

O/a 2-8-89

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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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FILED
SID J. WHITE

FEB 23 1989

CLERK, SUPREME COURT

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

PETITIONER'S SUPPLEMENTAL BRIEF ON THE SKYLAKE ISSUE

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STATEMENT OF THE FACTS AND OF THE CASE

Oral argument was held on the merits of this appeal on February 8, 1989. One day prior to oral argument, Respondent filed a notice of intention to rely upon a very recent case, Skylake Gardens Recreation, Inc., v. Sky Lake Gardens Nos. 1,3, and 4, Inc., 14 F.L.W. 324 (Fla. 3d DCA January 31, 1989). (App. 1.) Although Respondent admitted during oral argument that it would not be particularly proper to discuss this matter in light of the recency of the notice, the impact of the Skylake decision was briefly discussed by Respondent's attorney in his oral argument, and the Court questioned counsel for Petitioner, Condominium Association of Plaza Towers North, Inc., during rebuttal.

Previously in this case, Respondent had framed an argument virtually identical to the holding in Skylake, when Respondent moved to dismiss this appeal as being moot. (App. 2.) This Court rejected Respondent's argument and denied the motion to dismiss this appeal. However, this Court's ruling did not contain a written opinion outlining the reasons for the denial of the motion. Respondent did not file a similar motion in the consolidated Plaza Towers case.

Upon application by the two Petitioners, this Court permitted additional briefs on the issues raised by Respondent's Notice of Supplemental Authority and the decision of Skylake.

ISSUE ON APPEAL

WHAT IS THE IMPACT ON THIS CASE OF THE THIRD
DISTRICT COURT OF APPEAL DECISION: SKYLAKE GARDENS
RECREATION, INC., v. SKY LAKE GARDENS NOS. 1,3,AND
4, INC., 14 F.L.W. 324 (Fla. 3d DCA January 31,
1989)?

SUMMARY OF THE ARGUMENT

The Third District Court ruling in Skylake Gardens Recreation, Inc., v. Sky Lake Gardens Nos. 1, 3, and 4, Inc., 14 F.L.W. 324 (Fla. 3d DCA January 31, 1989) has virtually set the new condominium legislation on its ear, shaken out the sensible contents, and restacked the components in a manner never envisioned by legislature. Under the Third District's reading of the reenacted and renumbered 9718.4015, the benefits accruing to condominium unit holders over the course of the last fourteen years would be wiped out, and only the detriments would remain. Conversely (and perversely) Condominium developers and lessors who wrote these unscrupulous and onerous escalation clauses, and who could not have enforced such clauses prior to October 1988, would suddenly benefit from the amended legislation. The legislators did not intend such a result, and the language of the legislation avoids such a result.

This Court has already considered this issue by rejecting Respondent's Motion to Dismiss this appeal on grounds of mootness. Respondent's motion was based on the same premise as the Third District Opinion.

The holding of Skylake twists and distorts the new legislation, and ascribes to the legislation a purpose that directly conflicts with the stated legislative intent. The holding of Skylake, also erroneously implies repeal despite

substantial evidence that the statute is continuously in force. This Court should reaffirm its previous determination that 9718.4015 does not render this appeal moot, and this Court should write an opinion overruling Skylake.

ARGUMENT

I. SECTION 718.401 (8) HAS NOT BEEN REPEALED.

If the legislature had meant to repeal §718.401, it could have said so. The word repeal does not appear in the legislative proviso to senate bill 1422; it does not appear in the title to Chapter 88-148; and it does not appear in either the revisions to Q718.401 or the enactment of Q718.4015. Instead, the new legislation explicitly states that it is an amendment.

The title to SB 1422 reads as follows:

An act relating to condominiums and cooperatives; amending ss. 718.401 and 719.401 F.S.; . . .creating ss. 718.4015 and 719.4015, **F.S.**; prohibiting the enforcement of escalation clauses in certain existing condominium and cooperative leases; providing an effective date. (Emphasis added.)

After four pages of "whereas" clauses manifesting the intent to apply the prohibition of escalation clauses retroactively, and discussing the unscrupulous nature of escalation clauses, the legislation goes on to state:

Be It Enacted by the Legislature of the State of Florida:

Section 1. Paragraph (a) of subsection (6) and subsections (8), (9), and (10) of section 718.401, Florida Statutes, are amended to read: (Emphasis added.)

When the bill became Chapter 88-148, the title read:

AN ACT relating to condominiums and cooperatives; . . . amending ss.

718.401, F.S. and 719,401 F.S.; providing for the application of certain options available to condominium and cooperative leases governing recreational facilities or other common elements and making technical changes; creating ss. 718.4015 and 719.4015, F.S.; prohibiting the enforcement of escalation clauses in certain existing condominium and cooperative leases and making technical changes . . . (Emphasis added.)

The Legislature could hardly have made it more clear that it was amending and renumbering §718.401 if it had stated in bold faced capital letters: THIS IS AN AMENDMENT, NOT A REPEAL.¹

¹ Because the statute was not repealed, the Third District's theory that the court must apply the new statute is wrong. In addition, Griffith v. Florida Parole and Probation Commission, 485 So.2d 818 (Fla. 1986), cited by the Third District, does not apply to the situation at hand. Griffith involved a statute that divested district court jurisdiction over a certain subject matter. That is one of the instances where a statute is applied to the case before it. Normally, the rule of thumb is that in those cases where vested rights are adversely affected or destroyed, or when a new obligation or duty is created or imposed, the statute will not be applied retroactively. Where an act is remedial, affecting only the remedies available, or where the statute is procedural, the statute may be applied to the case before it. Village of El Portal v. City of Miami Shores, 362 So.2d 275 (Fla. 1978) (Sundberg and England concurring). If 9718.4015 had the effect ascribed to it by the Third District's opinion, the statute would adversely affect rights of, and impose new obligations upon, condominium owners previously protected by language incorporating the condominium act "as it may be amended from time to time." Under such circumstances, the traditional rules of statutory construction would prohibit §718.401 from being applied retroactively. But this discussion is academic, since the statute prohibiting the enforcement of escalations clauses was not repealed, but remained continuously in force.

Oddly enough, the Third District previously decided the same issue with a directly contradictory result in Goldenberg v. Dome Condominium Assn., 376 So.2d 37, 38 (Fla. 3d DCA 1979), where the Third District stated:

The appellant's basic argument is that the prior statutory prohibition against the inclusion or enforcement of escalation clauses in recreational leases, Section 711.231 Florida Statutes (1975), was repealed at the time the subsequent (present) statutory prohibition, Section 718.401 (8), Florida Statutes (1977), became effective, i.e. January 1, 1977, and that the escalation clause in the present lease, which also took effect on January 1, 1977, was thereby rendered valid. * * *

We hold that such reasoning is fallacious because a statute which is simultaneously repealed and re-enacted is regarded as having been continuously in force. (Cites omitted.) Escalation clauses have been void for public policy reasons in this state continuously since 1975. We cannot impute to the legislature, as suggested by the appellants, a purpose by the re-enactment of the prohibition in a slightly different form, to postpone the effective date of the prohibition to January 1, 1977 (Emphasis added.)

It is mind-boggling that the Third District has accepted a proposition it previously labelled as "fallacious."

This Court has flatly rejected similar arguments. In McKibben v. Mallory, 293 So.2d 48 (Fla. 1974), a party

argued that the Legislature's repeal² and revision of the wrongful death act eliminated all actions for wrongful death prior to the effective date of the new wrongful death act. This Court labelled the argument "untenable" in light of the clear legislative intent of the wrongful death statute. *Id.* at 51. Even though the new wrongful death act expressly repealed the old act, this Court noted that the Legislature had not declared any express intention to obliterate actions accruing under the old wrongful death act. After a lengthy discussion, this Court held:

We adhere to our early pronouncement . . . where a statute has been repealed and substantially reenacted by a statute which contains additions to or changes in the original statute, the re-enacted provisions are deemed to have been in operation continuously from the original enactment, whereas the additions or changes are treated as amendments effective from the time the new statute goes into effect.

The Third District's holding would have illogical and disastrous results if applied as a rule of statutory construction. Tax evaders could argue that by the passage of the new statute raising taxes, the old statute was repealed, and thus no back-due taxes could be collected. Under the new medical malpractice provisions, negligent parties could argue that all causes of action for

² In McKibben the statute was repealed on its face and reenacted, whereas in our case the legislature has merely amended, renumbered, and added an additional layer of protection.

malpractice prior to the new law have been terminated. Under the new punitive damages statute, defendants guilty of willful, reckless, and grossly negligent acts, could argue that because of the amendment, punitive damages are simply unavailable if they accrued before the effective date of the statute.

The holding of the Third District would also have a disastrous effect on all condominium owners who have benefitted from the language incorporating by reference of the "condominium act as it is amended from time to time"--language drafted by the landowners and development owners. Under Skylake, a developer or long term lease landlord who expressly accepted all changes to the condominium act, could now go back and enforce previously unenforceable escalation clauses. There can be no doubt that if this court upholds Skylake the courts will see an enormous amount of new litigation instituted by Developers and Lessors seeking to bypass the law created by this court in Century Village, Inc. v. Wellington, E, F, K, L, H, J, M, & G, Condominium Association, 361 So.2d 128 (Fla. 1978) and 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 Legislators certainly never envisioned such a result.

11. THE LEGISLATIVE PURPOSE IS TO BUTTRESS PREVIOUS LEGISLATION OUTLAWING ESCALATION CLAUSES. THE LEGISLATURE DID NOT INTEND TO PROVIDE A NEW LEGAL LOOPHOLE FOR PERSONS SEEKING TO BENEFIT FROM THESE ONEROUS AND UNSCRUPULOUS ESCALATION CLAUSES.

The legislature now, and the legislature since 1975, has continuously tried to outlaw the type of escalation clause that is the subject of this law suit. Despite the legislative will, this Court has held that the previously enacted provisions invalidating the escalation clauses could not be applied retroactively because such application would violate the contracts clause. The new legislation has been reframed to invoke constitutionally acceptable police powers so that the retroactive application of the statute will pass constitutional muster. In the 1988 amendment, the legislature did not repeal the statutes invalidating escalation clauses. Instead, the legislature amended these statutes to ensure their retroactive enforceability.

The legislative provisos set forth the legislatures' concerns:

- A. That the contract clause is "not absolute and may be required to yield to competing constitutional provisions including the state's police power";
- B. That "58,894" condominium units are subject to such escalation clauses;

- C. That the State "has an exceptionally large population of elderly and retired citizens . . . and an overwhelming number are living on a fixed income";
- D. That inflation in the early seventies "rose dramatically, providing windfall profits to owners of such condominium and cooperative leaseholds";
- E. That such escalation clauses "cause a rise in the cost of operations of recreational and common land and facilities which has no relation to the increase in costs of bringing those lands and facilities to the unit owners";
- F. That due to inflation, a growing proportion of Florida's population is denied basic necessities of life, and "stabilizing the artificial inflation of condominium and cooperative housing would help curb the rising cost of living in Florida and, ultimately, contribute to the welfare of all people of the state by improving their standard of living";
- G. That "there is a pressing public necessity for the state to do whatever it can to curb inflation and to keep the cost of living at a

level where it is possible and manageable to provide citizens a decent and healthful standard of life. The public use and purpose of providing all citizens a decent and healthful standard of life will be directly and substantially furthered by the retroactive application of ss. 718.401(8)"

(Emphasis added.)

The Legislature, in its proviso, then chastises the precise type of dealing that is the subject matter of this dispute:

WHEREAS, leases involving the use of recreational or other common facilities or land by purchasers of condominiums . . . which contain escalation clauses tied to a nationally recognized consumer price index, entered into by parties wholly representative of the interests of a condominium or cooperative developer at a time when the condominium or cooperative unit owners not only did not control the administration of their condominium or cooperative, but also had little or no voice in such administrations, have resulted in onerous obligations and circumstances," and

WHEREAS, the State of Florida has made substantial efforts to eliminate unscrupulous real estate and securities operations which, in the past, resulted in Florida's gaining a poor reputation for protecting consumers. Comprehensive laws have been adopted and scrupulously enforced in the areas of land sales, condominiums, cooperatives, time-share, and securities. It is in the public's interest and welfare that the state maintain its image of protecting Florida purchasers and dealing harshly with those who would take advantage of them. (Emphasis added.)

This Court must be guided by legislative intent. As stated in Village of El Portal v. City of Miami Shores, 362 So.2d 275 (Fla. 1978) (Sundberg and England concurring), a statute must be read "subject to legislative intent as it is expressed, or as it may be gathered from the purpose of the act, the administrative construction of it, other legislative acts bearing upon the subject, and all the circumstances surrounding and attendant upon it." The legislature has at all times intended to benefit the condominium unit owner and never intended to benefit the persons seeking to profit from such onerous escalation clauses.

As Justice Sundberg stated in Williams v. Jones, 326 So.2d 425 (Fla. 1975) (England concurring), legislature is presumed to know the existing law when it enacts a statute. This Court has repeatedly invalidated escalation clauses contained in instruments predating the 1977 amendment where the owner of the instrument containing an escalation clause agreed to be bound by amendments to the Condominium Act. See, Century Village, Inc. v. Wellington, E, F, K, L, H, J, M, & G, Condominium Association, 361 So.2d 128 (Fla. 1978) (Sundberg deciding in the majority); and 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 Skylake opinion misconstrues both the intent of the legislature and its express language. Skylake points to the following language of §718.4015:

The application of this statute to contracts entered into prior to June 4, 1975, may not divest the parties of any benefits or obligations arising from the escalation of fees prior to October 1, 1988, but only prohibits further escalation of fees prior to October 1, 1988. (Emphasis added.)

The Skylake decision would only benefit the developer. Skylake suggests that all escalation clauses entered into prior to June 4, 1975 are now enforceable through October 1, 1988, regardless of whether they were enforceable under the doctrine of Century Village and Angora. This interpretation, however, would divest condominium unit owners of benefits obtained in that gap period. The obvious meaning of the above provision is that prior to October 1, 1988, parties are to maintain the status quo with respect to the enforcement of such escalation clauses. If an escalation clause was unenforceable on September 30, 1988 under the doctrine of Century Village and Angora, it is also unenforceable if the litigation continues on October 1, 1988.

Even if this Court decides that the Third District has taken a purely literal reading of the above provision, this Court has often stated (and the Third District has agreed) that "a statute should be construed and applied so as to give effect to the evident legislative intent, regardless of

whether such construction varies from the literal meaning." Griffis v. State, 356 So.2d 297 (Fla. 1978), retreated from in part after the enactment of a new statute in Duckham v. State, 478 So. 2d 347 (Fla. 1985); Florida Jai Alai, Inc. v. Lake Howell Water and Reclamation District, 274 So.2d 522 (Fla. 1973); Deltona Corp. v. Florida Public Service Commission, 220 So.2d 905 (Fla. 1969); Beebe et ux. v. Richardson, 156 Fla. 559, 23 So.2d 718, 719 (Fla. 1945); State v. Nunez, 368 So.2d 422 (Fla. 3d DCA 1979).

The legislative intent in the new statute is to protect condominium purchasers and to deal "harshly with those who would take advantage of them." Legislature certainly did not intend to give the owners of the instruments containing such clauses any better rights than such owners would have had under the previous legislation and case law.

CONCLUSION

In Skylake, the Third District adopted a position that it previously labelled "fallacious" and that this court previously labelled "untenable." This Court should reaffirm its previous determination that §718.4015 does not render this appeal moot, and this Court should write an opinion overruling Skylake.

As to the issues raised in the main briefs, Petitioner 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.

Respectfully submitted,

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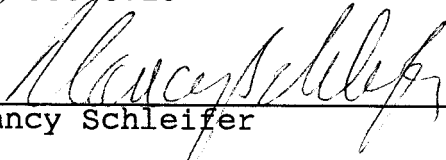
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Nancy Schleifer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this brief has been served by mail on the 20th day of February, 1989, 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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