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U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS, FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
<http://www.flmd.uscourts.gov>

TCR Holdings, Inc., a Florida corporation,

Plaintiff,

Case No.

v.

2: 11-cv-246 FTM-29DNF

WINDSOR WEST CONDOMINIUM ASSOCIATION, INC, a Florida Non Profit Corporation, REALTY SERVICES PROPERTY MANAGEMENT COMPANY, a Florida Corporation, VINCENT PIERRE, individually, MARIBEL HERNANDEZ MONZON, individually, MERCILENA LIMA, individually, ALEX WALTERS, individually, JOYCE VACCERALLI, individually, KENNETH AVILES, individually, REBECCA AVILES, individually, WANILCE BARBOSE, individually, and TOM SAGENDORF, individually.

Defendants.

PLAINTIFF TCR HOLDINGS, INC'S VERIFIED COMPLAINT FOR DECLARATORY RELIEF, AND INJUNCTIVE RELIEF

(INJUNCTIVE RELIEF SOUGHT)

Plaintiff, TCR Holdings, Inc. ("TCR"), sues Windsor West Condominium Association, Inc. ("**Windsor**"), Realty Services Property Management Company

(“**Realty**”), Vincent Pierre, Maribel Hernandez Monzon, Mercilena Lima, Alex Walters, Joyce Vaccaralli, Kenneth Aviles, Rebecca Aviles, Wanilce Barbose, and Tom Sagendorf (these individual defendants hereinafter referred to as the “**Tenant Defendants**” and with Windsor and Realty the “**Defendants**”) and alleges as follows:

Preliminary Statement

1. In the summer of 2010, the Florida Legislature passed significant revisions to Florida’s Condominium Acts, many designed to strengthen condominium and homeowner association rights to collect maintenance fees. But in its zeal to placate cash-strapped condominium associations, the Legislature bestowed a private cause of action upon associations empowering them to garnish rent payments due from unit owners without any due process protections. The Legislature has thus “turned back the clock” and re-enacted a prejudgment garnishment scheme mirroring those held unconstitutional by the Supreme Court in the 1970’s in *Sniadach v. Family Finance Corp*, *Fuentes v. Shevin* and their progeny.

2. That unconstitutional garnishment scheme, as enforced by Windsor, is causing irreparable harm to TCR. By snatching its rental payments, Realty and Windsor have left TCR without the income necessary to service its mortgages or maintain the rental units.

3. TCR, thus, now seeks the protection of this Court and respectfully requests that it issue a temporary and then permanent injunction against Realty and

Windsor's enforcement of the statute, declare that these provisions are unconstitutional, and grant related relief. TCR is entitled to injunctive relief because it is certain to suffer imminent and irreparable damage from the prejudgment attachment of its tenants' rental payments without notice and procedural due process.

JURISDICTION AND VENUE

4. This is a civil action for declaratory relief and injunctive relief for violation of its rights under the Fourteenth Amendment to the United States Constitution and seeks relief pursuant to that section, 42 U.S.C. § 1988, and 28 U.S.C. §§ 2201 and 2202 and Fed. R. Civ. P. 57 and 65.

5. This Court has jurisdiction over their claims pursuant to 28 U.S.C. §§ 1331(a) and 1343(a)(3), and authority to grant declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201 and 2202 and Fed. R. Civ. P. 57 and 65.

6. Venue in the Middle District of Florida is proper pursuant to Title 28 U.S.C. §1391(e) in that the parties reside in the Middle District of Florida and the events, which are the subject of this Complaint, occurred in the Middle District of Florida.

THE PARTIES

7. TCR Holdings, Inc. is a corporation organized under the laws of Florida, with its principal address at 649 SW 9 Street, Apartment 208, Miami, Florida 33130.

8. Windsor West Condominium Association, Inc. is a non-profit

corporation organized under the laws of Florida, with its principal address at 2525 Parkway Street, Fort Meyers, Florida 33901, care of Realty Services Property Management Company.

9. Realty Services Property Management Company is a corporation organized under the laws of Florida, with its principal address at 2525 Parkway Street, Fort Meyers, Florida 33901.

10. Vincent Pierre is an individual who, upon information and belief, resides at 3706 Broadway, Unit 8, Fort Myers, Florida 33901.

11. Maribel Hernandez Monzon is an individual who, upon information and belief, resides at 3706 Broadway, Unit 14, Fort Myers, Florida 33901.

12. Mercilena Lima is an individual who, upon information and belief, resides at 3706 Broadway, Unit 20, Fort Myers, Florida 33901.

13. Alex Walters is an individual who, upon information and belief resides, at 3706 Broadway, Unit 110, Fort Myers, Florida 33901.

14. Joyce Vaccaralli is an individual who, upon information and belief, resides at 3706 Broadway, Unit 200, Fort Myers, Florida 33901.

15. Kenneth Aviles is an individual who, upon information and belief, resides at 3706 Broadway, Unit 205, Fort Myers, Florida 33901.

16. Rebecca Aviles is an individual who, upon information and belief, resides at 3706 Broadway, Unit 205, Fort Myers, Florida 33901.

17. Wanlice Barbose is an individual who, upon information and belief,

resides at 3706 Broadway, Unit 208, Fort Myers, Florida 33901.

18. Tom Sagendorf is an individual who, upon information and belief, resides at 3706 Broadway, Unit 300, Fort Myers, Florida 33901.

ALLEGATIONS COMMON TO ALL COUNTS

19. **The Offending Statute.** The Florida Legislative Session for 2010 produced a number of significant changes to the Condominium Act (Chapter 718 of Florida Statutes), which became effective on July 1, 2010.

20. Most notably, the Legislature, responding to the demands from cash-strapped condominium associations, amended Florida Statutes §718.116 adding a revised section (11). That amendment creates a private action allowing an association to take rent from a tenant occupying a unit whose owner is delinquent to the association on any monetary obligation. This amendment authorizes an association to divert rental payments by mere written demand upon the tenant, and a copy to the unit owner. That diversion continues to the extent of the unpaid monetary obligation to the association. Worse, if the tenant does not pay, the association – a stranger to the lease – may evict the tenant as if the association was the landlord:

If the unit is occupied by a tenant and the unit owner is delinquent in paying any monetary obligation due to the association, the association may make a written demand that the tenant pay the future monetary obligations related to the condominium unit to the association, and the tenant must make such payment. The demand is continuing in nature and, upon demand, the tenant must pay the monetary obligations to the association until the association releases the tenant or the

tenant discontinues tenancy in the unit. The association must mail written notice to the unit owner of the association's demand that the tenant make payments to the association. The association shall, upon request, provide the tenant with written receipts for payments made. A tenant who acts in good faith in response to a written demand from an association is immune from any claim from the unit owner.

Florida Statute §718.116 (11).

21. **About TCR.** TCR was formed in 2002 and acquired 8 units at the Windsor West Condominium complex, including: Units A 8B; A 14B; A 20A; B 110A; B200 A; B 205B; 208B; and B 300A. (the "Units"). TCR acquired the Units as an investment and obtained financing from a Florida bank in exchange for a mortgage on the Units.

22. Each of the Units is rented to one of the Tenant Defendants. True and correct copies of the leases attached hereto as **Composite Exhibit A**. TCR's Tenant Defendants pay an average of \$450 in monthly rental payments, an amount sufficient to service the loan, pay reasonable maintenance, and meet periodic upkeep demands. By comparison, Windsor West Condominium Association levies an average monthly assessment of about \$250 to \$300 per unit.

23. TCR believes that Windsor's fees are grossly inflated due to the association's mismanagement and overspending, including substantial over payment of Realty's management services. For that reason, and due to the financial challenges caused by the real estate collapse in the Lee County area, TCR has withheld payment of its association dues for some time. TCR has repeatedly sought

to resolve the maintenance fees issue with Windsor, but to no avail.

24. **The Windsor Attachment.** On December 8, 2010, Realty, acting on behalf of Windsor, sent various demand letters to TCR and Tenant Defendants demanding that the Tenant Defendants submit their rental payments to Realty. That letter further threatens that Windsor will terminate the Tenant Defendants' leases and evict them should they fail to comply with the demand letters. True and correct copies of the demand letters attached hereto as **Composite Exhibit B.**

25. Feeling threatened and fearful of losing their residences, each of the Tenant Defendants have chosen to breach their lease with TCR and comply with Realty's demands.

26. TCR depends on these rental payments to maintain the Units and service its mortgage on the Units. If Realty and Windsor proceed pursuant to Florida Statute §718.116, TCR will not be able to maintain the Units. Additionally, TCR will fall into default on the mortgages, risk losing the Units by foreclosure, and be forced to file for bankruptcy.

27. Furthermore, as a result of Realty and Windsor's actions, TCR's procedural due process and property rights have been harmed.

28. Windsor has already sought relief against TCR by way of the traditional Florida right of imposing a lien on the Units. On January 14, 2011, Steve Adamczyk from Goede & Adamczyk, PLLC on behalf of Windsor sent TCR various demand letters for outstanding condominium assessments for his units. The letters

further state that Windsor would record a claim of lien in order to secure payment of delinquent assessments. True and correct copies attached here to as **Composite Exhibit C**.

COUNT I
REQUEST FOR DECLARATORY JUDGEMENT

(Violation of Procedural Due Process)

29. TCR expressly incorporates herein by reference the allegations set forth in paragraphs 1 through 28 of this Complaint as though fully set forth herein.

30. The Due Process Clause of the Fourteenth Amendment of the United States Constitution prohibits any person from depriving another person's life, liberty, or property without due process of law, notice, and an opportunity to be heard:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, §1.

31. TCR has liberty and/or property interest in leasing its rental dwelling units, in receiving income from such leases, and in the rental payments themselves.

32. Florida Statutes §718.116 deprives TCR of that interest without due process of law because it grants an association: (a) a private remedy; (b) grants a no-judgment writ of attachment upon bare written demand to TCR's tenants; and (c)

provides for no hearing or judicial supervision.

33. The statute does not require the association to sustain any burden to prove, by sufficiently probative evidence, that a property owner is in fact indebted to the association before the association deprives the owner of his liberty and/or property interest.

34. The statute permits the association to evict the tenant and thus deprive the owner of the liberty and/or property interest in retaining such tenant, conducting a rental property business, and/or receiving income from rental property, without any hearing or proceeding before such actions occur.

35. The statute also provides no due process within its statutory scheme for a tenant to challenge such actions.

36. The statute has no relation to any legitimate local government purpose, compelling state interest, or rational basis for its enactment.

37. As a result, Florida Statute §718.116, on its face and as applied, violates Due Process Clause of the Fourteenth Amendment.

38. Therefore, TCR is entitled to declaratory and injunctive relief.

WHEREFORE, Plaintiff TCR respectfully requests this Court:

1. Assume jurisdiction over this case;
2. Declare that Florida Statute §718.116 violates TCR's rights as protected by the Fourteenth Amendment to the United States

Constitution and 42 U.S.C. §1983;

3. Temporarily and permanently enjoin Windsor, Realty, their agents, successors and assigns from enforcing the Florida Statute §718.116;
4. Return of any funds submitted to Realty or Windsor that were improperly taken from TCR in violation of its rights;
5. Award TCR their reasonable attorneys' fees and costs in bringing this action pursuant to 42 U.S.C. § 1988; and
6. Together with such further relief the Court deems just, proper and necessary to effectuate any declaration consistent with 28 U.S.C. §§ 2201 and 2202 and Fed. R. Civ. P. 57 and 65.

Dated: April 27, 2011

Respectfully submitted,

By:


KATHERINE AMADOR-FORTUNY
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VERIFICATION

Under penalties of perjury pursuant to 28 U.S.C §1746 and §92.525, Fla. Stat., I, Orlando Machado, as President of TCR Holdings, Inc., a Florida corporation, declare that I have read the foregoing and I do swear that the allegations contained above are true and correct.

Authorized Representative of Plaintiff

Orlando Machado

Print Name: ORLANDO MACHADO
President of TCR Holding, Inc.

STATE OF FLORIDA)
) ss:
COUNTY OF MIAMI-DADE)

BEFORE ME, the undersigned authority, Orlando Machado, as President of TCR Holdings, Inc., a Florida corporation, personally appeared and is [] personally known to me or [X] produced Florida Drivers License, who, being first duly sworn upon oath, deposes and states that he is an authorized person to sign the foregoing Verification, and that the contents of the foregoing Verified First Amended Complaint are true and correct to the best of her knowledge, information and belief.

SUBSCRIBED and SWORN TO this 27 day of April 2011.



Karina Dominguez
NOTARY PUBLIC, State of Florida
Name: Karina Dominguez
My Commission Expires: Dec. 7, 2013