SUPREME COURT OF FLORIDA

ROGERS & FORD CONSTRUCTION CORP., and FLAGLER PROPERTIES, INC.,

Petitioners,

vs.

CARLANDIA CORPORATION,

Respondent.

_____/

CASE NO.: 80,788

District Court of Appeal
4th District - No. 91-2142

INITIAL BRIEF OF PETITIONER, ROGERS & FORD CONSTRUCTION CORP.

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STATEMENT OF CASE AND FACTS

The Petitioner, Rogers & Ford Construction Corp., shall be referred to as "Rogers & Ford," the Petitioner, Flagler Properties, Inc., shall be referred to as "Flagler", and the Respondent, Carlandia Corporation, shall be referred to as Respondent. References to the record shall be denoted by "R._____."

The Respondent commenced this action by the filing of a complaint in the trial court (R. 34-45). In its complaint, the Respondent alleged that it was the owner of a condominium unit in a condominium project known as Two North Breakers Row, that Flagler was the developer of this project, and that Rogers & Ford was the contractor. Respondent further alleged that defects existed in its condominium unit and in the common elements of the condominium project and sought damages against the Petitioners for repair of these defects.

Rogers & Ford moved to dismiss the complaint (R. 46-48). In its motion, Rogers & Ford asserted, inter alia, that, as to the alleged defects in the common elements, the complaint must be dismissed for the reason that the Respondent was not the proper party to bring the action and/or the Respondent had failed to join indispensable parties in that the action could only be brought by all unit owners having interest in the common elements or the condominium association as the representative of the unit owners. Upon this motion and the motion of Flagler (R.49-50), the trial court dismissed Respondent's complaint with leave to

amend (R. 55-56).

The Respondent thereafter filed its amended complaint (R. 57-69). In its amended complaint, the Respondent abandoned its claims for defects in its own unit, leaving only those claims for defects in the common elements.

Rogers & Ford moved to dismiss the amended complaint upon substantially the same grounds it had asserted in its motion to dismiss the original complaint (R. 70-72). Upon this motion and the motion filed by Flagler (R.75-76), the trial court dismissed the amended complaint with prejudice (R. 77-78).

Thereafter, the Respondent timely filed its motion for rehearing (R. 79-83), which motion the trial court granted and set the matter for rehearing (R. 84-85). In its motion for rehearing and its argument before the trial court (R. 1-33), the Respondent asserted that under the holding of S & T Anchorage, Inc., vs. Lewis, 575 So.2d 696 (Fla. 3d DCA 1991), the Respondent, as an individual condominium unit owner, had a right to maintain an action for defects in the condominium common elements. The trial court again dismissed the amended complaint with prejudice, finding that the cited case was inapplicable to the instant case (R.88-89) and Respondent timely appealed the dismissal to the district court of appeal.

After the submission of briefs and oral argument, the district court reversed the trial court and held that an individual unit owner could maintain an action for defects in the common elements of the condominium. The Petitioners timely moved for rehearing, clarification and for certification. The district

court granted these motions and certified the following question as one of great public importance:

> MAY AN INDIVIDUAL CONDOMINIUM UNIT OWNER MAINTAIN AN ACTION FOR CONSTRUCTION DEFECTS IN THE COMMON ELEMENTS OR COMMON AREAS OF THE CONDOMINIUM?

SUMMARY OF ARGUMENT

In addition to the arguments raised by Flagler in its initial brief, which are incorporated herein by reference, Rogers & Ford asserts that an individual unit owner may not maintain an action for construction defects in the common elements for the reasons which are summarized as follows:

I

Insofar as each condominium unit owner shares with all other condominium unit owners an undivided interest in the common elements of the condominium, any action brought by an individual unit owner for defects in the common elements will directly and substantially affect these undivided interests. Therefore, all unit owners are indispensable parties to an action for defects in the common elements.

II

The reliance of the district court upon section §718.111(3), Florida Statutes (1991), in its holding is misplaced in that neither this provision nor any other provision of the Condominium Act supports the right of an individual unit owner to maintain an action for defects in the common elements.

III

There are strong public policy reasons why an individual unit owner should not be permitted to maintain an action for defects

in the common elements and which make this issue one of great public importance.

DISCUSSION

I

An indispensable party is one whose interest will be substantially and directly affected by the outcome of the case and the case may not be decided without the presence of such party. W.R. Cooper, Inc. vs. City of Miami Beach, 512 So.2d 324 (Fla. 3d DCA 1987); Amerada Hess Corporation vs. Morgan, 426 So.2d 1122 (Fla. 1st DCA 1983); United States vs. State of Florida, 179 So.2d 890 (Fla. 3d DCA 1965). A condominium unit owner shares an undivided interest in the common element with all other unit owners. §§718.103(11), 718.106(2)(a), Fla.Stat. (1991). Any action brought for repair of the common elements would directly and substantially affect the undivided interests which all unit owners share in the common elements and, therefore, all unit owners are indispensable parties.[1]

1. In its argument before the district court, Respondent asserted that if there was an indispensable party defect in its pleadings it should have been given leave to amend to cure them and that it was therefore error to dismiss the amended complaint with prejudice citing Whittington Condominium Apartments, Inc. vs. Braemar Corp., 313 So.2d 463 (Fla 4th DCA 1975) for this proposition. First, the opinion in Whittington states that it is improper to dismiss with prejudice a complaint for the improper joinder of parties unless an opportunity to amend has been granted that there has been a failure to comply therewith. Id. at 466. Second, as the record reflects, Rogers & Ford raised the indispensable party defect in its motion to dismiss Respondent's original complaint, the Respondent was granted leave to amend, and the Respondent failed to cure the defect. Therefore, the trial court did not err in dismissing the amended complaint with prejudice.

II

In support of its holding, the district court cites a portion of the last sentence of section 718.111(3), Florida Statutes (1991). The portion cited by the district court is that "[n]othing herein limits any statutory or common-law right of any individual unit owner...to bring any action without participation by the association..." which the district court apparently construes as authority to permit actions for common element defects by individual unit owners. The full text of the sentence is as follows:

> Nothing herein limits any statutory or common-law right of an individual unit owner or class of unit owners to bring any action without participation by the association which may otherwise be available. (Emphasis supplied)[2]

However, neither this sentence nor the portion cited by the district court can be construed to reach the district court's conclusion, particularly given other provisions of the Condominium Act.

The operative phrase in the last sentence of section 718.111(3) is that an individual unit owner may bring an action which "may otherwise be available". For any action to be "otherwise available", all parties indispensable to that action must be present. As argued previously in this brief, all unit owners are indispensable parties to an action for defects in the common elements; therefore, such an action would not be

2. The Petitioner in its argument before the district court cited this sentence in §718.111(3), Florida Statutes (1987). The sentence was amended by including the phrase "without participation by the association".

"otherwise available" to an individual unit owner.

Furthermore, the association has the sole authority to operate the condominium, §718.111(1)(a), and is granted the power to operate, maintain and manage the condominium property, including its common elements, and the authority to institute suit with respect to these powers, §718.111(3). These are grants of powers and authority which have been specifically reserved to the association and not to the individual unit owner and, in fact, a unit owner has no authority to act for the association by reason of being a unit owner, §718.111(1)(c). Therefore, actions by individual unit owners which are "otherwise available" are those actions other than actions which the association is authorized to maintain concerning the common elements and matters of common interest under the Condominium Act's reservation of power and authority to the association to maintain such actions. Indeed, given the pervasive role of the association in the statutory scheme of the Condominium Act with respect to the common elements and matters of common interest, it could not have been the intent of the Condominium Act to permit an individual unit owner to maintain an action for defects in the common elements. It is therefore submitted that it was the intent of the last sentence of section 718.111(3) to reflect that unit owners did not lose any rights of action by virtue of being unit owners other than those actions which the association has the power and authority to maintain.

III

The issue of whether an individual unit owner may maintain an

action for defects in the common elements is one of first impression in this State. There are strong public policy reasons why an individual unit owner should not be permitted to maintain such an action. Given the pervasive nature of condominium life and development in this State, these reasons make this issue one of great public importance. These reasons are as follows.

First, suits against condominium developers for defects in the common elements have heretofore been brought by either the condominium association or as a class action by the unit owners. As such, the potential exposure of a developer in developing or in deciding whether to develop a condominium was limited to a single such claim from a single party which often times was resolved before suit was commenced. However, under the district court's holding in this case, a condominium developer could now conceivably be faced with as many lawsuits for such defects as there are unit owners. Insofar as these suits would be brought by a different unit owner, the doctrine of res judicata would not be bar to any of these suits notwithstanding the fact that the suits were brought on some or all of the same alleged defects or different defects. This increased exposure to multiple claims would have a chilling effect on condominium development in this State.

Second, if an individual unit owner were permitted to maintain an action for the common area defects, a developer in attempting to remedy or resolve defects claimed by the association or a unit owner could never be certain that the claim was resolved for fear that some other unit owner or unit owners

might assert that the remedy or resolution was inadequate and/or that additional defects existed. This would create great uncertainty for builders and developers in the resolution of claims which would continue until the applicable statute of limitations for these defects had expired. This would result in a great reluctance by builders and developers to remedy any defects until all possible claims by all potential claimants had been made or had become time-barred which would have a great chilling effect on the resolution of defect claims.

Third, the district court's holding in this case has the practical effect of eroding the condominium association's authority and ability to govern at the most critical time of the association's existence, to-wit, turnover of the association from the developer to the unit owners. It is during this period that the condominium construction records are reviewed, engineering surveys conducted, defects identified, and negotiation concerning the remedy of these defects takes place. Under the district court's holding, a condominium association would never be certain that its efforts in identifying and negotiating the resolution of defects and the substantial costs attendant thereto would be conclusive or even justifiable knowing that its efforts may be "second-guessed" by the assertion of a claim or claims by an individual unit owner or owners. Furthermore, the association would have great difficulty in negotiating with the builder or developer to resolve the claims where both parties knew that any agreement or procedure that is reached or employed to correct defects may be subverted by an individual unit owner or unit

owners. Indeed, in order to reach such a resolution, it would be necessary for the developer and the association to require that virtually every unit owner be a party to such a resolution and/or that a release be obtained from every unit owner. This would have a chilling effect on the authority and ability of the association to resolve such claims and to even make any efforts to resolve these claims.

Fourth, the district court's holding would create chaos in the scheme and structure of condominium life. Because the holding can be extended to permit the maintenance of virtually any action by an individual unit owner concerning the common elements and matters of common interest, it is an invitation for each unit owner to become a "one-person" association. This would would create virtual anarchy.

CONCLUSION

Based upon the foregoing, the Petitioner, Rogers & Ford Construction Corp., respectfully requests that this Court accept jurisdiction of this matter, reverse the decision of the district court, and affirm the decision of the trial court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. mail to Roy E. Fitzgerald, Esquire, Gunster, Yoakley & Stewart, P.A., P.O. Box 4587, West Palm Beach, Florida 33402-4587 and Louis R. McBane, Esquire, Boose, Casey, Ciklin, Lubitz, Martens, McBane & O'Connell, Northbridge Tower, 19th Floor, 515 North Flagler Drive, West Palm Beach, Florida 33401, 11th day of December, 1992.

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(RF-Brief)