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IN THE SUPREME COURT OF FLORIDA

CASE NO. **71,594**

CONDOMINIUM ASSOCIATION OF PLAZA TOWERS NORTH, INC.,

Appellant/Petitioner,

v.

PLAZA RECREATION DEVELOPMENT CORP., and SECURITY MANAGEMENT CORP.,

Appellees/Respondents.

PETITIONER'S JURISDICTIONAL BRIEF

On Discretionary Review from the
Third District Court of Appeal
Case No. **86-3097**

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SUMMARY OF ARGUMENT

The decision of the District Court announces a rule of law directly and expressly conflicting with the holdings in Halpern v. Retirement Builders. Inc., 507 So.2d 622 (Fla. 4th DCA), pet. for rev. denied, ____ So.2d ____ (No. 70,886, Nov. 2, 1987), Anaora Enterprises, Inc. v. Cole, 439 So.2d 832 (Fla. 1983), cert. denied, 466 U.S. 927, 104 S.Ct. 1710, 80 L.Ed.2d 183 (1984), and Cove Club Investors. Ltd. v. Sandalfoot South One, Inc., 438 So.2d 354 (Fla. 1983), on the issue of whether a lessor under a condominium recreation lease has agreed to be bound by future amendments to the Condominium Act.

The decision of the District Court, on substantially the same controlling facts as Halpern, supra, applies Angora, supra and Cove Club, supra, to produce different results, in the application of the "automatic amendment" doctrine.

STATEMENT OF THE CASE AND FACTS

This is a condominium recreation lease case, in which the Lessor (Respondent PLAZA RECREATION DEVELOPMENT CORP.) sued the Lessee (Petitioner CONDOMINIUM ASSOCIATION OF PLAZA TOWERS NORTH, INC.), for unpaid escalated rents.

Among the Lessee's defense was the one germane to this petition: that the escalation clause in the lease is void and unenforceable, pursuant to §718.401(8), Fla. Stat., formerly $711.231, Fla. Stat. (1975).

The other Respondent, SECURITY MANAGEMENT CORP., is the successor by merger of the Lessor (as well as of the developer/declarant, Plaza Building Corp.).

The subject Declaration of Condominium (A.1) created the condominium pursuant to the Condominium Act, and incorporated the provisions of the Act by reference. Article 1.6 of the Declaration defines "Condominium Act" as "the Condominium Act of the State of Florida (F.S. 711 Et Seq.), as the same may be amended from time to time".

The subject Long-Term Lease (A.2) is attached to the Declaration as Exhibit No. 4, and made a part thereof, "just as though said Lease were fully set forth herein".

Both the Declaration and Lease recite that the Association acquired the leasehold interest "pursuant to Florida Statute 711.121". (Declaration, p.22, Art. XVII; Lease, p.17, Art. XXIII).

The Lease contains approximately 33 references to the Declaration "to which this Lease is attached as Exhibit No. 4", includ-

ing, but not limited to:

a. an incorporation of all of the terms and provisions in the Declaration relative to the Lease, "just as though they were set forth in this Long-Term Lease". (Lease, Art. XXXI, p.24);

b. incorporation by reference of all of the definitions contained in Article I of the Declaration (Lease, Art. XXIX.B, p.22);

c. reciting that all of the provisions of the Declaration relative to the Lease "are hereby declared to be an integral part of the consideration given by the Lessee to the Lessor for this Lease". (Lease, Art. XXVI, pp.20-21);

d. a reference at one point to the "Declaration of Condominium to which this Long-Term Lease is attached as Exhibit No. 4 and made a part hereof" (Lease, Art. XXIII, p.17) (emphasis added).

The Lessor, however, did not physically sign the Declaration of Condominium.

ARGUMENT

THE DECISION OF THE DISTRICT COURT EXPRESSLY AND DIRECTLY CONFLICTS WITH:

A. THE DECISION OF THE FOURTH DISTRICT IN HALPERN V. RETIREMENT BUILDERS, INC.;

B. THE DECISIONS OF THIS COURT IN COLE V. ANGORA ENTERPRISES, INC., AND COVE CLUB INVESTORS. LTD. V. SANDALFOOT SOUTH ONE, INC.

Statement of Jurisdiction

This Court has jurisdiction under Article V, §3(b)(3) of the Florida Constitution, as the decision of the District Court directly and expressly conflicts with a decision of another district court of appeal, Halpern v. Retirement Builders. Inc., 507 So.2d 622 (Fla. 4th DCA), pet. fox rev. denied, ____ So.2d ____ (No. 70,886, Nov. 2, 1987), and with the decisions of this Court in Angora Enterprises, Inc. v. Cole, 439 So.2d 832 (Fla. 1983), cert. denied, 466 U.S. 927, 104 S.Ct. 1710, 80 L.Ed.2d 183 (1984) and Cove Club Investors, Ltd. v. Sandalfoot South One, Inc., 438 S0.26 354 (Fla. 1983).

The "Automatic Amendment" Doctrine

The questions of law determined by the District Court, and in the conflicting cases, all deal with application of the "automatic amendment" doctrine; i.e., when condominium documents incorporate by reference the Condominium Act "as the same may be amended from time to time", an amendment to the Act will operate as an amendment to the documents, for the parties have agreed to be bound by any

such future legislation. Angora, supra; Halpern, supra; Kosow v. Condominium Association of Lakeside Village, Inc., 512 So.2d 349 (Fla. 4th DCA 1987).

When the automatic amendment doctrine applies, no constitutional issue concerning the impairment of contract rights by subsequent legislation will arise, for the parties have consented to incorporation of future legislation into their contract. Compare Anuora, supra and KOSOW, supra, with Fleeman v. Case, 342 So.2d 815 (Fla. 1976).

The Decisions in the Conflictina Cases

In Anuora, supra, this Court held that where the developer and lessor were the same entity, the declaration incorporated the lease by reference, and the lease referred back to the declaration, the declaration and lease were not separate documents, each standing alone, and the lessor had agreed to be bound by the language in the declaration incorporating future legislation.

In Cove Club, supra, argued and decided the same days as Anuora, this Court reached a different result, for not only had the lessor in Cove Club not actually signed the declaration, "(b)ut nowhere does this petitioner agree to be bound by the declaration or by the Condominium Act. There is no way to tie up this petitioner with the declaration and the language contained therein". Cove Club, supra, at 355.

In Halpern, Supra, the Fourth District dealt with a management agreement which was in part also a recreation lease. The declaration incorporated the Condominium Act "as the same may from time to time

be amended", and incorporated the management agreement/lease by reference into the declaration. As in Cove Club, the declarant and the manager/lessor were different entities. Nonetheless, the Court held the manager had agreed to be bound by future amendments to the Act, by virtue of general language in the lease incorporating by reference the declaration. The fact that the management company was a separate entity from the declarant was "of no significance". **507** So.2d at **625.**

In this case, however, the District Court held the general incorporation by reference of a document **did not** constitute an agreement to be bound by the terms of the incorporated document. The District Court, instead, held that in the absence of a specific "clearly expressed" provision in the lease which expressly adopts the specific provision of the Declaration incorporating the Act, or in the absence of "clearly expressed lease terms which expressly adopt the Condominium Act, as amended", the Lessor would not be found to be have agreed to be bound by amendments to the Act. (A.1).

Therefore, the holding of the District Court announces **a** rule of law which is directly and expressly in conflict with Halpern, Angora, and Cove Club. Accordingly, this Court has jurisdiction to resolve the conflict. Nielsen V. City of Sarasota, **117** So.2d **731, 734** (Fla. **1960).**

In the instant case, the District Court cited as authority for its holding Cove Club, supra, which was also expressly considered and applied by the Fourth District in deciding Halpern, supra.

In both this case and Halpern, the declarant and the manager/lessor were separate entities, and the lessor had not physically

signed the declaration of condominium. In both cases, the lease incorporated the declaration in toto, in general terms. Yet, on substantially the same controlling facts, the two district courts applied Cove Club to produce different results. On this basis also, therefore, this Court has jurisdiction. Nielsen, supra.

The need for this Court to resolve this embarrassing conflict of decisions is highlighted by the fact that this case, involving a lease of real property in Broward County (in the jurisdiction of the Fourth District) was tried in **Dade** County (in the Third District's jurisdiction), solely because the Lessor had exercised its right under Article III.A of the Lease to specify Dade County as the place for payment of the rent. This allowed the Lessor to forum shop for venue in Dade County. Regardless of the motives behind the Lessor's choice of venue, Petitioner and its unit owners are as a result subject to the continued payment of escalated rents under an escalation clause of the kind declared contrary to the public policy of this state solely because of the Lessor's choice of venue.

This case is also far from the only one of its kind pending in the Florida courts. An appeal raising the same issue as the instant case is also, at last report, still pending in the Third District. Association of Golden Glades Condominiurn Club, Inc. v. Security Manaaement Corp., Case No. 87-539.

Allowing the decision of the District Court to stand, in conflict with the various cited conflicting decisions of this Court and the Fourth District, creates a real and embarrassing conflict, which this Court must resolve.

CONCLUSION

Based on the foregoing, Petitioner urges this Court to exercise its discretion and accept jurisdiction, and review the entire case on its merits.

Respectfully submitted,

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By 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true copies of Petitioner's Jurisdictional Brief and attached Appendix were furnished by mail to: IRA M. ELEGANT, ESQ., Buchbinder & Elegant, P.A., 46 S.W. First Street, Fourth Floor, Miami, FL 33130; STEPHEN CYPEN, ESQ., Cypen, Cypen & Dribin, Post Office Box 402099, Miami Beach, FL 33140; and, GARY L. KRULEWITZ, ESQ., 1250 East Hallandale Beach Boulevard, Suite 508, Hallandale, FL 33009, this 18th day of December, 1987.

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