IN THE SUPREME COURT OF FLORIDA

DEPARTMENT OF BUSINESS REGULATION,)
DIVISION OF LAND SALES, etc.,)

Appellants,)

vs.)

HERMAN E. SIEGEL,)

Appellant.)

CASE NO. 65,814

JURISDICTIONAL BRIEF OF APPELLANT DEPARTMENT OF BUSINESS REGULATION, DIVISION OF LAND SALES

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STATEMENT OF THE CASE

Herman Siegel, the owner of a condominium unit in the Towers of Quayside No. 2 Condominium, in Dade County, Florida, petitioned the Division of Florida Land Sales and Condominiums for the issuance of a declaratory statement. The petition requested the Division to declare the Towers of Quayside Homeowner's Association to be a condominium association within the meaning of Chapter 718, Florida Statutes, the Condominium Act. If the Homeowner's Association is a condominium association, then the provisions of the Condominium Act governing condominium associations would apply to it, including Section 718.301, which would enable the unit owners to elect no less than one-third of the Homeowner's Association Board. Obtaining this election right was the purpose upon which the Siegel petition was premised.

The Homeowner's Association intervened in the declaratory statement proceedings and opposed the request of Siegel. The Homeowner's Association argued that it was nothing more than a homeowner's association and not a condominium association.

The Division issued a declaratory statement on August 28, 1983. Contrary to Siegel's request, the Division declared that the Condominium Act did not apply to the Homeowner's Association, finding it not to be a condominium association. The declaratory statement was appealed to the Third District Court of Appeal by Siegel, where both the Division and the Homeowner's Association appeared as co-appellees. The Third District held that the Homeowner's Association is a condominium association and consequently reversed the Division's declaratory statement.

On Monday, August 27, 1984, the Division filed its notice to invoke this Court's discretionary jurisdiction. The Homeowner's Association filed a similar notice on Tuesday, August 28, 1984. See Supreme Court Case No. 65,834.

STATEMENT OF THE FACTS

The Towers of Quayside is a community currently composed of luxury condominiums, (Opinion of the Third District, Siegel v. Division of Florida Land Sales and Condominiums et al., Case No. 83-2113, (App.-2.), one of which is the Towers of Quayside No. 2 Condominium. Each of the four condominiums presently in the community is a condominium separate from the others. Three of the condominiums are single high-rise residential towers. The other is comprised of 40 townhouse apartments, which, until 1983 were non-condominium rental apartments. In February of 1983 these 40 townhouses were converted into the fourth condominium in the community. Each of these condominiums is governed by its own condominium association. (App.- 2).

The community is also composed of two undeveloped sites, proposed to serve as condominium sites, but not yet submitted to condominium, (App. 5), see f.n. 4) and certain properties denominated "Common Properties." Each of the four condominiums is governed by separate, individual declarations of condominium, which submit their respective condominiums to the condominium form of ownership. The "Common Properties," are governed by another document apart from the declarations of condominium. (App. - 5.) This document is a Declaratory of Covenants and Restrictions. It confers upon the Homeowner's Association the power to operate the "Common Properties." The Declaration of Convenants and Restrictions does not submit the "Common Properties" to condominium.

The Homeowner's Association's membership, for the time being, consists exclusively of condominium unit owners. (App.- 5 .) The Homeowner's Association operates the common properties, consisting of a health spa, marina, restaurant, and tennis courts, among others. (App.- 2 .)

Each of the four condominiums is composed of exclusively owned units to which there is appurtenant an undivided share in the common elements. The common elements include such property as parking lots, terraces, recreational amenities located in the plaza deck, a swimming pool, balconies and air conditioning equipment. (App. - 2 .) The Common elements of each condominium together with the condominium units comprise the condominium property. Section 718.103(2), F.S. The common elements of each of the four condominiums are operated by a respective condominium association independent of the Homeowner's Association. (App. - 2 .)

Siegel argued before the Court that the Homeowner's Association was, in reality and logically, a condominium association because it was comprised solely of condominium unit owners. This test was referred to in the proceeding as the "constituency" test. The Division and the Homeowner's Association, drawing authority from the Condominium Act's definition of "condominium association," in Section 718.103(2), Florida Statutes, argued that the Homeowner's Association was not a condominium association because it was not "the corporate entity responsible for the operation of a condominium," id., and that this function, as to each of the four condominiums, rested with the respective condominium associations. This test was referred to in the proceeding as the "function" test.

The Court held that under either test, the constituency test or the function test, the Homeowner's Association is a "condominium association," and therefore governed by Section 718.301, Florida Statutes, and the rights therein bestowed upon unit owners. In the course of the Opinion the Court found that the Homeowner's Association, although the four condominium associations are the corporate entities primarily responsible for the operations of their respective condominiums, to perform certain functions with respect to condominium property. These functions will be elaborated upon in the argument section of this brief.

I.

A. Conflict with this Court's Decision in Raines.

The decision of the Third District conflicts with both the decisions of the Fourth District in Palm Beach Leisureville Community Association, Inc. v. Raines, 398 So.2d 471 (Fla. 4th DCA 1981) and the decision of this Court in Raines v. Palm Beach Leisureville Community Association, Inc., 413 So.2d 32 (Fla. 1982), in which this Court approved of the Fourth District's Raines decision. Because any conflict with a decision of this Court, a court superior to the district courts of appeal, is more serious than conflict between sister district courts of appeal, this brief will address the conflict with this Court's decision first.

The conflict with this Court's Raines decision is obvious and occurs directly with several interrelated aspects of the two cases. First, in Raines, just as in this case, the issue was whether an association with powers over property related to more than one condominium, in a multi-condominium community, each of which already had its own individual condominium association, is a condominium association. This Court court said "no;" the Third District "yes." Second, this Court relied exclusively on the "function" test, the test set out in the Condominium Act, while the Third District decided the issue on both the Condominium Act's test, and the "constituency" test, the novel test advanced by Siegel. Third, this Court in its reliance on the function test, rejected the constiutuency test while the Third District endorsed and applied the constituency test.

The difference between the facts in this case and the facts in this Court's Raines decision, is that in this case the Homeowner's Association's membership is currently composed solely of condominium unit owners, when in the past it was composed additionally of non-unit owner renters, and has the potential in the future to be composed of other members who will be non-unit owners. In contrast, in Raines, the community association was composed, at the time of the court decision, of both condominium unit owners and the owners of single family lots. This difference is used by Siegel to support the constituency test he advances for determining condominium association status. But, it is a difference with no materiality.

This Court's Raines decision did not turn on the constituency of the community association. Instead, the decision was based on the definition of "condominium association" as it appears in the Condominium Act:

> [4] The respondent association derives its powers from its articles of incorporation and from the declarations of restrictions governing both the condominium apartments and the single-famile lots. Although the association has broad powers, it is not "the corporate entity responsible for the operation of a condominium." §718.103(2). The individual condominium associations fit within this definition, but the respondent association does not.
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> Raines, 413 So.2d at 32.

The Third District declared Raines to be distinguishable on its facts. In doing so the court stated, "The Supreme Court's affirmance [of the Fourth District Raines decision,] pivoted on the fact that the community association served both the single family homes and the condominium buildings, and the single family homes were not subject to condominium ownership." (App.- 7.)

As the above quote from this Court's Raines decision demonstrates however, the decision did not pivot on those facts. The decision pivoted on the fact that the individual condominium associations were "the corporate entit[ies] responsible for the operation of [the respective] condominiums." Id. [e.s.] The fact that the community association had other obligations did not make it any more or less the corporate entity responsible for operation of the condominiums.

It is just the same in this case. The corporate entity responsible for the operation of each of the respective condominiums is the individual condominium association. The homeowner's association is not the corporate entity with the responsibility for operating those individual condominiums. Instead, the homeowner's association operates the common properties. The fact that its membership is exclusively condominium unit owners (for the moment), does nothing to confer upon it the status of a condominium association any more than does a local Lion's Club or Rotary Club become a condominium association if all its members are condominium unit owners.

The Homeowner's Association operational responsibilities touch upon the condominium property. But so did the community association's responsibilities in Raines as is shown by a close look at the Fourth District's Raines decision, in Part I. B. of this Argument.

B. Conflict with the Fourth District's Decision in Raines.

The Fourth District's decision in Raines was approved by this Court in its Raines decision. Raines, 413 So.2d at 32. The similarities between Raines and this case, which clearly demonstrate the conflict, become even more

apparent when the Fourth District decision is examined because the Fourth District decision is more detailed than the Supreme Court's.

The Third District in this case placed great emphasis on the three minor functions of the Homeowner's Association which touch condominium property. The Association provides security for both the common and comdominium properties, i.e., community-wide security; it has the power to require community-wide architectural conformity; and it may make repairs to condominium property if the condominium association fails to do so. (App. 2-3.)

In Raines, the community association also had some power over the condominium property:

> [The community association] has the primary responsibility of insuring visual uniformity throughout the community and maintaining all of the exterior areas of the homes and condominium units. Significantly, it also has the power to approve or disapprove of all transfers of title.
>
> Raines, 4th District, 398 So.2d at 473.

But the Fourth District's decision, just as this Court's decision, turned on the functions of the respective condominium associations when compared with the community association:

> [The community association] is organized for the purpose of performing certain functions for the benefit of a planned community. It is not responsible for the operation of any of the 21 condominiums. With respect to the condominium buildings, its responsibility is limited to the exterior maintenance, and unlike a condominium association, it does not have the irrevocable right of access to each unit for repair or protection of the common elements, §718.111(5); it does not have the power to lease the common elements, or to maintain or make any repairs to the common elements beyond the exterior surfaces of the buildings, §718.111(6); it does not have the power to purchase units in any condominium and hold, convey, lease or mortgage them, §718.111(8);

> it is not required to maintain any insurance to protect the common elements of any of the condominiums, §718.111(9); and it does not have the power to purchase the recreation lease to which all residents of the project are bound. §718.111(12). All of these powers and duties are exercised by the condominium associations, not the appellant. [e.s.]
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> 398 So.2d at 474.

The conflict could not be clearer. The Third District did not find the Homeowner's Association to have the powers of a condominium association, listed above, other than the power to repair condominium property. But that power is only when the individual condominium associations fail to meet their responsibility to repair. Just as these enumerated powers were exercised in Raines by the condominium associations and not by the community association so it is in this case. These powers are exercised by the individual condominium associations not by the Homeowner's Association, other than the "back-up" repair power. The Third District decision conflicts with Raines.

II. THE SIGNIFICANCE OF THIS CASE

If this Court determines conflict exists, as the Division is confident it will, the Division believes the Court should exercise its jurisdiction because of the significance of the case.

Other than this decision and the two Raines decisions, there is no Florida case law on the issue. The Third District recognized this, "Concededly we are exploring an area where the law is in early stages of development and without clearly defined landmarks." (App.-4.)

Unfortunately, rather than serve as a beacon illuminating a developing area of the law, the Third District's decision will only cause confusion. The Condominium Act implies that each condominium will have only one association: "The corporate entity responsible for the operation of a condominium." [e.s.] Section 718.103(2), F.S. The Third District holds that there may be more than one, in this case, according to the Third District, each of the four Towers of Quayside Condominiums has two condominium associations, an individual association named as the condominium association and the Homeowner's Association.

The holding poses problems for developers and unit owners, alike. How is a developer to structure a multi-condominium community where some property will serve more than one condominium and the developer desires to protect these properties from the destruction of condominium squabbles and conflicts? If, as the Third District holds, there can be more than one condominium association per condominium, then the potential exists for diluting the power of the individual unit owner. Without one association upon which a unit owner can focus his attention, the unit owner may not make the effort to have his voice heard in decisions affecting his daily life.

These may be issues appropriate for address by the legislature. But, this case deserves the attention of this Court, so that the legislature, the developers of condominiums in Florida, and Florida condominium unit owners will know what the current state of law is with respect to what is, and what is not, a condominium association.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by U. S. Mail to the following this 6th day of September, 1984.

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