

O/A 2-8-89

15

IN THE SUPREME COURT OF FLORIDA

FILED

SID J. WHITE,

FEB 6 1989

CLERK, SUPREME COURT

Deputy Clerk

CASE NO. 71,594

CONDOMINIUM ASSOCIATION OF PLAZA TOWERS
NORTH, INC.,

Petitioner,

v.

PLAZA RECREATION DEVELOPMENT CORP.,
a Florida corporation, and SECURITY
MANAGEMENT CORP., a Maryland corporation,

Respondents.

PETITIONER'S REPLY BRIEF

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

JEFFREY E. STREITFELD, ESQ.
BECKER, POLIAKOFF & STREITFELD, P.A.
Attorneys for Petitioner
Post Office Box 9057
Fort Lauderdale, FL 33310
(305) 732-0803 (WPB); 987-7550 (BR)

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CITATIONS	ii
ARGUMENT	1-10

POINT I

THE LESSOR IS BOUND BY AMENDMENTS TO THE
DECLARATION OF CONDOMINIUM RESULTING FROM
AMENDMENTS TO THE FLORIDA CONDOMINIUM ACT

POINT II

WHETHER THE LESSOR AGREED IN THE 1973
SETTLEMENT STIPULATION THAT THE ASSOCIATION
WOULD HAVE THE BENEFIT OF ALL SUBSEQUENT
LEGISLATION? INCLUDING THE SUBJECT STATUTE

POINT III

WHETHER THE ENACTMENT OF §711.231,
EFFECTIVE JUNE 4, 1975, PRECLUDED
COLLECTION OF ESCALATED RENTALS WHICH
BECAME DUE AFTER THAT DATE

CONCLUSION	11
CERTIFICATE OF SERVICE	12

TABLE OF CITATIONS

<u>CASES</u>	<u>PAGE</u>
<u>Ansora Enterprises, Inc. v. Cole,</u> 439 So.2d 832 (Fla. 1983), <u>cert. denied</u> , 466 U.S. 927, 104 S.Ct. 1710 (80 L.Ed.2d 183 (1984)).	6,7,8,9
<u>Century Villase, Inc. v. Wellington, etc.. Condominium Association,</u> 361 So.2d 128 (Fla. 1978)	2,3,4,9
<u>Cove Club Investors, Ltd. v. Sandalfoot South One, Inc.,</u> 438 So.2d 354 (Fla. 1983)	4,6,8,9
<u>Halpern v. Retirement Builders, Inc.,</u> 507 So.2d 622 (Fla. 4th DCA 1987)	1,6,8,9
<u>Kaufman v. Shere,</u> 347 So.2d 627 (Fla. 3d DCA 1977), <u>cert. denied</u> , 355 So.2d 517 (Fla. 1978)	1-4,7,8,9
<u>Pomponio v. The Claridge of Pompano Condominium, Inc.,</u> 378 So.2d 774 (Fla. 1980)	3
 <u>FLORIDA STATUTES</u>	
§711.231	10
§711.63 (4)	2,3

A R G U M E N T

POINT I

**THE LESSOR IS BOUND BY AMENDMENTS TO THE
DECLARATION OF CONDOMINIUM RESULTING FROM
AMENDMENTS TO THE FLORIDA CONDOMINIUM ACT.**

Respondents represent to this Court that the only instances where a recreation lease lessor has been bound to amendments to the Condominium Act have occurred where either the lessor and developer were the same entities, or, the lease expressly incorporates all of the provisions of the declaration. This is not true.

The first reported decision embracing the "amended from time to time" exception to the rule that statutes may not be applied retroactively, in the condominium setting, is Kaufman v. Shere, 347 So.2d 627 (Fla. 3d DCA 1977). In that case, the parties were described by the court in its opinion as follows:

Defendants Ralph Shere and the late Inez Shere, his wife, were officers and directors of the corporation which developed the Fifth Moorings Condominium, which is part of a complex that includes seven other condominiums. Defendants were also the lessors of the recreation facilities, which serve the entire Moorings complex.¹

347 So.2d at 627.

At "the Fifth Moorings", Ralph and Inez Shere planned a development whereby they would create a corporation to develop the condominiums, and individually lease the recreation area to the associations and their members. In determining whether or

1 Halpern v. Retirement Builders, Inc., 507 So.2d 622 (Fla. 4th DCA 1987), contains factual statements that are in error with regard to the lessor and developer being the same party.

not the lessors, as individuals, should be bound to the language of the declaration created by them through their development corporation, the court stated:

The contested clause unequivocally states that provisions of the Condominium Act are adopted '**as it may be amended from time to time**'. Kaufman v. Shere (emphasis added). We perceive no ambiguity in this language, and thus find that it was the express intention of all parties concerned that the provisions of the Condominium Act were to become a part of the controlling document at Fifth Moorings whenever they were enacted. Even if we were to find an ambiguity, we would be forced to construe it against the defendant developer/lessors as authors of the declaration of condominium.

347 So.2d at 428.

In Kaufman v. Shere, supra, the same controlling persons established a separate development corporation, separate and apart from the lessor, but as a part of a common scheme. There was no general incorporation of the Declaration of Condominium. The court was concerned with the interrelationship of the parties and the scheme of development, not the technical existence of a separate legal entity. Certiorari review was denied by this Court.

This Court expressly adopted the Kaufman v. Shere decision in Century Village, Inc. v. Wellington, etc., Condominium Association, 361 So.2d 128 (Fla. 1978). Respondent misstates the facts of the case, and the basis for this Court's opinion.

While perhaps not critical to this Court's decision, Petitioner is also disturbed by Respondents' discussion of Century Village. While it is true that this Court mentioned that the Florida Legislature intended to retroactively apply **§711.63(4)**, Florida Statutes, calling for the deposit of rent in the registry of the

court pending an action to challenge the lease, this Court expressly declined to address the constitutional question because of the existence of the "amended from time to time" language. In Pomponio v. The Claridge of Pompano Condominium, Inc., 378 So.2d 774 (Fla. 1980), this Court refused to retroactively apply §711.63(4), Florida Statutes, absent the "amended from time to time" language.

In Century Village, this Court was unconcerned with whether or not there was a difference in the corporate name of the developer or lessor. It did not address the issue, nor did it state the facts clearly in its opinion. There are only two statements of fact contained within this Court's opinion that relate to the technical status of the parties:

In March, 1975, Appellee Condominium Associations filed suit against Century Village, Inc., the Appellant herein, challenging the validity of certain recreation leases and the rent escalation clauses contained therein.

361 So.2d at 130.

Because we find that Appellant in this case, by specific language contained in its declaration, expressly agreed to be bound by all future amendments to the Condominium Act...

361 So.2d 132.

This Court was unconcerned with stating the names of the parties and their relationship to the various condominium agreements, because it was clear that the developer and lessor were interrelated, and that the recreation lease was part of the general development scheme of the property. This is the same approach taken by the Third District in Kaufman v. Shere, where the developer and lessor were technically distinct and different entities.

This Court in Cove Club Investors, Ltd. v. Sandalfoot South One, Inc., 438 So.2d 354 (Fla. 1983) said it would not apply the doctrine where it appeared that there was no such relationship between the developer and the lessor, i.e., where there was "no way to tie up the lessor to the declaration". This exception has been stretched beyond the intent of this Court's opinion by the lower courts in this case. A reversal of their decision would put this case back on the track created by Kaufman v. Shere and embraced by this Court in Century Village, Inc. v. Wellington, *supra*.

Similarly, in the case before this Court, the facts are undisputed that the same controlling persons established both the developer, Plaza Building Corp., and the Lessor, Plaza Recreation Development Corp. The Declaration of Condominium was executed by Michael Zaret for the developer. The Lease was executed by Michael Zaret as vice-president of Lessor, Plaza Recreation Development Corp., and as vice-president for Plaza Building Corp., the developer, as lessee/owner. Mr. Zaret also executed the Lease for Acmar Engineering Co. with regard to certain easements granted within the Lease.

Respondents misread Cove Club Investors, Ltd. v. Sandalfoot South One, Inc., 438 So.2d 354 (Fla. 1983). This Court chose to create an exception to the cases that had previously applied the "amended from time to time" language to a recreation lease lessor because:

Petitioner makes several arguments, but we will address only one which we deem dispositive of the entire matter. Petitioner makes the argument that though it is the lessor under

the agreement it is neither the declarer nor the developer of the condominium. In fact, it maintains, it is the owner of the country club and recreational facilities which serve not only other condominium complexes but also the general public which is free to join and use the facilities. Furthermore, it did not sign the declaration of condominium and was a party only to the recreation agreement. Consequently, it never agreed to be bound by the declaration even though the parties who did sign it are bound by the subsequent amendments to the Condominium Act. We find merit in this argument.

We have examined the recreation agreement and find that though the petitioner acknowledges its commitment to provide the recreational facilities and services to the condominium owners, it does not agree to be bound by the declaration. We find that the agreement lays out in clear language that the declarer was developing the condominium, that the country club had facilities available, and that the association was "desirous of securing" the benefit of those services and facilities. But nowhere 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.

At pages 9 and 10, Respondents advise this Court that, in Cove Club, specific parts of the declaration were incorporated by reference in the lease, and this Court found that this was not sufficient to bind the lessor to the relevant provisions of the declaration or the Condominium Act. There is no such language in this Court's decision in Cove Club. The recreation agreement involved in Cove Club was made a part of the record in this case, and is supplied with the appendix to Petitioner's Initial Brief. There is no such incorporation language of provisions of the declaration, nor did the Court reference or rely upon such language

in its decision.

The underlying argument being made by the Respondents is that the Lessor never intended to be bound by the Declaration of Condominium, per se, nor by the Condominium Act. Therefore, unless it expressly agreed to be bound by either, or both, it should not be bound by an amendment to the Declaration of Condominium created by an amendment to the statute, even though the Declaration on its face would adopt and incorporate future amendments to the Condominium Act. This argument has been made by every single, unsuccessful recreation lease lessor in this type of litigation. This argument has been expressly rejected by this Court in Ansora 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 by the Fourth District Court of Appeal in Halpern v. Retirement Builders, Inc., supra. In Ansora Enterprises, Inc. v. Cole, supra, this Court stated:

The lessor argues that these are separate documents, each standing alone, but to adopt that rationale is to ignore the realities of the situation. And to say that the lessor who in his corporate capacity was both the developer and the management firm, did not agree to the terms of the declaration is to refuse to see what is plainly written in black and white.

Therefore, the issue before this Court is not whether the entire Declaration of Condominium has been adopted within the Lease, or whether the Lessor and developer are the same. The question, as this Court stated in Cove Club is, whether the lessor is sufficiently "tied up" with the declaration.

Respondents attempt to cloud this issue by referring to the rule of exclusion, that the enumeration of particular things excludes that which is not mentioned. The issue is not whether the Lessor intended to be bound by all the provisions of the Declaration of Condominium; rather, the question is whether the Lessor is sufficiently tied up with the Declaration so as to be bound by it. Any ambiguity should be resolved against the Respondents, as drafters of the documents. Kaufman v. Shere, supra.

The Respondents similarly attempt to divert this Court from the true issue by asserting the existence in the Lease of an integration clause and an exclusive means of amendment clause that requires the written consent of the lessor prior to amendment or modification of the leasehold. These standard contract clauses existed in the recreation lease construed by this Court in Angora Enterprises, Inc. v. Cole, and these arguments were briefed by lessor's counsel in that case. The arguments were unsuccessful, and were rejected by this Court, in favor of an analysis as to whether or not the lessor was sufficiently tied to the declaration so as to bind it to amendments to the Condominium Act. These clauses must be read in conjunction with the intent of the parties to the condominium developers to be bound by amendments to the Condominium Act.

This central concern, the interrelationship of the lessor and the developer of the condominium community, is premised on the understanding that condominiums are creatures of statute, and do not exist separate and apart from the requirements of the Florida

Condominium Act. It is the inclusion of the language "as amended from time to time" in the Declaration of Condominium that expands the scope of the statute beyond its language as it existed at the time the condominium was created.

It is clear that the Respondents are now unhappy with the affect of the language of the documents (the Declaration and Lease) that its principals created. Since Kaufman v. Shere was first decided in 1977, the courts of this state have repeatedly decided that statutory amendments will be applied even though they might either negate, or substantially modify, the clauses of an existing agreement, so long as there is an adequate expression of the intent to apply the Condominium Act "as it may be amended from time to time". It is the Respondents, not Petitioner, that wish this Court to remake the Lease, so as to exclude a multitude of cross references and incorporations of the Declaration and Lease, including the definitional section of the Condominium Act which is contained within the Declaration of Condominium.

To conclude, this Court has to decide whether the Respondent/ Lessor is sufficiently tied to the Declaration so as to, therefore, bind it to amendments to the Condominium Act as in Kaufman v. Shere, Ansora Enterprises, Inc. v. Cole, and Halpern v. Retirement Builders, Inc., or, whether, as in Cove Club, the lessor is separate and apart, and operates facilities open to other condominiums and the general public, so as not to be sufficiently tied up with the Declaration.

For all the reasons previously stated by Petitioner, the

facts of this case bring it squarely within the rationale of Kaufman, Centurv Village, Ansora, and Halpern. To clarify its prior rulings, this Court should narrow Cove Club to its facts, and reaffirm the analysis and policy first enunciated in Centurv Villase.

POINT II

WHETHER THE LESSOR AGREED IN THE 1973 SETTLEMENT STIPULATION THAT THE ASSOCIATION WOULD HAVE THE BENEFIT OF ALL SUBSEQUENT LEGISLATIONS INCLUDING THE SUBJECT STATUTE.

Petitioner stands by its argument contained within its Initial Brief.

POINT III

WHETHER THE ENACTMENT OF § 711.2 31 EFFECTIVE JUNE 4, 1975, PRECLUDED COLLECTION OF ESCALATED RENTALS WHICH BECAME DUE AFTER THAT DATE.

Petitioner stands by its argument contained within its Initial Brief.

CONCLUSION

For the foregoing reasons, and those set forth in its Initial Brief, Petitioner respectfully urges that this Court reverse the decision of lower courts, with a mandate issued to find for the Petitioner CONDOMINIUM ASSOCIATION OF PLAZA TOWERS NORTH, INC., that, effective June 4, 1975, the Lease was and is amended to exclude therefrom the enforcement of the escalation of the rent tied to the cost of living, and for further proceedings consistent with the opinion of this Court.

Respectfully,

BECKER, POLIAKOFF & STREITFELD, P.A.
Attorneys for Petitioner
Post Office Box 9057
Fort Lauderdale, FL 33310-9057
(305) 987-7550 (BR); 944-2926 (DADE)
and 732-0803 (WPB)

By



JEFFREY E. STREITFELD

IC OF SERVICE

I HEREBY CERTIFY that true copies of the Petitioner's Reply Brief were furnished by mail to: NANCY SCHLEIFER, ESQ., Co-Counsel for Petitioner, 801 Brickell Avenue, Suite 1200, Miami, FL 33131; ALAN C. SUNDBERG, ESQ., Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., Attorneys for Respondents, Post Office Drawer 190, Tallahassee, FL 32302, this 3RD day of February, 1989.

BECKER, POLIAKOFF & STREITFELD, P.A.
Attorneys for Petitioner
Post Office Box 9057
Fort Lauderdale, FL 33310-9057
(305) 987-7550 (BR); 944-2926 (DADE)
and 732-0803 (WPB)

BY



JEFFREY E. STREITFELD