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IN THE SUPREME COURT OF FLORIDA
CASE NO. 71,909

ASSOCIATION OF GOLDEN GLADES CONDOMINIUM CLUB, INC., a Florida corporation not for profit,

Petitioner

vs.

SECURITY MANAGEMENT CORP., a Maryland corporation,

Respondent.

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Deputy Clerk

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

PETITIONER'S REPLY BRIEF

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TO WHAT EXTENT DOES SECTION 718.401(8), FLORIDA STATUTES (1985), APPLY TO RENT ESCALATION CLAUSES ENTERED INTO BEFORE THE EFFECTIVE DATE OF THE STATUTE?

ARGUMENT

I. THIS COURT SHOULD EXERCISE ITS JURISDICTION AND ANSWER THE QUESTION CERTIFIED BY THE THIRD DISTRICT COURT OF APPEAL.

The Third District's certification of this issue indicates its concern with the ultimate result of this case. This Court should exercise its jurisdiction[1] because (1) the decision in this case alone will affect a large population of Golden Glades condominium unit owners who have potentially disastrous judgment liens against them; (2) this case will have a much wider impact, affecting many other condominium owners and prospective purchasers[2] whose condominium and lease documents predate the amendment to the Condominium Act; (3) Cove Club Investors, Ltd. v.

[1] Petitioner agrees that this Court has discretionary jurisdiction to determine this matter. However, this Court has rarely refused to review an issue that a district court has certified as a matter of great public importance.

[2] For instance, the same lease language is being contested in Condominium Association of Plaza Towers North, Inc. v. Plaza Recreation Development Corp., 514 So.2d 381 (Fla. 3d DCA 1987). The Petitioner in Plaza Towers has filed a motion to consolidate that case with this case. This petitioner has joined in that motion to consolidate.

Sandalwood South One, Inc., 438 So.2d 354 (Fla. 1983) has led to contradictory and confusing case law from various district courts of appeal; and (4) the case law has become so confusing that prospective purchasers of condominiums predating the 1975 amendment have no way of knowing whether or not they will be held responsible for escalated rentals.

II. THE LESSOR AGREED TO BE BOUND BY THE CONDOMINIUM ACT AS SUBSEQUENTLY AMENDED.

Two very clear provisions of the Long Term Lease adopt the definitions as set forth in the Declaration of Condominium:

> XXIX.:Lessee's Covenants to Lessor
> B. Incorporation of Definitions by Reference: The definitions of the words terms, phrases, etc., as provided in Article ----I of the Declaration of Condominium to which this Long Term Lease is attached as Exhibit No. 4, are incorporated by reference and made a part hereof, and unless the context otherwise requires, said definitions shall prevail. (Page 22, Long Term Lease.)
>
> XXIII.:Lien upon Condominium Units as Security
> The terms "Condominium Parcel", "Condominium unit", "unit", "unit owner", and all other terms of this Lease shall be defined as said terms are defined and used in the Declaration of Condominium to which this Lease is attached as Exhibit No. 4. (Emphasis added.) (Page 16, Long Term Lease)

The Declaration of Condominium plainly provides that "the Condominium Act, means and refers to the Condominium Act of the State of Florida (F.S. 711 Et.Seq.) as the same

may be amended from time to time." (Emphasis added.) The Long Term Lease contains no contradictory definition.

If the Landlord had wanted to define the "Condominium Act" differently in the Long Term Lease or had wanted to incorporate by reference all definitions except the definition of the "Condominium Act," the Landlord could have done so in plain, clear, unambiguous language. The Petitioner agrees that it is a fundamental rule of contractual construction that a court should not rewrite the instrument. Utilizing the very language quoted by the Landlord its Answer Brief at page 15, if the Landlord wanted a different provision regarding the definition of the "Condominium Act," "it would have been a simpler matter . . .to have said so." Home Development Co. v. Bursani, 178 So.2d 113 (Fla. 1965).

The Long Term Lease did not have to adopt the Declaration in its entirety for the Landlord to be bound by future amendments to the Condominium Act. Once the Landlord adopted definition of the Condominium Act "as it may be amended from time to time," as set forth in the Declaration of Condominium, the Landlord agreed to be bound by future amendments to the Condominium Act. 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).

The Long Term Lease at paragraph **XXVI** at page 20-21 states:

> . . .all of the Provisions of the Declaration of Condominium to which this Long-Term Lease is attached as Exhibit No. 4 relative to this Lease, including, specifically, those provisions relative to the Lessor's approval and consent with regard to voluntary termination of the Condominium and, where required, any Amendment of the Declaration of Condominium, are hereby declared to be an integral part of the consideration given by the Lessee to the Lessor for this Lease. (Emphasis added.)

The obvious meaning of that language is that the Lease incorporates "all of the provisions of the Declaration of Condominium." If that paragraph is not clear, it is ambiguous and should be construed in favor of the Lessee. Enegren v. Marathon Country Club Condominium West Association, 13 F.L. W. 1249,1250 (Fla. 3d DCA May 24, 1988).

The Landlord argues in its Answer Brief that specific provisions in the Lease "would have been rendered meaningless if the parties had intended to incorporate the Declaration in its entirety into the Lease." According to the Landlord, one of these "inconsistencies" would occur because the Lease imposes a "firm and irrevocable obligation to pay the full rent."

The language concerning the "irrevocable obligation to pay full rent" appears in a section entitled "Lien upon Condominium Units as Security" beginning on page 15 of the

Long Term Lease. That section consists five pages and 17 separate paragraphs of boilerplate. The language which the Landlord now proclaims to be the key language of the Long Term Lease appears in the middle of the eleventh paragraph of that boilerplate. Certainly that clause does not present any red flag to the weary lessee's eye.[3]

The meaning of "full rent," a term appearing in the language quoted by the Landlord as "key" to this lease, is also ambiguous. The Long Term Lease is 25 pages long. The "Rent" clause appears at paragraph III on page 1 of the Lease. The escalation clause does not appear until paragraph XXV on page 19 of the Lease in a section entitled "Rent Adjustment." There is no definition of "full rent" in the Long Term Lease. The ambiguous term "full rent" could have been clarified by defining the term as "rent, as defined in paragraph 111, including the adjusted rent as defined in paragraph XXV," but the Lessor included no such clarifying definition. Once again, it would have been far clearer for the Landlord to have said what it now claims it meant. Since the Landlord agreed to amendments to the Condominium Act because the Lease adopts the definition of the "Condominium Act" as it is set forth in the Declaration, the rent adjustment clause is unenforceable, and "full rent"

[3] Ironically, that multi-page boilerplate provision reiterates that "The terms 'Condominium parcel', 'Condominium unit', 'unit' 'unit owner', and all other terms of this lease shall be defined as said terms are defined and used in the Declaration of Condominium." (Emphasis added.)

simply means the rent described in Paragraph III of the Long Term Lease.

According to the Landlord, the "integration clause" is also inconsistent with the Condominium Association's interpretation of the Long Term Lease. The Condominium Association finds no such inconsistency. Since the Long Term Lease incorporated by reference certain portions (if not all) of the Declaration of Condominium, those portions of the Declaration are considered to be part of the Long Term Lease, and not a separate or collateral agreement. That is what "incorporation by reference" means.

The Trial Court, on its first try at construing this instrument determined that the Long Term Lease incorporated the Condominium Act "as it may be amended from time to time." The Third District, on its first try at interpreting this instrument came to the same conclusion in Golden Glades Club Recreation Corp. v. Association of Golden Glades Condominium Club, Inc., 385 So.2d 103 (Fla. 3d DCA 1980), pet. for rev. denied, 392 So.2d 1374 (Fla. 1980) (referred to in all briefs as Golden Glades I). The second time around, both the Trial Court and the Third District overlooked the provision by which the Landlord incorporated the definition section of the Declaration, and thereby agreed to abide by the Condominium Act "as it is amended from time to time." Judge Ferguson wrote a stinging dissent in Association of Golden Glades Condominium Club, Inc. v.

Golden Glades Club Recreation Corp., 441 So.2d 154 (Fla. 3d DCA 1983), pet. for rev. denied, 455 So.2d 1032 (Fla. 1984) (referred to throughout all briefs as Golden Glades II) and in Condominium Association of Plaza Towers North, Inc. v. Plaza Recreation Development Corp., 514 So.2d 381 (Fla. 3d DCA 1987). Judge Ferguson asserted essentially the same position as this petitioner now asserts. Judge Jorgenson, in the opinion appealed from here, adopted Judge Ferguson's previous dissenting opinions.

Two courts looked at the same Long Term Lease on two occasions and came to two contradictory conclusions.[4]

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[4] In footnote 9 on page 18 of Respondent's brief, the Respondent comments (1) that the Golden Glades I decision did not constitute law of the case, (2) that law of the case was never affirmatively pled by the Condominium Association, and (3) that Golden Glades II would control if there was a "law of the case" issue. On the contrary, (1) Golden Glades I specifically ruled that this Long Term Lease did incorporate the Condominium Act, Chapter 711, Fla. Stat. by reference "as it may be amended from time to time." That is the identical issue in this case and the parties were precluded from relitigating the issue. (2) The Condominium Association raised this defense in a Motion for Summary Judgment filed simultaneously with its Answer and Affirmative Defenses. (R-75-76, 207-209). The Condominium devoted a substantial portion of its argument at the trial to establish that Golden Glades I conclusively determined the issue. (Transcript of January 20, 1987 at p. 12-16.) The Landlord addressed the law of the case doctrine in rebuttal at trial. (Transcript of January 2, 1987 at p. 27.) (3) Golden Glades II did not recede from Golden Glades I. From the dissenting opinion in Golden Glades II, we learn that issue central to the majority decision in that case was whether or not the five year escalated rental adjustment fully vested prior to the July 1975 effective date of the Condominium Act amendment. The majority opinion in Golden Glades II did not discuss whether the lease incorporated of the Condominium Act, as amended or whether future 5 year rental adjustments would be unenforceable.

Several three-judge panels were sharply divided as to the proper interpretation of this Long Term Lease. These changes of heart, and this discord, evidence the ambiguous nature of the Long Term Lease.

Since the Landlord incorporated by reference a definition of the Condominium Act "as it may be amended," Angora controls the decision in this case. If there are any ambiguities as to whether any particular clause of the Declaration was incorporated by reference into the Long Term Lease, such ambiguities must be construed in favor of the Condominium Association and the condominium unit owners.

III. AN ANALYSIS OF COVE CLUB

A closer analysis of Cove Club Investors, Ltd. v. Sandalfoot South One, 438 So.2d 354 (Fla. 1983) reveals that this case does not come "squarely within" the holding Cove Club, as the Lessor argues. The addendum attached to the back of this brief, contains two items: (1) The entire Recreation Agreement in the Cove Club case (which was part of the record below, and has been partially reproduced in the Landlord's brief); and (2) a side by side listing of all provisions in relevant part of the Cove Club Recreation Lease and the Golden Glades Long Term Lease which make reference to the Declaration of Condominium. As that list demonstrates:

a. The Cove Club document was relatively short (eight pages) while the Golden Glades document was a monstrosity (twenty-six pages).

b. Cove Club's Recreation Agreement mentions the Declaration of Condominium in only three sections. Two of these sections have no relevance to the "incorporation by reference" issue. The other section simply states that the provisions of the Recreation Agreement "shall be incorporated in and made a part of the Declaration of Condominium." There is not the slightest reference in the Cove Club Recreation Agreement that even arguably incorporates by reference all or part of the Declaration of Condominium into the Recreation Agreement.

c. By contrast, the Golden Glades Long Term Lease refers to the Declaration of Condominium on at least 23 occasions. The Golden Glades Long Term Lease, in two separate paragraphs, adopts all of the definitions in the Declaration of Condominium (See paragraph **XXIII** page **16** and paragraph **XXXIX.B.** on pages **21-22** of the Golden Glades Long Term Lease). The Golden Glades Long Term Lease also requires its Condominium Association to assess unit owners "in accordance with the Condominium Act [and] its Declaration of Condominium" (see paragraph **XXIII** at page 18), and requires the owners to pay assessments "as required under the terms of the Declaration of Condominium" (see paragraph **XXX** on

page 22). The Golden Glades Declaration, of course, unequivocally adopts the amendments to the Condominium Act.

d. The Condominium Act "as it may be amended" is not mentioned even once in the Cove Club Recreational Lease, but is specifically mentioned in paragraph XXIII on page 19 of the Golden Glades Long Term Lease.

e. The Cove Club Recreational Lease contains nothing equivalent to the following two paragraphs contained in the Golden Glades Long Term Lease:

> XXVI. Termination of Condominium of which the Lessee Association is Formed to Conduct and Administer the Affairs:
> All of the provisions of the Declaration of Condominium to which this Long Term Lease is attached as exhibit No. 4, relative to this Lease . . . are hereby declared to be an integral part of the consideration for this Lease; . . .
>
> XXXI. Lessee's Covenants to Lessor:
> The terms and provisions as to the Long-Term Lease, under the Declaration of Condominium to which this Long-Term Lease is attached, shall be deemed to have been repeated and realleged, just as if they were set forth in this Long-Term Lease.

As this Condominium Association stated in its initial brief, Halpern v. Retirement Builders, Inc., 507 So.2d 622

(Fla. 4th DCA 1987)[5] correctly noted the fundamental distinction between Cove Club and Angora:

> In Cove Club Investors there was nothing to show that the petitioner, the lessor, who was not the developer of the condominium, had agreed to be bound by the Declaration of Condominium or the Condominium Act.
>
> * * *
>
> We believe appellants are correct. The facts of this case are very similar to those of Cole. The fact that here the management company is a separate entity from the developer is of no significance when the management agreement by its terms incorporates the condominium declaration.

IV. AS A MATTER OF LAW, THE SEPARATE EXISTENCE OF THE LESSOR AND DECLARER VANISHED WHEN BOTH CORPORATIONS MERGED INTO THE PLAINTIFF CORPORATION

Security Management denies its legal existence. When the Declarer Corporation, the Lessor Corporation and several other corporations merged into Security Management, Articles of Merger were filed with this State declaring:

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[5] The Halpern management agreement, like our Long Term Lease, was attached to and made a part of the declaration, and contained numerous paragraphs tying the management agreement and the declaration to each other. One paragraph of the Halpern management agreement stated that the declaration and exhibits attached thereto, together with the management agreement constituted the entire agreement between the parties to the management agreement. In our case paragraphs XXVI and XXXI, cited above, also completely tied the two instruments together. If the language is slightly more equivocal and ambiguous, it must be construed in favor of the Condominium Association. Once again, the incorporation of the definition of "Condominium Act" in our Lease is very clear. All in all, the language contained in the Lease in this case, even more strongly than in Halpern, warrants a conclusion that the present plaintiff did agree to abide by amendments to the Condominium Act.

> Fourth: Security Management is the corporation which will survive the merger. The separate existence of the other seven corporations will cease.

Now Security Management urges this Court to ignore the single entity which it chose to become and to treat it as two separate corporations--a declarer and a lessor.

Contrary to Security Management's argument that the issue of merger was never brought before the Trial Court, the merger was admitted as a stipulated fact **(R-340)**, and the Articles of Merger were in the record **(R-256-264)**. During trial, the Condominium Association argued:

> Security Management was actually the owner of all the stock of the predecessor corporation and then they merged into Security Management. When the lease was executed Security Management owned all of the stock of the developer and the lessor, and that's also in the pre-trial stipulation. (Transcript of January **22**, 1987 at page 9.)

While it is true that the merger statute was not mentioned in the record below, it was no more necessary to mention that section than it would be for a counsel of a divorced wife who is trying to claim dower rights under her ex-husband's will to run through the entire domestic relations act. In fact, the Articles of Merger in the record contain the same language as the merger statute.

A corporation cannot use its corporate existence for one purpose and then deny its corporate existence for another. Security Management cannot choose a chameleon existence, to obtain the benefits of a merged corporation and then deny the legal ramifications of the merger. "The

acquired corporation is absorbed into the structure of the acquiring corporation and with that absorption the acquiring corporation takes the bad with the good." 3 Florida Corporation Manual 72, Section 37.17 "Liability for Debts in a Merger and Sale of Assets," (1975). Security Management, having succeeded both declarer and lessor by merger "cannot now disclaim its lineage." Celotex Corp. v. Pickett, 490 So.2d 35 (Fla. 1986).

Security Management is what it is--a single corporation which is both the Lessor and the Declarer. Its existence as a merged corporation is a legal fact. The Condominium Association simply states that the legal merger of Declarer and Lessor into a single corporation completely destroys Security Management's "separate identity" argument under Cove Club. Security Management, having stripped off the veil of separate corporate existence now wants this Court to look in the other direction while it slips that veil back on. Security Management has given no authority to permit it to argue that the merger of the Lessor and Declarer should be ignored in this appeal.

CONCLUSION

The Condominium Association respectfully requests this Court to reverse the decision below, to hold that the escalation clause in the Long Term Lease is unenforceable,

and to award costs and attorneys fees to the Condominium Association.

The issue certified by the Third District Court of Appeal should be answered by reaffirming the holding in Angora, and by restating the principle that where this type of contract of adhesion is confusing, ambiguous, and contradictory, the document must be construed against the drafter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this brief has been served by mail on June 14, 1988 upon Alan C. Sundberg, Esq., Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., First Florida Bank Building, Post Office Drawer 190, Tallahassee, Florida 32302; Ira M. Elegant, Esquire, Buchbinder & Elegant, P.A., 46 S.W. 1st Street, Fourth Floor, Miami, Florida 33130 and upon Cypen, Cypen & Dribin, Post Office Box 402099, Miami Beach Florida 33140.

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