047

IN THE SUPREME COURT OF THE STATE OF FLORIDA.

CASE NO. 80,233

4th District Court of Appeal - Case No. 90-0728

BANK ONE, DAYTON, N.A.,

Petitioner,

vs.

SUNSHINE MEADOWS CONDOMINIUM ASSOCIATION, INC., et al.,

Respondents.

AN APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL

REPLY TO ANSWER BRIEFS OF RESPONDENTS, THE 5000 CORPORATION AND PRIME BANK

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REPLY TO ANSWER BRIEF OF THE 5000 CORPORATION

STATEMENT OF THE CASE AND FACTS

Bank One disagrees with The 5000 Corporation's discussion of the record evidence. The statement on page 4, citing to "(A.447)", that there are no documents in Bank One's file that indicated the Bank intended to "spread its lien" by executing the Consent of Mortgagee, is wrong. The citation does not support this assertion. Other portions of the deposition of Bank One loan officer John Kavanaugh, including pages surrounding the citation, clearly establish that Bank One's file contained a memo from its in-house counsel, Eric Sadow, stating that two months prior to consenting to the phased-in Amendment, Bank One obtained a legal opinion that the mortgage lien would extend to all of the condominium parcels if Bank One consented to the Amendment and the property became phased-in to the Condominium (A.449, 450, 465-466, 492-493, 495, 497-498, 501).

Matters involving John Shaw are irrelevant. Mr. Shaw was sued in Count III of the Second Amended Complaint to recover on the promissory note which gave rise to the mortgage (A.22). The 5000 Corporation failed to disclose that the Bank's records showed collection is impossible or doubtful at best (A.557, 560). The settlement agreement with Mr. Shaw is also irrelevant.

The discussion by The 5000 Corporation on page 5 about the K.T.I. sale is very misleading. Bank One did not receive any proceeds because it did not have notice of the K.T.I. sale of a few condominium parcels to The 5000 Corporation (A.524). Moreover, the Special Warranty Deed which conveyed the

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condominium parcels and title to all of the Phase IV-B property, provided that the conveyance was subject to Bank One's mortgage (A.40, 41, 73-75, 77-78). Whether Bank One received any proceeds of the K.T.I. sale is also irrelevant because Bank One's pre-existing lien would remain on the condominium parcels sold no matter who the owner is.

ARGUMENT

The 5000 Corporation has raised several arguments which are irrelevant to deciding the certified question. The entire discussion about the deposition testimony of John Kavanaugh is irrelevant. The answer to the certified question depends on what occurred by operation of law when the mortgaged property was phased-in to the Condominium. Bank One's beliefs about its collateral, or the degree of vigilance exercised in protecting its collateral, neither adds to, detracts from, nor otherwise alters the legal principles that will decide the certified question.

The discussion about John Shaw and Bank One's suit on the note are also irrelevant. Shaw cannot pay the note, so the foreclosure is Bank One's only meaningful remedy.

The discussion about the claims asserted in the original Complaint versus those asserted in the Second Amended Complaint are also irrelevant. Amendments to the pleadings which arise from the same occurrences relate back to the original pleading. See, Fla. R. Civ. P. 1.190(c). The 5000 Corporation's argument about why the amendment to the Complaint occurred is based on speculation, is beyond the record, and is beside the point. So

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is the argument that because no one has appeared as amicus curiae in this case, the issue to be decided must not be of great public importance.

The 5000 Corporation has portrayed a distorted picture of Bank One's position, and has obscured the real issues at bar with irrelevant matters. The essential issues are the legal effect of the "mortgagee consent" provisions of the Condominium Act (Sections 718.403(7) and 718.104(3), Florida Statutes), the so-called "anti-severance provisions" (Article XI(A)(B) of The Declaration and Section 718.107, Florida Statutes) and the meaning of Section 718.121, Florida Statutes. The essential facts are undisputed. The focus of this appeal should be on these issues.

A. THE "MORTGAGEE CONSENT" PROVISIONS

The 5000 Corporation is advocating an interpretation which is neither stated in Sections 718.403(7) and 718.104(3), Florida Statutes, nor reasonably inferable. The 5000 Corporation's interpretation leads to an absurd result. No rational mortgagee would ever give its consent to the recording of a declaration if the result is that its mortgage cannot be foreclosed. The absurdity is exemplified by The 5000 Corporation's conclusion that the condominium could some day be terminated and that the foreclosure of the mortgage can occur at that time. As a practical matter, this is tantamount to having the mortgage impaired forever. This argument was accepted by the District Court in its holding. There would be no reason for any lender to do this. Statutes will not be construed to lead to an absurd

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result. Winter v. Play del Sol, Inc., 353 So. 2d 598 (Fla. 4th DCA 1977).

Section 718.104(3), Florida Statutes, provides for mortgagees to "join in" or otherwise "consent" to the declaration. This only means that the mortgagee agrees to conversion of the property from fee simple to the condominium form of ownership, and agrees to the imposition of the use restrictions that are placed on the property by the declaration. On page 12, The 5000 Corporation emphasized the phrase "subordinating their mortgage interest", which is found in Section 718.104(3), Florida Statutes, and states that this is what Bank One did. However, the "subordination agreement" method, whereby the mortgage is subordinated to the declaration, is only one of three options by which a mortgagee may act under Section 718.104(3). The other two options are, 1) joining in the execution of the declaration, and 2) executing and recording a consent to the declaration. Bank One executed a consent to the Declaration. Bank One did not enter into a "subordination agreement", as The 5000 Corporation states.

There is nothing in Section 718.403(7) or 718.104(3), Florida Statutes, that can reasonably be interpreted to mean that a mortgagee forfeits its statutory and contractual right to foreclose in the event of a default by consenting to a declaration or an amendment to a declaration. This requirement applies to all condominiums, phase and non-phase. In fact, Section 718.403, et. seq. (the provisions governing "phase condominiums") squarely places the burden on the developer, the

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unit owners and the condominium association to make sure that the owners are protected in the phasing process.

For example, Section 718.403(3) states that the developer shall notify owners of existing units by certified mail of the commencement of or decision not to add a phase. Section 718.403(5) provides that any unit owner or the association may enforce the developer's phasing obligations, or sue the developer for damages caused by the failure to comply.

Bank One is only a lender. It funded the construction loan to build the amenities when the property was fee simple and not part of the condominium. It recorded a mortgage to give the world notice of its security interest. It has nothing to do with the relationship between the developer and the unit owners.

B. THE "ANTI-SEVERANCE" PROVISIONS

The 5000 Corporation has misconstrued the so-called "anti-severance" provisions. Contrary to its arguments, the purpose of these provisions is not to defeat a duly recorded mortgage which pre-existed the phasing of the property to condominium. Instead, these provisions merely serve as a "unity of title", which irrevocably bonds the unit with its appurtenant undivided share of the common elements into an indivisible, legal interest in condominium property called the "condominium parcel". The unity of title is necessary because the "condominium parcel" is the unit of ownership in a condominium. See, Section 718.106(1), Florida Statutes (stating that a "condominium parcel" created by the declaration is a separate parcel of real property). An

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analogy common to fee simple real property illustrates the "unity of title" concept in the present case.

There is a house on a lot, and an adjacent lot upon which the driveway of the house is located. The adjacent lot is encumbered by a duly-recorded mortgage. There is an irrevocable Unity of Title recorded in the public records, which ties title to the two properties together. Assume, as frequently occurs, the Unity of Title was required by local government for the lots to be used together to comply with local land use law. Subsequently, the mortgage goes into default. The mortgagee would be entitled to foreclose both parcels, even though the mortgage encumbers only the adjacent lot, because of the irrevocable Unity of Title.

A close reading of the "anti-severance" provisions shows that unity of title is all that was intended:

> Article XI of the Declaration of Condominium
> (A) The fractional undivided interest in and to the Common Elements and/or Condominium Property which each Unit Owner shall own by reason of his ownership of a Condominium Unit, (both initially and after a subsequent Phase or Phases are included within the Condominium Property by Amendment hereto) is set forth in Exhibit "D" attached hereto and made a part hereof.
> (B) The fee simple title to each Condominium Parcel shall include both the Unit and the undivided interest in the Common Elements and/or Condominium property in the percentages set forth in Exhibit "D" even though the description in the instrument of conveyance or encumbrance may refer only to the title to the Unit. Any attempts to separate the fee simple title to a Unit from the undivided interest in the Common Elements and/or Condominium Property appurtenant to such Unit shall be null and void.

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(A. 121).

> Section 718.107, Fla. Stat.:
> (1) The undivided share in the common elements which is appurtenant to a unit shall not be separated from it and shall pass with the title to the unit, whether or not separately described.
> (2) The share in the common elements appurtenant to a unit cannot be conveyed or encumbered except together with the unit.
> (3) The shares in the common elements appurtenant to the units are undivided, no action for partition of the common elements shall lie.

The 5000 Corporation argues that these provisions prevent foreclosure of Bank One's mortgage. That notion is nowhere to be found in these provisions. The more reasonable and the proper construction is that because of the "unity of title", the condominium parcel is encumbered to the extent of each parcel's pro-rata share of liability for the common expense. The interpretation is consistent with mortgage lien law and the condominium form of ownership, especially Section 718.121, Florida Statutes.

The 5000 Corporation asserts that under Bank One's interpretation, "no unit owner ever has any idea of how much he must pay to redeem the mortgage; the amount of redemption changes as phases are added or the developer increases the debt". This statement ignores Article XI(C) of the Declaration, which provides in pertinent part:

> The common expenses of the Condominium, including the monthly maintenance charges, shall be borne and paid by each of the Unit Owners in the same fractions of the whole as are set forth in Exhibit "D" to the Declaration....

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Exhibit "D" contains a detailed schedule of the percentage of ownership of the common elements and share of common expenses for each unit owner as each phase is added (A.212-215). This schedule, which is required by the Condominium Act to be included in every declaration, operates in tandem with Section 718.121, Florida Statutes.

C. SECTION 718.121, FLORIDA STATUTES

The 5000 Corporation's arguments about the correct interpretation of Section 718.121, Florida Statutes are erroneous and contradictory.

The 5000 Corporation admits that Section 718.121, Florida Statutes embodies the same legal principle that Bank One contends applies to this case. However, The 5000 Corporation claims because the concept is mentioned in the context of mechanics liens, that is the only time it was intended to apply. Because the statute does not specifically mention this exact factual situation does not mean that the principle does not apply. The legislature cannot possibly foresee every future circumstance that might arise. The legislative intention that the unity of title concept applies to this case follows from inclusion of the concept in Section 718.121, Florida Statutes, and the analogous situation presented.

The gist of The 5000 Corporation's argument is that since the Bank One mortgage lien predated the Declaration, it was not "created" and "did not arise" against the condominium parcels because the property was not condominium property when the mortgage was recorded. The result of this argument is absurd--

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every mortgage pre-existing the declaration would be a nullity once the property became condominium, unless it was a lien against the entire condominium and it had the unanimous consent of every unit owner, which never occurs. This argument is contrary to the very existence of the "mortgagee consent" provisions. Why would a mortgagee consent to the development of a condominium if its mortgage is going to be a nullity?

This argument of The 5000 Corporation is also contrary to its other argument that Bank One's mortgage lien becomes effective when the Condominium is terminated. On one hand, The 5000 Corporation argues that Section 718.121, Florida Statutes precludes liens against condominium property which pre-dated the recording of the declaration. On the other hand, it argues that the Bank One mortgage lien is valid against the condominium parcels when the condominium becomes terminated.

At first blush, The 5000 Corporation seems to have an answer for everything. On closer examination its arguments fail. The 5000 Corporation has attempted to obscure the fundamental condominium concepts involved in this case by advocating interpretations which were not intended by the legislature and which are ridiculous in the business world.

According to the arguments of The 5000 Corporation, a lender who funds the construction of improvements which are to become common elements in a phase condominium and who has a pre-existing mortgage is some kind of "wrongdoer", who the legislature targeted to make recovery of its collateral impossible upon default. The 5000 Corporation claims that Bank One should have

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withheld its consent, and instead, insisted that 1) its mortgage be paid off or refinanced; 2) the mortgage be modified such that the lien encumber some or all of the condominium parcels in the newly created phases; or 3) the developer offer some other collateral to secure the loan. Yet, there is no reason to believe that the legislature intended to require Bank One to change its entire financing scheme where it already had a pre-existing mortgage on fee simple property, had closed the loan, and had constructed the improvements. It is more ludicrous in view of the inclusion in the phase condominium statute of rights and remedies in favor of the unit owners and the association against the developer to remedy improprieties in the phasing process.

The 5000 Corporation states on page 22 that Bank One's interpretation "...would leave a unit owner without any protection as to the developer's use of his condominium parcel as collateral". Again, this ignores the rights that the legislature granted to the unit owners and association against the developer in Section 718.403, Florida Statutes, especially Section 718.403(3) and Section 718.403(5), as well as the common law. If the developer is deficient in its responsibilities, then that is a matter between the unit owners, the association and the developer. Bank One is only a lender. It did not participate in the development of the condominium.

It is undisputed that neither the Declaration nor the Condominium Act has a prohibition against submitting land encumbered by a mortgage to the condominium form of ownership.

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In fact, Article II of the Declaration states that the land has been divided into 12 phases for the purpose of financing the construction (A.109). The unit owners never bargained with the developer for the right to have the phased-in land submitted free and clear of the construction mortgage. Yet that is precisely the result being sought.

If the unit owners have a claim against the developer, then they could have utilized the remedies set forth in Section 718.403, Florida Statutes and sued the developer for damages sustained; or they could have brought an action to cancel the conveyance of the phase because of non-compliance with the developer's legal duties. They never did this, and instead, since 1987, continue to enjoy the use and ownership of the encumbered property and improvements constructed with the money that Bank One loaned based upon the security of the mortgage. This has been occuring throughout the time the loan has been in default. There is nothing in the Declaration or Condominium Act that precludes Bank One from foreclosing each condominium parcel for the respective portion of the debt that the unit owners assumed by accepting ownership of the additional common elements that became appurtenant to each condominium parcel when the phase was added.

The 5000 Corporation has also misconstrued Bank One's arguments pertaining to the notice given by the recorded mortgage. The 5000 Corporation states the notice is that "...a purchaser should have known that this 1.43 acres might become a common element such that the Bank One lien spreads to the

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purchasers condominium parcel". (Emphasis in original). The notice given was more--it was notice of Bank One's mortgage at the time the mortgaged property was phased into the Condominium by the Amendment to the Declaration. At that time every existing unit owner had constructive notice (if not actual notice) that the property which was to become additional common elements to every condominium parcel was already encumbered by Bank One's mortgage. At that time each unit owner had the right to determine whether to accept or reject the additional phase, depending on whether the developer had complied with his legal responsibilities to the unit owners. This is why Section 718.403(3), Florida Statutes, requires the developer to give each owner of existing condominium parcels certified mail notice of the commencement of adding a phase. If there is an impropriety or defect in this process, the unit owners and the association have the right pursuant to Section 718.403(5), Florida Statutes, as well as the common law, to enforce the developer's phasing obligations or sue for damages.

In the case at bar, the unit owners accepted the phase, enjoyed and continue to enjoy the additional amenities, at the same time arguing that Bank One's consent to the declaration, which made all of this possible, precludes it from foreclosing its security for the loan in default. It is beyond comprehension that such an unjust result was intended by the legislature.

The 5000 Corporation argues at page 18 that "...it is not reasonable to impute knowledge of such a legal "rule" to condominium purchasers for 1983 through 1987 when Bank One had no

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idea such a rule existed until it filed its second amended complaint in September, 1989". However, the converse is true-the unit owners would not have known when they accepted the phase that the District Court would construe the mortgagee's consent to the declaration as precluding foreclosure of the mortgage if and until the condominium was terminated. Further, as set forth at the beginning of this Brief, Bank One obtained a legal opinion before giving its consent to the declaration in March, 1987, that by giving consent its mortgage lien would extend to each condominium parcel in its pro-rata ownership and liability share upon the submission of the property to condominium ownership. Therefore, the statement that Bank One had no idea "the rule" existed until it filed the Second Amended Complaint is totally false. Most important, however, there was no reason for the unit owners or The 5000 Corporation to believe that the duly-recorded mortgage of Bank One would "magically disappear" when the property was phased into the condominium.

REPLY TO ANSWER BRIEF OF PRIME BANK

STATEMENT OF THE CASE AND FACTS

Prime Bank's discussion about which mortgages are the subject of Bank One's foreclosure claim and to the Order Granting Bank One's Motion for Partial Summary Judgment ignores the Stipulation and Agreed Order (A. 575-577) entered into between Bank One and Prime Bank, and signed by the Trial Court. This document amended the Second Amended Complaint (A. 577) by interlineation to specify the junior mortgages of Prime Bank being foreclosed. The Trial Court's Order Granting Bank One's

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Motion for Partial Summary Judgment, which is the Order on appeal, did not need to expressly reference the Agreed Order. Further, any concern in this regard can be addressed in the Final Judgment.

ARGUMENT

I. A PRE-EXISTING MORTGAGE ON LAND SUBMITTED TO CONDOMINIUM OWNERSHIP ATTACHES TO EVERY CONDOMINIUM PARCEL

Bank One incorporates by reference the foregoing arguments and authorities from its Reply to The 5000 Corporation.

Prime Bank, who is aligned with The 5000 Corporation in this appeal, concedes that the Opinion of the District Court is legally erroneous, illogical and impractical in result. The Opinion is predicated on the arguments of The 5000 Corporation. In an effort to improve its position, Prime Bank is advocating a construction of the applicable provisions of the Declaration and the Condominium Act which results in a compromise. Prime Bank's position has initial appeal, but it is significantly defective in an important aspect--it fails to take into account that under the Declaration and Condominium Act, every condominium parcel in the Condominium received additional common elements from the property that was phased-in and encumbered by Bank One's mortgage. Exhibit "D" of the Declaration sets forth the fractional share of ownership of the common elements of each condominium parcel and the share of the liability for common expenses to be borne by each condominium parcel, as each phase is added (A. 21-215). It would be contrary to this fundamental principle of condominium law and the agreement between the owners on sharing liability,

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for some of those who received the same, additional ownership interest in the common elements by the phase-in to be relieved of paying their proportionate share of the debt.

Prime Bank, in its footnotes, shows confusion with some of the condominium law concepts involved in this appeal. In footnote 4, Prime Bank states that Bank One's argument that the liens against each condominium parcel in pro-rata amounts which arise from its mortgage "is fair", but is unsupported by authority other than Section 718.121, Florida Statutes. This argument fails to consider Exhibit "D" to the Declaration, which provides the proportionate share of common expenses to be borne by each condominium parcel as each phase is added.

In footnote 7, Prime Bank seems to challenge Bank One's contention that the lien against each condominium parcel from Bank One's mortgage would also be a common expense of the Condominium. Prime Bank does not offer any legal authority for its assertion, and it is incorrect. Section 718.115(1)(a), Florida Statutes (1991) provides that common expenses include the expenses of the operation, maintenance, repair, replacement or protection of the common elements and association property. A condominium association has the power to protect the common elements included in each condominium parcel from being foreclosed by assessing each condominium parcel its pro-rata share. Each condominium parcel's share of the liability of the debt is determined by Exhibit "D" to Declaration.

In footnote 5, Prime Bank states that Bank One and The 5000 Corporation have misconstrued the "non-severance" (or "unity of

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title") aspect of Section 718.107, Florida Statutes. Prime Bank argues that a "chunk of the common elements" may be physically separated from the condominium parcel under Section 718.107, Florida Statutes, without violating the statute because it can be done by condemnation. However, condemnation is an exception because of the legally superior right of the sovereign (the State in this case) of eminent domain for a public purpose. See, Fla. Const., Art. X, Section 6 (1968).[1]

Prime Bank, on pages 15 through 17, engages in a discussion about relative economic values of condominium parcels during the phasing process. This discussion is entirely speculative, and ignores the variation in the nature, quantity and quality of the improvements that are added by each phase.

Prime Bank also states in its discussion on page 17, that an owner of property cannot have their rights diminished by subsequent unilateral actions to which they do not consent. That argument does not apply to this case because every unit owner agreed to be bound by the phase plan of development set forth in the Declaration by purchasing a condominium parcel in Sunshine Meadows condominium. Further, Section 718.403(6)(f), Florida Statutes, provides that an amendment which adds a phase to a condominium does not require the consent of the unit owners. This is because the unit owner's consent is obtained by purchasing subject to the phase plan of development. The unit

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[1]This concept is included in Section 718.111(3), Florida Statutes, which provides that a condominium association may defend actions in eminent domain or bring inverse condemnation actions.

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owners rights in the phasing process are protected by the various obligations imposed by Section 718.403, Florida Statutes.

II. BANK ONE PROPERLY JOINED THE CONDOMINIUM ASSOCIATION AS A CLASS REPRESENTATIVE OF ITS UNIT OWNERS PURSUANT TO FLA. R. CIV. P. 1.221, SO THERE HAS NOT BEEN A FAILURE TO JOIN INDISPENSABLE PARTIES.

The following argument is submitted subject to this Court's ruling on Bank One's Motion to Strike Portion of Answer Brief of Respondent Prime Bank.

The argument that every unit owner at the condominium must be made a party to this action is meritless. It is contrary to the language of Fla. R. Civ. P. 1.221, contrary to case law and ignores the Condominium Association's admission and the clear fact that Count I of the Second Amended Complaint concerns a matter of common interest to all unit owners at Sunshine Meadows Condominium.

Fla. R. Civ. P. 1.221 is a special rule of civil procedure for condominium association class representation, and provides for both plaintiff and defendant classes. The language of Fla. R. Civ. P. 1.221 makes it clear that the Condominium Association can properly be joined as a defendant class representative on behalf of all of the unit owners in a foreclosure action involving all condominium parcels. Historically, foreclosures involving all condominium parcels have proceeded under Rule 1.221. See, Southern Colonial Mortgage Company, Inc. v. Medeiros, 347 So. 2d 736, 739 (Fla. 4th DCA 1977); Royal Ambassador Condominium Association, Inc. v. East Coast Supply Corp., 495 So. 2d 932, 933 (Fla. 4th DCA 1986); Kohl. v. Bay

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Colony Club Condominium, Inc., 398 So. 2d 865, 870 (Fla. 4th DCA 1981) pet. for rev. den., 408 So. 2d 1094 (Fla. 1981); The Greens of Inverrary Condominium Association Phase I, Inc. v. Johnson, 445 So. 2d 1096 (Fla. 4th DCA 1984); Brazilian Court Hotel Condominium Owners Association, Inc. v. Walker, 584 So.2d 609 (Fla. 4th DCA 1991). The legislative history of Fla. R. Civ. P. 1.221 also supports the Trial Court's ruling. See, In the Florida Bar, In Re: Rule 1.220(b), Florida Rules of Civil Procedure (Petition to Modify), 353 So. 2d 95, 97 (Fla. 1977).

As a practical matter, utilizing Rule 1.221 to foreclose all condominium parcels in a condominium based upon a common claim is essential due to the potentially large number of unit owners. Some condominiums have more than 1,000 condominium parcels, and many of these have multiple owners. If Rule 1.221 could not be utilized, the cost and delay incident to service, getting the case "at issue", reviewing pleadings, mediation, and the like would be insurmountable and unnecessarily burdensome.

The prerequisites to bringing a class action under Rule 1.221 are allegations that control of the condominium association is obtained by unit owners other than the developer, and that the subject matter of the litigation concerns a matter of common interest. It is undisputed that at all material times control of the Condominium Association was by unit owners other than the developer (A. 14, 34). The Condominium Association also admitted, in response to Bank One's Request for Admissions, that the allegations of the Second Amended Complaint relating to the

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common elements are of common interest to the unit owners of the condominium (A. 38, 76).

Prime Bank never filed a Motion to Dismiss for Failure to Join Indispensable Parties and did not join in the Condominium Association's Motion. Therefore, Prime Bank does not have standing to raise this issue for the first time on appeal. Moreover, all of Prime Bank's arguments are directed to the Trial Court's ruling, not the ruling of the District Court from which this appeal is taken. The Opinion of the District Court is silent on this issue. Neither Prime Bank nor any other party opposing Bank One moved for clarification of the Opinion. Thus, Prime Bank has waived any right to contest the issue here.

The Trial Court also correctly determined the Motion to be moot because Bank One had to prove the class action allegations of the Second Amended Complaint for its Motion for Partial Summary Judgment. It did this through the pleadings, discovery, and other proofs submitted in support of its Motion. Once the Trial Court granted Bank One's Motion for Partial Summary Judgment, it was unnecessary for the Trial Court to rule upon the Condominium Association's Motion. Therefore, the Motion was moot because the issue had already been decided as part of the Trial Court's decision to grant Bank One's Motion for Partial Summary Judgment.

CONCLUSION

The correct construction of the statutes at issue becomes apparent when the issues are not obscured by false arguments, irrelevant matters and convoluted reasoning which attempt to

justify an inequitable and absurd result. Bank One has done absolutely nothing wrong. In fact, no one has shown that anyone, including the developer, did anything wrong. Bank One, like any other cooperative lender, consented to the declaration to help the developer and the unit owners achieve success in their development. Consenting to the declaration is not a waiver of the right to foreclose until the condominium is terminated. Such a result is illogical and hinders development of phase condominiums and legitimate lending contracts.

The Opinion of the District Court is erroneous as a matter of law. It should be quashed and the case remanded to the Trial Court for further proceedings.

Respectfully submitted,

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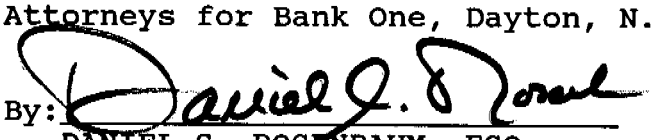
By: 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 20 day of November, 1992 to: all persons listed on the attached Schedule.

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SUPREME COURT OF THE STATE OF FLORIDA
CASE NO. 80,233

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