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What's the Difference?

Forcible Entry and Detainer v. Small Claims

One issue that comes up with some frequency, especially when new board members are voted in, are the types of cases that are filed when owners fail to pay assessments. Generally speaking, associations file lawsuits using the Forcible Entry and Detainer Act. However, on occasion, an association will only file a small claims case. The type of case filed determines the relief the association can obtain.

A small claims case seeks a money judgment. The case is based purely on the association's governing documents (the declaration, by-laws and rules and regulations) and, if the association is a condo, the Condominium Property Act. Condominiums are entitled to recover their attorneys' fees in small claims cases. However, non-condos can only recover attorneys' fees if its governing documents specifically grant the association that right.

A case filed under the Forcible Entry and Detainer Act seeks both a money judgment and a right to take possession of the owner's unit or home. If the association proves that assessments are owed, then it is entitled to possession. The association can exercise its right to possession and place a tenant in the property in hopes of reducing the amounts owed by the owner. The Forcible Entry and Detainer Act specifically provides associations with the right to recover their attorneys' fees regardless of what type of association it is.

Small claims cases and forcible cases generally take approximately the same time to complete. However, the right for the association to take possession of the home in a forcible case must be stayed by the judge for a period of 60 to 180 days. Thus, the association will not be able to attempt to take possession until after that stay date. Please note that the law on when the association can take possession has just changed. As of January 1, 2015, an association has to exercise its rights to take possession in the first 8 months after the stay expires. If it does, the association can enter into a lease for up to 13 months.

The association's ability to collect on a judgment is different depending on the type of case that is filed. If the association receives a judgment in a forcible case, any assessments and other common expenses, except attorneys' fees, that come due after the judgment is entered must be paid before the order for possession can be vacated. If an association receives a small claims judgment, the judgment must be released when the judgment amount is paid in full; the association cannot collect other common expenses that came due since the judgment was entered.

Since associations have additional rights when they receive judgments pursuant to the Forcible Entry and Detainer Act, we generally recommend that associations file forcibles when they can. However, when it cannot, a small claims case is the next best thing.