evidence to discredit the theory had it been raised in the evidence presentation stage, that is to say, in the trial court." *Id.*, 169 Ill. 2d at 536. Since Carlson had an opportunity to raise issues regarding these theories, and did in fact introduce evidence on at least some of these points, she suffers no prejudice in their being raised on appeal.

On a substantive basis – and virtually ignored by Carlson in response (Reply and Appellee Brief at pp. 9-10) – the above matters each support the reversal of the trial court's decision to exclude from the judgment in the Association's favor any amount toward the special assessment for the elevator and fire panel replacement.

First, and as explained at pp. 14-15 in the Brief of Plaintiff-Appellee/Cross-Appellant, the work relating to the special assessment was required to bring the fire panel and elevator up to Code. Thus, it should be deemed "mandated by law" such that it is excused from a unit-owner vote under Section 18(a)(8) of the Illinois Condominium Property Act (the "Act"), 765 ILCS 605/18(a)(8).

she has not filed a motion or otherwise taken any action to supplement the Record on Appeal to include supplemental matters she wishes this Court to consider. Silny v. Lorens, 73 Ill. App. 3d 638, 643 (1st Dist. 1979) (the Court's understanding of the facts in a case on appeal "derive[ ] from the record, not matters De hors the record" of which the Court may not take notice). Thus, Carlson's argument on this issue properly should be disregarded by the Court.

III. CARLSON FAILS TO REFUTE THE ASSOCIATION'S ENTITLEMENT TO AN AWARD OF ITS ADDITIONALLY INCURRED LEGAL FEES AND COSTS ON APPEAL

Lastly, in its Brief of Appellee/Cross-Appellant, the Association had contended that it is entitled to an award of such additional attorneys' fees and costs it incurs if it is successful in defending the underlying judgment in its favor in this appeal. (*Id.*, p. 16, Section VII(E) and cases cited thereat). Carlson neither refutes the applicability of the authority provided nor supplies any cogent response thereto. Instead, she laments the "significant amount of resources, expenses, and time, including the posting of a bond in order to resist heavy handed conduct" and argues that the litigation has been prolonged because, in essence, the Association insisted on proceeding with the trial in adherence to the well established authority identifying what is considered "germane" to a forcible entry and detainer lawsuit. (*See* Brief of Plaintiff-Appellee/Cross-Appellant, pp. 7-9).

Such response supplies no legitimate basis for disregarding both the statutory and contractual authority allowing the Association to recover its attorneys' fees incurred in collection efforts based on a unit owner's default, and on appeal thereof. Thus, the Association respectfully reiterates its argument in favor of an award of its additionally incurred fees and costs in connection with this appeal.

CONCLUSION

For the foregoing reasons, Plaintiff-Appellee/Cross-Appellant, the Spanish Court Two Condominium Association, prays that this Honorable Court:

A. Reverse outright the trial court's denial of additional money damages to the Association in an amount equal to the special assessments due and owing by Carlson for the fire alarm panel and elevator, namely, of $197.77 per month, beginning January 2011 and continuing through present;

B. To the extent the Association prevails on this appeal, remand this matter to the trial court with instructions to determine such other attorneys' fees and costs as are to be awarded to the Association for all post-judgment matters relating to this litigation, inclusive of the handling of this matter on appeal and through collection on such amended judgment as may be entered in the Association's favor; and

C. Award the Association such other and further relief as the Court deems just and proper.

Respectfully submitted,
SPANISH COURT TWO CONDO-MINIUM ASSOCIATION

By: _____
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