

**IT IS BETTER TO ASK FOR PERMISSION THAN TO SEEK FORGIVENESS:  
NICKSOLAT V. GHARAVI AND THE EFFECT OF FAILING TO OBTAIN  
MORTGAGEE CONSENT IN THE REASSIGNMENT OF LIMITED COMMON ELEMENTS  
PURSUANT TO VIRGINIA CODE § 55-79.57**

by John C. Altmiller\*

The Circuit Court of Fairfax County has issued an opinion addressing the effect of the failure to obtain lender consent for the reassignment of a condominium parking space pursuant to Virginia Code § 55-79.57. The case, *Nicksolat v. Gharavi*, Case No. CL-2013-1659 (Fairfax County Circuit Court, Sept. 16, 2013), involved a dispute over a parking space that arose subsequent to a foreclosure sale. Applying the Condominium Act, the Court, found that the failure to obtain consent of the mortgage lender prior to the reassignment of the parking space rendered the reassignment a nullity.

**FACTS**

The facts in this case were almost entirely undisputed. The Plaintiff, Mandona Nicksolat (“Nicksolat”), purchased a unit (the “Unit”) in the Rotonda Condominium (the “Rotonda”) at a foreclosure sale conducted pursuant to a default under a valid deed of trust (the “Deed of Trust”) encumbering the Unit at that time. The notice of the foreclosure sale stated that the Unit included the use of the limited common element known as Parking Space Number 145 (the “Parking Space”). In addition, both the memorandum of sale signed by the parties at the foreclosure and the deed into Nicksolat stated that the Unit included the exclusive use of the Parking Space. However, Nicksolat soon realized that the Parking Space was being used by another unit owner, Mohammad Gharavi (“Gharavi”).

Gharavi claimed that he had purchased the Parking Space from the former owner of the Unit, Ali Vaezi (“Vaezi”), and that he had a reassignment of the Parking Space recorded in the land records to support his position. The evidence showed that Vaezi had sold the Parking Space to Gharavi, less than a year before his condominium unit was foreclosed upon. Because the sale of a parking space involves the reassignment of a limited common element, an amendment to the Rotonda's Declaration was required. Although the amendment reassigning the Parking Space had been duly executed by the condominium association and recorded among the Fairfax County land records, no one had contacted the mortgage lender to obtain its approval for the reassignment. When Gharavi was unwilling to relinquish the Parking Space, Nicksolat filed suit in Fairfax County Circuit Court.

**THE LAWSUIT**

The Complaint filed by Nicksolat against Gharavi and the Rotonda contained three counts. In the first count, Nicksolat sought a declaratory judgment determining that she was entitled to exclusive use of the Parking Space based upon her purchase of the Unit at the foreclosure sale. The second count was a claim for unlawful detainer, which sought the fair market rental value of the Parking Space during the time that Gharavi refused to deliver possession. Finally, Nicksolat sought relief pursuant to Virginia Code § 55-79.53, based upon Gharavi's failure to comply with the condominium instruments.

The claims for declaratory relief and rent were based upon the theory (i) that Vaezi lacked the authority to convey the Parking Space to Gharavi, or, alternatively, (ii) that the reassignment of the Parking Space was made subject to the Deed of Trust. In either event, Nicksolat claimed, the Parking

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Space was conveyed to her when she purchased the Unit. Nicksolat also sought money damages in the amount of the fair market rental value of the Parking Space pursuant to Virginia Code § 8.01-128.

In her claim for relief pursuant to § 55-79.53, Nicksolat asserted that the Rotonda's Declaration by its terms reserved the right to assign parking spaces "for the exclusive use of certain Unit Owners to whose Units these parking spaces shall be appurtenant." The Declaration further explicitly assigned the Parking Space to the Unit. By defeating her exclusive use of the Parking Space, Nicksolat claimed, Gharavi was in violation of the Declaration. Virginia Code § 55-79.53 allows an aggrieved unit owner to sue for injunctive relief and other remedies available at law or in equity against a unit owner failing to comply with the condominium instruments. The statute also permits recovery of attorney's fees for the prevailing party in such a suit.

### **THE PRIOR CASE: *SHEDADEH V. FOUNTAINS AT MCLEAN***

Supporting Nicksolat's position was a prior case decided in the Fairfax County Circuit Court. In *Shedadeh v. Fountains at McLean Condominium Unit Owners Association*, 79 Va. Cir. 103 (Fairfax County Circuit Court, 2009), the Court addressed the same issue upon virtually identical facts. The Plaintiffs in *Shedadeh* had purchased a condominium unit from Bank of America after the lender had foreclosed on the unit pursuant to a deed of trust. As in *Nicksolat*, the exclusive use of assigned parking spaces had been conveyed to the trustee under the deed of trust by the former owner of the unit but, prior to the foreclosure, the parking spaces had been reassigned. The positions taken by the parties in *Shedadeh*, and the trial court's analysis in that case, are instructive.

In *Shedadeh*, the Plaintiffs' arguments were essentially the same as those in *Nicksolat*. The Plaintiffs contended that:

- “[A]fter the deed of trust was recorded, [the former owner] retained only his right to use the parking spaces subject to the deed of trust. As a result, this right of use, subject to the deed of trust, was all that [the former owner] could transfer, assign or convey to Defendants.”
- “[W]hen property subject to a deed of trust is purchased, the deed of trust operates to give the trustee priority over the purchaser. Thus . . . [the] trustee has the superior claim, and any subsequent purchasers have an inferior claim against the trustee.”
- “[B]ecause [the trustee] recorded his deed first, prior to Defendants' recordation of the amended parking space assignments, [trustee's] deed of trust takes priority.”
- “[O]nce the deed of trust was filed among the land records . . . the public had constructive notice that the condominium unit and the parking spaces were subject to the deed of trust,” and “Defendants acted at their own peril by purchasing the right to use the parking spaces without first conducting a title search . . . [I]f Defendants had conducted a title search, they would have been aware of the fact that parking spaces could only be purchased subject to [the trustee's] deed of trust.”
- “[W]hen the valid deed of trust was foreclosed on, the foreclosure extinguished any rights that were later transferred to Defendants.”

The Plaintiffs' position, in summary, was that the parking spaces at issue were encumbered by the deed of trust, as would be the case with any property conveyed to a trustee pursuant to a deed of trust. Since the deed of trust was duly recorded, all subsequent purchasers of an interest in the parking spaces would be on notice of the trustee's superior interest. The Defendants' interest in the parking spaces was therefore subject to the trustee's right of foreclosure.

The Defendants argued that the trustee under the deed of trust had not received legal title (or any other rights) to the parking spaces at issue in that case, or that the trustee was subsequently divested of its interest in the parking spaces. Specifically, the Defendants claimed that:

- “[The owner] was not in a position to convey more than he owned in the deed of trust, and while he owned the unit, *he did not own the parking spaces*. The Association owns all limited common elements, including the parking spaces, and can assign or reassign them at their discretion. Thus, . . . while [the owner] could convey the unit in the deed of trust, he could not convey the limited common elements.” [emphasis added]
- “[T]he parking spaces were only appurtenant to [the] condominium unit, unless and until they were detached from that unit in accordance with Virginia Code § 55-79.57. [T]he amendments to the condominium instruments signed by [the former owner], Defendants, and the Association followed the procedure outlined in [Virginia] Code § 55-79.57. [T]hese amendments became effective when recorded, before the foreclosure occurred. Therefore . . . the parking spaces had been reassigned to their units and could not be foreclosed on under the deed of trust because they were no longer appurtenant to the conveyed unit.”

The Defendant’s position, in summary, was that (i) the former owner could not have validly conveyed the appurtenant interest in the limited common element because the former owner did not possess fee simple title in the parking spaces, and (ii) even if such a conveyance would be validly made, that property interest could be defeated by a reassignment made in compliance with the procedures set forth in § 55-79.57.

The trial court recognized that the question of “whether the parking spaces or the right to use the parking spaces could be conveyed . . . in the deed of trust” was a matter of first impression in Virginia. After observing that the property conveyed to the trustee was described exactly as it was described in the deed into the former owner of the unit, including the reference to the parking spaces, the trial court held that “persuasive authority” supported the conclusion that the former owner could convey the right to use the parking spaces in the deed of trust. The trial court cited *15A Am. Jur. 2d Condominiums and Cooperative Apartments §30 (2009)*, which states that “limited common elements become appurtenant to unit and are conveyed with that unit.” Essentially, if a unit owner has the power to convey the unit and the appurtenant interest in the limited common element to a subsequent purchaser, then he or she has the power to convey the unit in the appurtenant interest to a trustee pursuant to a deed of trust. In taking this approach, the trial court observed:

Had [the former owner] discharged his debt, each defendant would have possessed the exclusive right to use the parking spaces. However, until [the former owner’s] debt was discharged, Defendants’ claims to the parking spaces were inferior to [the trustee’s] claim. Given that [the trustee] had the superior claim to use of the parking spaces, when the deed of trust was foreclosed on, Defendants’ rights to the parking spaces were likewise foreclosed on and extinguished. As of the date of foreclosure, Defendants were divested of their interest in the parking spaces, and [the trustee] acquired the exclusive right to the use of the parking spaces.

*Shedadeh*, pp. 9-10. Again, the court simply treated the appurtenant interest in the parking spaces as it would treat any property subject to a deed of trust. That is, subsequent transfers of the property *are not invalid*, but they *are subject to* the trustee’s right of foreclosure under the deed of trust. This is an important distinction in light of how the Court ultimately ruled in *Nicksolat*.

Interestingly, the court in *Shedadeh* did not address the apparent argument made by the Defendants that compliance with § 55-79.57 as a matter of law detaches the parking spaces from the unit, and therefore *per se* defeats any subsequent foreclosure.

## THE TRIAL

Trial in *Nicksolat* was held on August 7, 2013. After Plaintiff's opening statement, it became clear that most of the pertinent facts were being stipulated by the parties. During Gharavi's opening statement, the Court engaged counsel in a colloquy regarding the legal issues at the heart of the case. At that point, the parties presented their legal arguments concerning the validity of the reassignment and whether the Parking Space was subject to the Deed of Trust.

Unlike the defendants in *Shedadeh*, Gharavi stipulated that the conveyance under the Deed of Trust was valid. Rather than arguing the validity of the conveyance to the trustee, Gharavi contended that compliance with the procedures and terms set forth in § 55-79.57 had the legal effect of separating the Parking Space from the Unit, thereby defeating the trustee's interest in the Parking Space. Gharavi pointed out that this section sets forth the specific procedure for amending the Declaration to reassign the Parking Space, and that consent of the lender or trustee under a deed of trust is not required. Gharavi argued that the section's unequivocal statement that the amendment "shall become effective when recorded" further supported his interpretation of the statute.

Nicksolat's analysis was substantially the same as that of the court in *Shedadeh*. The reassignment of the Parking Space was valid, she claimed, subject to the rights of the trustee under the Deed of Trust. Under this analysis, there was no dispute that the amendment "became effective when recorded." In fact, it was not essential to the success of Nicksolat's claim that the amendment be deemed void or ineffective; rather, all that was necessary was a recognition by the Court that any such amendment was made subject to the rights of the trustee.

The Rotonda supported Gharavi's position. Apparently, as a matter of procedure, the Rotonda did not inquire as to whether there were any existing deeds of trust prior to executing and recording an amendment reassigning a parking space, nor did it require any representation from the unit owner regarding such deeds of trust. The Rotonda contended that the law required no such inquiry, and certainly did not require any lender or trustee consent. Specifically, the Rotonda called the Court's attention to the fact that, under Virginia Code § 55-79.57(B), an amendment to the Declaration reassigning a limited common element involves no discretion on the part of the condominium association. Further, it noted that that other sections in the Condominium Act require mortgagee consent, while no such consent is required for the reassignment of a limited common element pursuant to § 55-79.57.

The Court took the matter under advisement in order to analyze the effect of any other sections in the Condominium Act requiring mortgagee consent. Nicksolat and Gharavi had each prepared a trial memorandum setting forth their respective positions; however, neither memorandum addressed this issue raised by the Rotonda. Because the outcome of the Court's analysis might have rendered Nicksolat's claims for rent and attorney's fees moot, the Court deferred the presentation of evidence on those matters until ruling had been issued regarding the parties' respective rights regarding the Parking Space.

After trial, the Court requested that the parties submit briefs regarding the applicability of Virginia Code § 55-79.73:1, the only section of the Condominium Act which addresses mortgagee consent. On September 16, 2013, after all parties had submitted briefs on this issue, the Court issued its memorandum opinion.

## THE OPINION

The Court's analysis focused on § 55-79.73:1. Subsection A of this section applies to circumstances in which consent of the mortgagee is required by the condominium instruments, and provides a procedure for obtaining implied consent. Since the Rotonda Declaration did not require written consent from the mortgagee, this subsection is not applicable. Subsection B provides an exception to the

procedures set forth in subsection A, and is similarly inapplicable. Subsection C, however, would determine the outcome of the case.

Subsection C states: "Where the condominium instruments are silent on the need for mortgagee consent, no mortgagee consent shall be required if the amendment to the condominium instruments does not specifically affect mortgagee rights." The Court reasoned:

This subsection uses a double negative: if written consent is not required by the instrument, consent is not needed *unless* the instrument affects mortgagee rights. But if mortgagee rights *are* "specifically affect[ed]," then written consent *is* required.

*Nicksolat*, p. 5. There was no dispute that the reassignment of the Parking Space, if given the effect claimed by Gharavi and the Rotonda, would have significantly affected the mortgagee's rights. As the Court observed, "[a]s this litigation proves, Defendant Gharavi has interfered with the interest that Plaintiff bought in the Parking Space by maintaining that it is his parking space per the agreement with Mr. Vaezi."

Having established the applicability and effect of Virginia Code § 55-79.73:1, the Court proceeded to address the two arguments advanced by Gharavi and the Rotonda: (i) that § 55-79.57 provides the exclusive method through which limited common elements are assigned, and (ii) that the condominium instruments do require mortgagee consent in some circumstances but not in others, such that § 55-79.73:1(C) is inapplicable.

The Defendants pointed out that § 55-79.73:1 is a generally applicable statute (having no specific application to the reassignment of limited common elements), while § 55-79.57 is a more specific provision. As such, the Defendants argued, the specific provisions of § 55-79.57 supplant the general rule stated in § 55-79.73:1. Although the Defendants' argument focused on the procedures set forth in subsection B of § 55-79.57, the Court found the answer to this question in subsection A, stating:

However, Defendants take an overly narrow view of the procedures applicable to assigning a limited common element under § 55-79.57. The explicit language of that Code section requires that "[n]o limited common element shall be assigned or reassigned except in accordance with the provisions of this chapter." Va. Code § 55-79.57(A). The text does not say *section*; instead, it says *chapter*; section 55-79.73:1 is a provision within the same chapter, and it is precisely because it is a generally applicable section that it must be read in concert with § 55-79.57.

*Nicksolat*, p. 5. Further, since there is no reference in § 55-79.57 as to the requirements of mortgagee consent, there is no specific rule supplanting the general rule regarding mortgagee consent contained in § 55-79.73:1(C). Finally, in response to the argument that the Rotonda lacked discretion under the statute to wait until mortgagee consent before executing and recording the amendment, the Court stated:

When Mr. Vaezi failed to obtain the consent of the Trustees before reassigning the Parking Space, he violated § 55-79.73:1(C), which waived his right under § 55-79.57(8) to assign the Parking Space. *This rendered the subsequent assignment a nullity.* Nothing in § 55-79.57—which itself requires assignment to occur "in accordance with the provisions of this chapter"—suggests that the strict requirements of § 55-79.73:1 can be ignored.

*Nicksolat*, p. 5 (emphasis added).

## DISCUSSION

The opinion in *Nicksolat* is notable not so much for the outcome but for the reasoning of the Court and the logical conclusions that flow from that reasoning. Although *Nicksolat* had pleaded alternatively that the reassignment of the Parking Space was either ineffective *ab initio* or merely subject

to the foreclosure rights under the Deed of Trust, her argument at trial focused primarily on the second approach. Since Gharavi had conceded that the appurtenant rights to the Parking Space had been validly transferred to the trustee, the argument at trial ultimately came down to whether or not the provisions of § 55-79.57 could act to unilaterally divest the trustee of those rights.

The appeal of making the "subject to" argument, as opposed to the "void *ab initio*" argument, was that it took almost all of the punch out of Gharavi's contentions regarding § 55-79.57. Gharavi was asserting that the statute, by its language, granted special powers to a unit owner to sell his parking space at any time, despite it being subject to a deed of trust, without any repercussions. In fact, he argued that the trustee of the deed of trust received the appurtenant rights to a parking space with full knowledge that it might subsequently be unilaterally divested of those rights under the statute.

By taking a more conservative approach, Nicksolat granted the Defendants most of their points without granting them their outcome. Yes, the Rotonda had no discretion except to sign and record the amendment once the interested unit owners requested that it do so. Yes, that amendment became effective upon its recordation. Yes, if Vaezi's loan had been paid off and the Deed of Trust released, Gharavi would have an unencumbered appurtenant right to use the Parking Space. But the transfer still remained subject to the Deed of Trust. Further, there is nothing controversial or revolutionary about such a position. For example, I may sell my house even though it is subject to a mortgage; the deed to the new owner, having been recorded among the land records, will be effective. In the event of a default on that mortgage, however, the new owner's interest in the house will be subject to the right of the trustee to foreclose. This was the conclusion of the trial court in *Shedadeh*.

Because the Rotonda raised at trial the applicability of other provisions of the Condominium Act relating to mortgagee consent, the Court in *Nicksolat* determined that § 55-79.73:1 was not merely relevant to the analysis of the case, it was dispositive. Neither Nicksolat nor Gharavi asserted the relevance of that statute in their pleadings or trial memoranda, and the statute was nowhere addressed in the *Shedadeh* opinion. Furthermore, if the reassignment in this case was a nullity as a result of the failure to obtain mortgagee consent pursuant to § 55-79.73:1, this would also be true even if the foreclosure sale had never occurred. In other words, even if the loan was paid off and the Deed of Trust released, Gharavi would never have had an interest in the Parking Space.<sup>1</sup>

More important, the same result would appear to obtain for any reassignment of a limited common element (i) occurring in Virginia (ii) during the applicability of the relevant statutes (iii) in which the limited common elements being transferred was subject to a deed of trust, and (iv) for which consent from the mortgagee was not obtained. Therefore, the ruling in *Nicksolat* would appear to cast doubt upon the validity of all transactions meeting the above criteria. It is also unclear whether such transactions could be rendered valid after the fact, and, if so, by what procedure this could be

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<sup>1</sup> The editor, like the author, is troubled by this language of the opinion. Let's try a little *reductio ad absurdum*: A owns Blackacre, which borders on a public way. A grants B, owner of Whiteacre, an easement across Blackacre to reach B's property, situated behind A. B encumbers Whiteacre with a deed of trust that includes the language "together with" the easement. A then sells C Greenacre, to the rear of Whiteacre, and grants C the right to use, in common with B, the aforesaid easement. B joins in the grant to C. The access easement is entirely on Blackacre, forming the western boundary of Blackacre, Whiteacre, and Greenacre. B then defaults, and the bank forecloses. Because C's "right to use" was recorded after the deed of trust, by the language of the *Nicksolat* opinion, C would have no right of access over that portion of the easement that bordered Whiteacre without the consent of B's foreclosure purchaser (and presumably, the subsequent lender).

BTW, for those of you who had forgotten about Blackacre and Whiteacre since passing the bar exam, well, you're welcome. And no, this isn't the same Green Acres owned by Oliver Wendell Douglas. (The rest of you can look it up when you get home.)

accomplished. This is one of those times when it is better to be a trial attorney than a transactional attorney.

### **EPILOGUE**

After the opinion in *Nicksolat* was issued, an evidentiary hearing was held with regard to the claims for rent and attorney's fees. After hearing evidence regarding the fair market monthly rental value of the Parking Space, the Court awarded damages on Nicksolat's claim with regard to unlawful detainer. At the conclusion of the Plaintiff's evidence, Gharavi made a motion to strike with regard to the claim for attorney's fees, arguing that Nicksolat's claim was for declaratory relief and unlawful detainer, rather than a violation of the condominium documents.

Nicksolat argued that it was the Declaration that granted her exclusive use of the Parking Space, and that this action rested entirely upon her rights under the Declaration and the Condominium Act. She further asserted that Gharavi's actions in depriving her of that exclusive use constituted a violation of the parties' respective rights and obligations under the Declaration. Because Nicksolat's right to exclusive use of the Parking Space, and her right to fair market rent, arose solely from the Declaration, the lawsuit necessarily involved enforcement of her rights thereunder. However, the Court concluded that Nicksolat's claims were not for violations of the Declaration, and that attorney's fees were therefore not recoverable.