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IN THE SUPREME COURT OF FLORIDA

CASE NO. _____

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.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL, THIRD DISTRICT OF FLORIDA

JURISDICTIONAL BRIEF OF PETITIONER THE TOWERS OF QUAYSIDE HOMEOWNERS' ASSOCIATION, INC.

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I. Introduction

Petitioner, THE TOWERS OF QUAYSIDE HOMEOWNERS' ASSOCIATION, INC., ("Association") submits that the decision of the District Court of Appeal, Third District of Florida ("Third D.C.A.") (Appendix at 1-4) is in direct conflict with this Court's decision on the same question of law in Raines v. Palm Beach Leisureville Community Assoc., Inc., 413 So.2d 30 (Fla. 1982)(Appendix at 5-7). Accordingly, Association seeks to invoke the Court's jurisdiction pursuant to Fla.R.App.P. 9.030(a)(2)(A)(iv) and Article V, §3(b)(3), Fla. Const.

II. Statement of the Case

Respondent, HERMAN E. SIEGEL, ("Siegel") is a unit owner in The Towers of Quayside No. 2 Condominium ("No. 2 Condominium") located in Dade County, Florida and a member of Association. Siegel initiated this action in April, 1983 by filing a Petition for Declaratory Statement with the Department of Business Regulation, Division of Florida Land Sales and Condominiums ("Division") concerning the applicability of the Florida Condominium Act, §718.101, et seq., Fla. Stat. (1983) ("Act") to the conduct of the affairs of Association. The Division issued its Declaratory Statement concluding that Association is not the entity responsible for the operation of a condominium, is not a condominium association within the meaning of the Act and, therefore, is not governed by the Act.

Siegel prosecuted an appeal to the Third D.C.A. That court, in an opinion by Judge Ferguson filed June 19, 1984, reversed the Declaratory Statement and held that Association is a condominium association under the Act. A Motion for Rehearing by Association

and Division was denied on July 30, 1984. On August 28, 1984, Association filed its Notice to Invoke Discretionary Jurisdiction.

III. Statement of the Facts

The Towers of Quayside ("Quayside") is a community of three residential towers, 40 townhouse apartment units, two undeveloped building sites and various community-wide recreational facilities. Each tower is operated as a separate condominium; each has its own separate condominium association. The townhouses were operated from 1978 to 1983 as rentals and in February, 1983, two months before Siegel commenced this proceeding, they were converted into a separate condominium. No. 2 Condominium, in which Siegel resides, is one of the condominium towers within Quayside.

Each condominium has common elements including parking lots, recreational amenities, a swimming pool and common building components which are operated and maintained by an individual condominium association. Each condominium association has the responsibility for operation of its respective condominium, as well as all the powers and duties set forth in the Act and the association's bylaws and articles of incorporation: the irrevocable right of access to units for repairs and maintenance and the power to (1) make and collect assessments and other charges against members of the condominium association, (2) contract for the maintenance and management of the condominium property, (3) adopt and amend rules and regulations governing the condominium's operation and use and (4) lease, maintain, repair, and replace the condominium's common elements.

Association, on the other hand, was created to supervise the operation of the entire Quayside community and to operate certain

community-wide facilities such as the health spa, marina, tennis courts and restaurant. Association does perform certain limited functions with respect to individual condominiums. It has the power and duty to maintain security services, to require architectural conformity and, upon the failure of the individual condominium associations, to correct a condition of disrepair which has created a dangerous, unsafe or unattractive condition.

IV. Raines v. Palm Beach Leisureville Community Association, Inc.

In Raines, supra, this Court was asked to answer a certified question from the District Court of Appeal, Fourth District, concerning the applicability of the Act to a community association which exercises administrative and management powers and duties over a residential development. Although this Court declined to answer the question as framed, it nonetheless deposed of the case by affirming the lower court's determination that the community association was not an association within the meaning of the Act. In Raines, like here, the community at issue was comprised of separate condominium buildings with separate condominium associations formed under individual declarations of condominium. The association at issue in Raines, like here, had broad powers and duties to fix and collect maintenance assessments for community wide services. Moreover, like Association, the association in Raines had the responsibility of ensuring visual and architectural uniformity throughout the community. Palm Beach Leisureville Community Assoc., Inc. v. Raines, 398 So.2d 471, 473 (Fla. 4th DCA 1981) (Appendix at 8-12).

This Court made clear in Raines that even though an association has broad powers, it is not governed by the Act

unless it is "the corporate entity responsible for the operation of a condominium." 413 So.2d at 32. The Court concluded that the individual condominium associations fit within this definition but that the community-wide association did not.

The Court of Appeal's opinion in Raines, which was specifically approved by the Supreme Court (413 So.2d at 32), applied a three pronged test to determine whether an association is a "condominium association" as that term is used in the Act: (1) what is the source of the association's powers? (2) what functions does the association perform? and (3) was there an intent to subject the property administered by the association to the condominium form of ownership?

Source of Powers. Both the Court of Appeal and the Supreme Court in Raines focused their analysis on whether the particular association under scrutiny derived its powers from a declaration of condominium and the Act or from another independent source. Both courts thought it was significant that the association at issue derived its powers from its articles of incorporation and a declaration of restrictions and not from a declaration of condominium. The instant case is similar. Association derives its power from its articles of incorporation and from the Declaration of Covenants, Restrictions and Easements ("Declaration of Covenants") and not from any condominium declaration.

Association Functions. In Raines, the Court of Appeal examined whether the association was responsible for the operation of a condominium or rather served to perform certain community-wide services encompassing a larger community. In making its analysis, it noted that the association performed

some functions which might be deemed to be condominium functions: exterior maintenance of condominium buildings to ensure visual uniformity, assessment of individual owners for community expenses and approval or disapproval of transfers of title for all units in the community. The Court, however, felt that it was more significant that the association lacked authority under its governing documents to perform certain functions that were particularly functions of a condominium association. The association had no right of access to each unit for repair or protection of the condominium's common elements as provided in §718.111(5), no power to lease the common elements or to repair the common elements indicated in §718.111(6) (other than the exteriors of the buildings), no power to purchase units and to hold, lease convey and mortgage units described in §718.111(8) and no power to provide insurance on the common elements of the condominiums as contemplated under §718.111(9). All of these functions were performed by the individual condominium associations and not by the community-wide association. Similarly, in the case sub judice, although Association does perform certain functions which may be deemed to be condominium functions (ensuring visual uniformity as in Raines, furnishing security services and correcting dangerous or unsightly conditions in any building after the failure of the condominium association to take appropriate action), it is not the association responsible for the operation of any condominium. This function is performed by the existing condominium associations at Quayside. As in Raines, Association has no right of access to each unit for repair or protection of the common

elements, no power to lease the condominium's common elements or to repair the common elements other than to ensure visual uniformity, no power to purchase units or to hold, convey, lease or mortgage units and no power to insure the condominium's common elements. These functions are performed by the association which was created to be the condominium association.

Intent. The Court of Appeal in Raines also focused on the intent of the developer in preparing the declaration of covenants to determine whether any intent existed to subject the property covered by the declaration of covenants to the condominium form of ownership. This is appropriate since the existence of a condominium association subsumes the fact that the property to be administered by the association will be condominium property. The Court of Appeal found there was no intent to subject the property administered by the community association to condominium ownership. In the instant case, a similar rationale is present. There is no intent in the Declaration of Covenants to subject the property administered by Association to condominium ownership. While the residents of the individual condominiums have use rights to such property, there is no intent to subject the underlying property to condominium ownership.

V. The Opinion of the Third D.C.A.

In the instant case, the opinion below acknowledges that the Court was exploring an area "where the law is in early stages of development and without clearly defined landmarks." (Appendix at 2). Nonetheless, the Court appears to have chosen to ignore the landmarks already established by this Court. Although this Court held in Raines that the litmus test for determining whether an

association is governed by the Act is whether it is "the corporate entity responsible for the operation of a condominium," Judge Ferguson's opinion sanctioned a so-called "constituency test" invented by Siegel's counsel without support in prior case law or the Act. (Appendix at 2-3). The Third D.C.A. reasoned that since Quayside currently consists solely of condominium units[1], Association must be governed by the Act. This approach clearly disregards the statutory definition of a condominium association under §718.103(2), Fla. Stat. and followed by this Court in Raines.

Although the community in Raines consisted of both condominium units and single family lots, this fact was not determinative to the three pronged test approved by the Supreme Court and did not create a "constituency test." Moreover, the existence of single family lots in Raines does not distinguish it from the case at bar.

Even if the presence of residential units other than condominiums is somehow relevant in determining the applicability of the Act to a given entity, Quayside, like the community in Raines, consisted of both condominium units and non-condominium dwellings at all material times. At the time Association and No.

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1 Quayside is not limited to condominium units:

> "dwelling unit" shall mean and refer to a constructed dwelling which is designed and intended for use and occupancy as a residence by a single family. Said term includes, without limitation, a Unit in a Condominium . . . . Declaration of Covenants, Article I, Section 14 (emphasis added).

Although condominiums are contemplated for the two undeveloped building sites, market conditions existing at the time of development might dictate other residential development.

2 Condominium were established and the Declaration of Covenants recorded, Quayside consisted of both condominium units and these rental townhouses. The subsequent conversion of the townhouse units to a condominium did not alter the articles of incorporation of Association, the Declaration of Covenants of Association or the the declaration of condominium creating No. 2 Condominium.

In addition to applying a constituency test, the Third D.C.A. also purported to apply the functionality test expounded in Raines. (Appendix at 3). The Court found that the three functions performed by Association with respect to condominium property (security, architectural conformity and correction of condominium disrepair) rendered it a condominium association under the Act. In reaching this conclusion, the Court ignored the other two prongs of the test set forth by the Court of Appeal in Raines and then approved by the Supreme Court: the source of the association's powers and the intent of the developer in preparing the documents establishing the Association. Moreover, of the three functions relied upon by the Court, one, ensuring visual uniformity or architectural conformity, has been explicitly rejected by both the Supreme Court and the Court of Appeal in Raines as determinative. In addition, the Supreme Court found that other factors more significant than those found in this case (for example the power to approve all transfers of title) did not render the community association a condominium association. The focal point of the Supreme Court's examination was where it should be: is the entity under examination "the corporate entity" responsible for the operation of a condominium? This question was answered in the negative in Raines and the same analysis requires

a similar negative answer in the instant case. Association is not the corporate entity responsible for the operation of a condominium; the individual condominium associations perform this function.

VI. Jurisdiction Should be Invoked by this Court

If left intact, the decision rendered by the Third D.C.A. will create much confusion concerning governance of condominiums in Florida. Although the Act permits a single association to administer more than one condominium (§718.111(1), Fla. Stat.), it does not permit more than one condominium association to operate a single condominium. §718.111(1), Fla. Stat. provides:

> The operation of the condominium shall be by the association, which must be a corporation for profit or a corporation not for profit.... (emphasis added)

Section 718.111(2), Fla. Stat. (1983) empowers "the [condominium] association [to] institute, maintain, settle or appeal actions or hearings in its name on behalf of all unit owners;" §718.111(5) grants "the [condominium] association . . . [an] irrevocable right to access to each unit . . . for the maintenance, repair or replacement of any common elements or for making repairs necessary to prevent damage to the common elements or to another unit or units;" §718.118(8) enables "the [condominium] association . . . to lease, maintain, repair and replace the common elements;" §718.111(8) affords "the [condominium] association . . . the power to purchase units in the condominium;" §718.111(10) empowers "the [condominium] association to modify or move any easement for ingress and egress;" and §718.113 provides that "maintenance of the common elements is the responsibility of the [condominium] association."

(emphasis added). Are these obligations and responsibilities those of the individual condominium associations or are they now, after the decision at hand, responsibilities and obligations of the Association which has been denominated a condominium association by the Third D.C.A.? If, as the Third D.C.A. has held, Association is a condominium association, is it responsible under the above-cited provisions of the Act for management of the property previously administered by the individual condominium associations? The result is far from clear under the Act since it speaks only of a single association.

Rather than providing landmarks for future action, which the Third D.C.A. felt were lacking, the Court has created a hodge podge of the Act. Practitioners can only act at their peril in advising of the consequences of this decision which, at a minimum, will require future amplification and definition.

VII. CONCLUSION

WHEREFORE, Petitioner, THE TOWERS OF QUAYSIDE HOMEOWNERS' ASSOCIATION, INC., prays that the Court invoke its jurisdiction to review the decision below since it expressly and directly conflicts with the Court's ruling in Raines v. Palm Beach Leisureville Community Assoc., Inc., 413 So.2d 30 (Fla. 1982), is repugnant to the Florida Condominium Act and creates confusion in the law.

Respectfully submitted,

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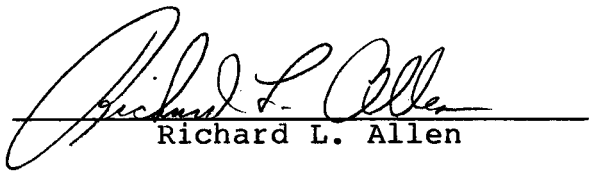
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Jurisdictional Brief was mailed this 5th day of September, 1984 to MARK B. SCHORR, ESQ., attorney for Herman E. Siegel, 6520 North Andrews Avenue, P. O. Box 9057, Ft. Lauderdale, Florida 33310-9057 and to DAVID M. MALONEY, ESQ., Deputy General Counsel, Department of Business Regulation, 725 South Bronough Street, Tallahassee, Florida 32301.



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