

IN THE SUPREME COURT OF FLORIDA

CASE NO. 65,814

DIVISION OF FLORIDA LAND SALES :
AND CONDOMINIUMS, DEPARTMENT OF :
BUSINESS REGULATION; and THE :
TOWERS OF QUAYSIDE HOMEOWNERS' :
ASSOCIATION, INC., :

Petitioners, :

v. :

HERMAN E. SIEGEL, on behalf of :
himself and other unit owners :
of THE TOWERS OF QUAYSIDE NO. :
2 CONDOMINIUM, :

Respondent. :

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FILED
OCT 3 1984
CLERK, SUPREME COURT
BY Chief Deputy Clerk *pl*

On Appeal from the District Court of Appeal,
Third District of Florida, Case No. 83-2113

RESPONDENT'S ANSWER BRIEF ON JURISDICTION TO
THE DIVISION OF FLORIDA LAND
SALES AND CONDOMINIUMS

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STATEMENT OF THE CASE

Petitioner, DIVISION OF FLORIDA LAND SALES AND CONDOMINIUMS (the "Division") misdescribes the issue in these proceedings. The issue is not whether Petitioner THE TOWERS OF QUAYSIDE HOMEOWNERS' ASSOCIATION, INC. ("Homeowners' Association") is a "condominium association", but rather whether it is an "association" within the meaning of §718.103(2), Florida Statutes.

STATEMENT OF THE FACTS

Petitioner's Statement of the Facts contains some omissions and inaccuracies.

First, there is nothing in either the record, or the decision of the Third District, to reflect the conversion of rental apartments to the condominium form of ownership. All the record reflects is condominiums, proposed condominiums, and the "Common Properties".

Petitioner's statement that the Declaration of Covenants does not submit the Common Properties to condominium is misleading, as the issue has been not whether the Common Properties are a condominium, but whether they are "condominium property".

Petitioner's Statement of the Facts also omits any reference to the interrelationship between the Common Properties and the condominium, as set forth by the District Court in its opinion.

The "common properties" are appurtenances to each and every condominium unit in the community. The unit owners' rights in the common properties are set forth in intertwined provisions in the Declaration of Covenants and the Declarations of Condominium. We say "intertwined" because the Declaration of Covenants is expressly incorporated into the Declaration of Condominium.

The Submission Statement of the Declaration of Condominium submits to condominium ownership

... the Land and Building (each as hereinafter defined), all other improvements erected thereon, and all other property, real, personal or mixed, intended for use in connection therewith (collectively called the "Property") ...
(Emphasis supplied by District Court of Appeal).

Article 2.9 of the Declaration of Condominium defines "condominium property" as:

(T)he land and personal property that are subject to condominium ownership under this Declaration, all improvements on the Land, and easements and rights appurtenant thereto which are intended for use in connection with the Condominium.

Article 21 of the Declaration of Condominium requires that each unit owner shall become a member of the Homeowners' Association, and shall have a right to enjoy the common properties, and further provides:

All rights, privileges, benefits, liabilities and obligations set forth in said Declaration of Covenants, Restrictions and Easements are incorporated herein by reference and each Unit Owner shall be bound thereby in all respects. (Emphasis supplied).

Article II, §1 of the Declaration of Covenants provides that each unit owner shall have:

... a right and easement of ingress and egress and of enjoyment in, to and over the Common Properties which shall be appurtenant to and shall pass with title to every Dwelling Unit ... (Emphasis supplied).

Article I, §10 of the Declaration of Covenants which defines "common properties", states again that said properties are for the common use and enjoyment of the unit owners.

It must be emphasized that even if some of the condominiums in The Towers of Quayside were created by the conversion of existing buildings to the condominium form of ownership, rather than by the construction of new improvements as condominiums, there are no residences in the community which are not condominium units,

nor are any proposed residences planned to be anything other than condominium units. Thus, the "condominium property" of each of the four condominiums includes the Common Properties operated by Petitioner Homeowners' Association.

During the proceedings below, the Division, while arguing that the "function" test should apply, also argued that the "constituency" test could be applied as well, but only to defeat "association" status.

The Decision of the District Court Does Not
Conflict With Any Decision of Another
District Court Or of This Court

This Court lacks jurisdiction because the requisite conflict does not exist. The decision of the Third District neither applies a rule of law to reach a different result in a case which involves substantially the same controlling facts as the prior case, nor announces a rule of law which conflicts with a rule previously announced. Nielsen v. City of Sarasota, 117 So.2d 731 (Fla. 1960).

Lack of a Different Result on the Same Controlling Facts.

There is a crucial factual distinction between the decision in this case and the decisions in Raines v. Palm Beach Leisureville Community Association, Inc., 413 So.2d 30 (Fla. 1982); and Palm Beach Leisureville Community Association, Inc. v. Raines, 398 So.2d 471 (Fla. 4th DCA 1981). Namely, while The Towers^d of Quayside community consists exclusively of condominiums, Palm Beach Leisureville consisted of 502 condominium units and 1,803 improved lots with single-family homes not subject to the condominium form of ownership.

The underlying declarations governing the Palm Beach Leisureville community were separate documents, and the declarations of covenants governing the single-family home properties contained no contemplation of that land being subject to the condominium form of ownership. While the condominium units were condominiums, the declaration of restrictions for the single-family lots did not create a condominium form of ownership for those lots. 413 So.2d at 32. As the Fourth District put it, "the 1803 improved lot owners were never 'condominiumized' as such. ... the improved lot owners held deeds to their property which were free of condominium-type restrictions."

Here, on the other hand, the Common Properties are "condominium property", as defined by §718.103(11), Fla. Stat., as both the Declaration of Condominium and Declaration of Covenants provide that the unit owners' rights therein are appurtenant to and are intended for use in connection with the condominium. Further, the Declaration of Condominium contains the same definition of "condominium property" as §718.103(11), and submits to condominium ownership all other property "intended for use in connection (with)" the actual condominium land and building. The lack of "different result" conflict is highlighted by this Court's refusal in Raines to answer the broad certified question, and by its statement that:

It might well be that other associations similar to this one would be associations as defined by the statute.

413 So.2d at 32.

This Court, in Raines, was confronted with the issue of whether an "association" administering a mixed community comprised of

condominium and single-family homes was an "association" under Chapter 718, Florida Statutes. This Court declined to reach even that broad issue, and merely decided the status of the Palm Beach Leisureville community. Given this crucial distinction in the composition of the two communities, the controlling facts in the two cases are simply not substantially the same.

Further, in Palm Beach Leisureville, as both this Court and the Fourth District noted, no declaration of condominium was filed to specify the powers of the community association. Here, the Declaration of Covenants, containing all of the Homeowners' Association's powers and duties, is expressly incorporated into the Declaration of Condominium, in Article 21.

Consistent Rules of Law.

No different rule of law has been announced in the instant case, because the Raines decisions did not deal with a community which was exclusively condominium. Put quite simply, the issue in the Raines cases was the status of an association which operated a mixed community, while the issue in the instant case was the status of an association which exists in an exclusively condominium community.

Petitioner Division's Brief characterizes the "constituency" test as "novel". However, the Fourth District's opinion in Palm Beach Leisureville is based solely on this test. After examining all of the relevant facts, including the provisions of the governing documents, the Fourth District's holding was based only on the "constituency" test. After finding that "it would be absurd and

patently unfair" to require the single-family home owners to pay attorney's fees under the Condominium Act, "when those owners did not contemplate participation in the condominium way of life", the Fourth District held:

We therefore hold that the improved lot owners did not take title to their property as 'condominium' unit owners, and thus, the appellant Association was not an 'association' within the meaning of Section 718.103(2) and Section 718.303(1).

398 So.2d at 474. This Court merely affirmed that the Palm Beach Leisureville Community Association was not an association within the meaning of §§718.103(2) and 718.303(1), Fla. Stat.

As to the "function" test nonetheless applied by the Third District, its opinion addresses a question not previously dealt with, even by this Court: whether an association which operates condominium property as defined by the statute, which is exclusively for the use of condominium unit owners is an "association" under Chapter 718. Since neither this Court nor the Fourth District has addressed this issue, no different rule of law has been announced.

Even under the "source of powers" test hinted at by Petitioner, no different rule of law has been announced, as the test has not previously been applied. Even if this Court feels it has, Petitioner Homeowners' Association's powers, which derive from the Declaration of Covenants, end up being derived from the Declaration of Condominium, by virtue of the incorporation of the Declaration of Covenants into the Declaration of Condominium. The opinions of this Court and the Fourth District in the Raines cases indicate no such incorporation. Indeed, they indicate a complete lack of intent, as

to the single-family homeowners at issue, to subject them to the condominium form of ownership. The non-existent "source of Powers" test is, therefore, really the constituency test, without the requisite conflict.

The Significance of This Case.

The Third District's decision creates no "problems" for developers. If anything, it stops developers from ostensibly creating condominium communities, but insulating the master association from the reach of the Condominium Act. It creates no problem for unit owners: rather than "diluting the power of the individual unit owner", it restores to the unit owner power he was denied by the developer in drafting the Declaration of Covenants. Indeed, under the controversy which lead to this case, Respondent may now vote for one member, and later a majority, of the Board of Directors of Homeowners' Association, at a much earlier time than provided for in the Declaration of Covenants.

The decision does not cause confusion, especially if a little common sense is used. There have always been two associations with responsibilities for governing the condominium property, and two associations with liens on Respondent SIEGEL's unit. Each association is responsible for separate condominium property. As long as each exercises its powers in accordance with its documents and (now) the Condominium Act, there is no dilution of a unit owner's power. All the District Court's decision does is more clearly delineate the unit owners' and the Homeowners' Association's powers and duties to each other, by holding they must be exercised in accordance with Chapter 718, Florida Statutes.

CONCLUSION

Based on the foregoing, this Court lacks jurisdiction as the requisite conflict does not exist, and the Petition for Review should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true copies of the foregoing Respondent's Answer Brief on Jurisdiction to the Division of Florida Land Sales and Condominiums were furnished by mail this 1st day of October, 1984, to: RICHARD L. ALLEN, ESQ., Rubin, Baum, Levin, Constant, Friedman & Bilzin, Attorneys for Petitioner THE TOWERS OF QUAYSIDE HOMEOWNERS' ASSOCIATION, INC., 1201 Brickell Avenue, Suite 314, Miami, FL 33131; and DAVID M. MALONEY, ESQ., Deputy General Counsel, Department of Business Regulation, 725 South Bronough Street, Tallahassee, FL 32301.

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