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IN THE SUPREME COURT OF FLORIDA

CASE NO. 71,594

CONDOMINIUM ASSOCIATION OF
PLAZA TOWERS NORTH, INC.,

Petitioner,

v.

PLAZA RECREATION DEVELOPMENT CORP.
and SECURITY MANAGEMENT CORP.,

Respondents.

FILED
SID J. WHITE
JAN 7 1988
CLERK, SUPREME COURT
By ______ Deputy Clerk

RESPONDENTS' BRIEF IN OPPOSITION ON JURISDICTION

(Discretionary Review)

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STATEMENT OF THE CASE AND FACTS

Petitioner, Condominium Association of Plaza Towers North, Inc. 1/ seeks review of the Third District Court of Appeal's decision in Condominium Association of Plaza Towers North, Inc. v. Plaza Recreation Development Corp. and Security Management Corp., 514 So. 2d 381 (Fla. 3d DCA 1987). The opinion 2/ reflects the following facts:

The lessor brought an action to collect unpaid escalated rent pursuant to a long term recreation lease which was entered into prior to the effective date of Sec. 711.231 Fla. Stat. (1975) [now Sec. 718.401(8), Fla. Stat. (1985)] [RA 1]. The lease contained a rent escalation clause which is based upon

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1/ The Petitioner was the Defendant in the Circuit Court and the Appellant below. The Respondents were the Plaintiffs in the Circuit Court and the Appellees below. The parties will be referred to interchangeably by trial and appellate court standings, descriptively or by proper names wherever clarity is best served. All emphasis is supplied, unless otherwise indicated. The symbol "RA" will be used to designate the Respondents' Appendix, The symbol "PA" will be used to designate the Petitioner's Appendix.

2/ Petitioner's arguments in its Jurisdictional Brief improperly refer to "facts" which are not before this Court as they are not stated in the Opinion of the District Court of Appeal, Third District. Conflict "must appear within the four corners of the majority decision" Reeves v. State, 485 So. 2d 829, 830 (Fla. 1986). Petitioner's suggestion of forum shopping is entirely inappropriate and intentionally set forth to improperly influence this Court. The original action was filed in Dade County, Florida where rent was to be paid under the lease. The Association questioned venue at the outset at the trial level, but never raised it on appeal below at any time.

increases in the consumer price index. The declaration of condominium expressly defines the Condominium Act, "as it may be amended from time to time". It is undisputed, however, that the lessor under the recreation lease did not sign the declaration and was not bound thereby [RA 2]. The lease contains no language incorporating the Condominium Act, as amended. Although there were references in the lease to the declaration, there was no provision in the lease which adopted the declaration [RA 23. There were, however, specific provisions in the lease which would have to be voided in order to imply that the lease had incorporated the declaration and the Condominium Act, "as amended from time to time" [RA 3].

If the Court implied that the lease expressly adopted the declaration of condominium in its entirety, specific rental provisions in the lease would have been meaningless. Thus, the Court refused to imply such an interpretation. Therefore, the statute prohibiting the enforcement of rental escalation clauses could not be retroactively applied to this lease. On that basis, the District Court of Appeal, Third District affirmed an Amended Final Judgment which enforced the rent escalation clause contained in the lease.

SUMMARY OF ARGUMENT

There is no basis for discretionary review of the decision below. As in Angora Enterprises, Inc. v. Cole, 439 So.2d 832 (Fla. 19831, cert. denied, 104 S.Ct 1710 (1984), Cove Club Investors v. Sandalfoot South One, Inc., 438 So.2d 354 (Fla. 1983) and Halpern v. Retirement Builders, Inc., 507 So.2d 622 (Fla. 4th DCA 1987), rev. denied, No. 78,886 (Fla. Nov. 2, 19871, the court below considered whether the Respondent/lessor (which was a separate and distinct entity from the developer/declarer) and the Petitioner/lessee had agreed by contract to be bound by future amendments to the Condominium Act. The court applied the same rule of law and on substantially different facts found that here there was no agreement to be bound by the declaration or the Condominium Act, "as amended from time to time." The court below refused to imply such an agreement because "the result of such an interpretation is to void specific rental provisions in the Lease" [RA 3]. Moreover, the court stated:

> ... The parties by contract did not agree to be bound by future amendments to the Condominium Act, including Section 711.231, (Florida Statutes (1975) [RA 3].

ARGUMENT

For the reasons which follow, it is respectfully submitted that the decision below is correct. It is not in direct and express conflict with the decisions of the Supreme Court and the other District Courts of Appeal. Since this is the case, it is respectfully submitted that certiorari should be denied.

A. NO BASIS FOR REVIEW.

There is no express and direct conflict with the decisions cited by Petitioner on the samequestion of law, as required by Art. V, Sec. 3(b)(3), Fla. Const. and Fla. R. App. P. 9.030(a)(2)(A)(iv).

Conflict exists when two decisions are "wholly irreconcilable" or where decisions collide so as to "create inconsistency of conflict". Williams v. Duggan, 153 So. 2d 726 (Fla. 1963); Kincaid v. World Insurance Company, 157 So. 2d 517 (Fla. 1963). "[C]onflict must be such that if the latter decision and the earlier decision were rendered by the same Court, the former would have the effect of overruling the latter." Kyle v. Kyle, 139 So.2d 885, 887 (Fla. 1962).

Jurisdiction cannot be invoked because the Supreme Court disagrees with the District Court of Appeal's decision or because the Supreme Court would have made a different factual determination if it had been the trier of fact. Mancini v.

State, 312 So. 2d 732 (Fla. 1975). Conflict "...must appear within the four corners of the majority decision..." Peeves v. State, 485 So. 2d 829, 830 (Fla. 1986). Conflict must be express and direct, not inherent or implied. Dept. of Health v. Nat. Adoption Counseling, 498 So. 2d 888 (Fla. 1986).

B. THE CASES RELIED UPON BY PETITIONER ARE IN HARMONY WITH THE ONE BELOW.

In the instant case, the developer and the lessor were separate entities. It is undisputed that the lessor did not sign the declaration [RA 2]. In the declaration the developer, Plaza Building Corp., submitted certain real property to condominium ownership "...pursuant to the Condominium Act of the State of Florida, F.S. 711 et seq..." [PA Item No, 2]. However, the lessor, which was a separate and distinct entity from the declarer (the developer), never agreed to be bound by the declaration [RA 2]. In fact, specific language in the lease negates any agreement to be bound by future amendments to the Condominium Act [RA 3].

This case is in complete harmony with those cases relied upon by the Petitioner.[3/] The Courts applied the same rule of

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[3/] Although Petitioner cites Kosow v. Condominium Association of Lakeside Village, Inc., 512 So.2d 349 (Fla. 4th DCA 1987), in its brief, Petitioner does not suggest that this opinion is in conflict with Kosoy. Plainly, it is not. Moreover, Petitioner's oblique reference to Association of Golden Glades Condominium Club, Inc. v. Security Management Corp., (Fla. 3d DCA Case No. 87-539), pending but not yet decided, is somewhat puzzling. It is not even a "decision" which could conflict. It cannot be considered on the question of conflict jurisdiction.

law to very different facts which naturally produced different results. In Angora Enterprises, Inc. v. Cole, 439 So. 2d 832 (Fla. 1983), cert. denied 104 S. Ct. 1710 (1984), the developer who executed the declaration of condominium was also the lessor who executed the lease agreement. Here, different entities executed the lease and the declaration [RA 2]. In Angora, the developer/lessor (the same entity) specifically agreed to incorporate the Condominium Act," as it may be amended from time to time" in the declaration of condominium:

> ANGORA ENTERPRISES, INC. ... hereby states and declares that said realty, together with improvements thereon, is submitted to condominium ownership pursuant to the Condominium Act of the State of Florida, F.S. 711, et. seq. (hereinafter referred to as the "Condominium Act"), and the provisions of said Act are hereby incorporated by reference and included herein thereby,...
> Id. at 834.

Here, the lease contained various provisions which negated any agreement to incorporate the Condominium Act, "as it may be amended from time to time" [RA 2].

The instant case is also in harmony with Halpern v. Retirement Builders, Inc., 507 So. 2d 622 (Fla. 4th DCA 1987) rev. denied, No. 70,886 (Fla. Nov. 2, 1987). There, the Court held that subsequent amendments to the Condominium Act which prohibited enforcement of escalation clauses in management contracts were incorporated into the management agreement between the parties. In that case the parties specifically and

unequivocally provided in paragraph 42 of the management agreement that the declaration's terms were part of the agreement:

> This instrument, together with the Declaration of Condominium to which this agreement is attached, and the exhibits attached to said Declaration of Condominium, including this agreement, constitute the entire agreement between the parties.. .
> Id. at 624.

The Court found that it was clear that the declaration incorporated future statutory amendments and that the management contract by its terms incorporated the declaration.

Here, the District Court of Appeal, Third District found that "the recreational lease, which the parties herein did sign, contains no language incorporating the Condominium Act, as amended" [RA 2]. The Court refused to imply such an incorporation where "the result of such an interpretation is to void specific rental provisions in the lease" [RA 3]. The management agreement in Halpern specifically provided that the declaration and the management agreement constituted the entire agreement of the parties. Here, there was no specific provision whereby the declaration was incorporated in the lease. In fact there were provisions to the contrary. In light of this, the District Court of Appeal's decision in the instant case is in harmony with Halpern.

This case is factually similar to Cove Club Investors v. Sandalfoot South One, Inc., 438 So. 2d 354, 355 (Fla. 1983),

where the Supreme Court stated:

> [N]owhere does the petitioner agree to be bound by the declaration nor by the Condominium Act. There is no way to tie up this petitioner with the declaration and the language contained therein.

The Court below merely followed the holding in Fleeman v. Case, 342 So. 2d 815 (Fla. 1976), which stated that Sec. 711.231 Fla. Stat. (1975) [now Sec. 718.401(8), Fla. Stat;. (1985)] could not be applied retroactively. Unless the parties agreed to the application of that statute in the declaration or the lease, the statute could not be applied retrospectively. The Petitioner suggests that the Court below announced a new rule of law, namely that in the absence of a "specific" provision in the lease which expressly adopts the declaration or the Condominium Act "as amended from time to time", the lessor could not have agreed to be bound by amendments to the Act. This rule does not conflict with the above-mentioned opinions. In Angora and Halpern the leases did not contain specific provisions which would have to be voided by implying that the lease adopted the provisions of the declaration of condominium. To the contrary in this case the lease contained specific provisions which would have to be voided if the Court implied that the parties had incorporated future statutory amendments in their lease. Therefore, the Court refused to imply such an interpretation in the absence of language incorporating the Condominium Act because there were

specific provisions in the lease which belie an intent to incorporate the entire declaration. The results are different from those in Angora and Halpern only because the language in the documents in the instant case is not the same as those in Halpern and Angora. Under the second test for conflict announced in Nielson v. City of Sarasota, 117 So.2d 731 (Fla. 1960), a rule of law must be applied to "substantially the same controlling facts" and produce a different outcome. Here, there is no conflict because the cases differ in their controlling facts.

CONCLUSION

The decision sought to be reviewed does not contain any statement of law capable of causing confusion or disharmony in the law of the State. The Third District Court's decision is not the kind of decision which the Constitution contemplates as being reviewable, and thus, review should be denied.

Respectfully submitted,

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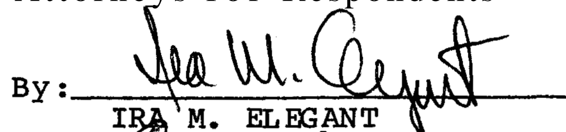
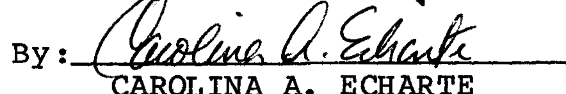


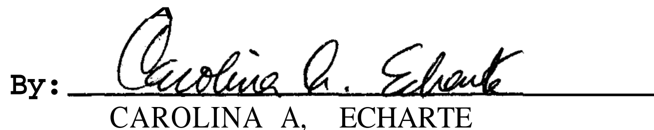
By: ____________________
IRA M. ELEGANT



By: ____________________
CAROLINA A. ECHARTE

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a true and correct c py of the foregoing has been furnished, by mail, to: MARK B. SCHORR, ESQ., Becker, Poliakoff & Streitfeld, P.A., Attorneys for Petitioner, Post Office Box 9057, Fort Lauderdale, Florida 33310; and GARY L. KRULEWITZ, ESQ., 1250 East Hallandale Beach Boulevard, Suite 508, Hallandale, Florida 33009, this 6th day of January, 1988.

By: 
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