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500 SOUTH DUVAL STREET, TALLAHASSEE, FLORIDA 32399-1927

ROGERS AND FORD CONSTRUCTION COMPANY, a Florida corporation, and FLAGLER PROPERTIES, INC., a Florida corporation,

Petitioners,

v.

CARLANDIA CORPORATION,

Respondent.

CASE NO.: 80,788
DISTRICT COURT OF APPEALS
FOURTH DISTRICT - NO. 91-2142

original

INITIAL BRIEF OF PETITIONER, FLAGLER PROPERTIES, INC.

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PREFACE

This is an appeal, pursuant to Rule 9.030(a)(2)(A)(v), to review a question certified by the Fourth District Court of Appeal as one of great public importance. The District Court's opinion is attached at App. 1-4.

The Petitioners are Rogers and Ford Construction Corp. ("Rogers") and Flagler Properties, Inc. ("Flagler").

Rogers and Flagler were the Defendants in the Trial Court and will be referred to collectively as Defendants.

Respondent, the Plaintiff in the Trial Court, is Carlandia Corporation and will be referred to as Plaintiff.

References to the Record on Appeal will be made as "(R.-__.)." References to the Appendix will be made as "(App. -____.)".

POINT ON APPEAL
(AS CERTIFIED BY THE FOURTH DISTRICT COURT OF APPEAL)

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

STATEMENT OF THE CASE AND OF THE FACTS

This appeal arose from an individual condominium unit owner's claim for damages against the condominium project's builder and developer for construction defects in the project's common elements. The trial court dismissed the unit owner's claims after it found that the owner had no standing to pursue an individual claim for such defects. The trial court had given the unit owner an opportunity to amend its complaint; however, after the owner failed to amend its claim in any substantive way, the trial court dismissed the unit owner's complaint with prejudice. The court of appeal reversed the trial court finding that the individual unit owner was "a real party in interest" and had standing to bring a claim for alleged defects in the common elements. Because the court of appeal found "inherent difficulties" with its decision, it certified a question of great public importance to this Court.

Plaintiff is the corporate owner of one condominium unit and a cabana in the Two North Breakers Row Condominium in Palm Beach County, Florida. (R.-58.). Rogers is the builder of the condominium project and Flagler is the condominium project's developer. (R.-58.).

Plaintiff alleges that there are thirty-three construction defects in the common elements in its Amended Complaint. (R.-68-69.). Plaintiff does not allege any construction defects

in its individual unit. (R.-58, 68-69.). Among the defects it alleges in the common elements are loose balcony railings, leaky ceilings, rusted gates and hinges, scratches to sliding door glazing, leaks in the spa, improper drainage systems in the planters, a rusted parking garage exhaust fan, and problems with the swimming pool heater that made it "insufficient to maintain a comfortable water temperature." (R.-68-69.).

Plaintiff first filed a five-count complaint against the Defendants. (R.-34-45.). In that complaint, Plaintiff sought damages for alleged construction defects and deficiencies in its individual condominium unit and in the common elements of the condominium project. Flagler and Rogers each filed a motion to dismiss Plaintiff's complaint. (R.-49-50 and 46-48, respectively.). In its motion, Flagler argued, among other things, that the Plaintiff had no standing as "a sole unit owner in which to seek damages for alleged defects which occur within the common areas or common elements" and that Plaintiff was "not the real party in interest under Florida Rules of Civil Procedure 1.210". (R.-49-50.). Similarly, Rogers argued in its motion, among other things, that Plaintiff had failed to join indispensable parties (i.e., other unit owners or the condominium association) and that Plaintiff was not the proper party to bring the action. (R.-46-47.).

The Trial Court dismissed the Plaintiff's original complaint. (R.-55-56.). In dismissing the Plaintiff's claims

regarding alleged construction defects in the common elements, the Trial Court ruled that:

> ... Section 718.203 [of the Florida Statutes] does not give an individual unit owner the right to sue with respect to defects and deficiencies in the common elements.

(R.-55.).

The Trial Court granted the Plaintiff twenty days within which to file an Amended Complaint. (R.-56.).

The Plaintiff filed an Amended Complaint. (R.-57-69.). In its Amended Complaint, the Plaintiff removed all allegations relating to its individual unit and sought only damages for alleged defects in the common elements. (Cf: R.-35-36 with R.-58-59.). Plaintiff has framed this lawsuit and the ensuing appeals to pertain only to the alleged defects in the common elements.

Defendants each filed a Motion to Dismiss Amended Complaint. (R.-70-72; 75-76.). In these motions, Defendants argued the same points as in their prior respective motions to dismiss the original complaint.

The Trial Court entered an Order Granting Defendants' Motions to Dismiss and Dismissing the Amended Complaint. (R.-77-78.). In so ruling, the Trial Court held that:

> ... an individual unit owner may not maintain a claim for defects in the common elements or common areas of the condominium.

(R.-77.).

Plaintiff filed a Motion for Rehearing. (R.-79-83.). In that Motion, Plaintiff argued that S & T Anchorage, Inc. v. Lewis, 575 So. 2d 696 (Fla. 3d DCA 1991), published after the Trial Court's April 2, 1991 decision, directly addressed the findings in the Trial Court's Order. The Trial Court determined that S & T Anchorage, Inc. v. Lewis, Id. was inapplicable and affirmed its dismissal of Plaintiff's Amended Complaint with prejudice. (R.-88-89.).

Plaintiff appealed the Trial Court's Order on Rehearing of Defendants' Motions to Dismiss Amended Complaint. (R.-90.).

The Fourth District Court of Appeal issued its original opinion in this action reversing the Trial Court's decision. Flagler and Rogers each filed a Motion for Rehearing and Clarification. The District Court granted Defendants' motions for rehearing, withdrawing its earlier opinion, reversing the Trial Court and certifying to this Court 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?

(App. -4.).

SUMMARY OF ARGUMENT

In Florida, the condominium form of ownership is a creature of statute and, as such, is subject to the control and regulation of the Legislature. Condominium owners relinquish many rights possessed by fee owners. This relinquishment of rights, for the sake of the whole, is the basis of condominium ownership. The condominium association is the contractually and statutorily designated agent of the individual unit owners with respect to maintenance and repair of the common elements. The nature of the condominium form of ownership and the rights assigned to the condominium association by statute and contract logically lead to the conclusion that an individual owner may not pursue an individual claim for alleged construction defects to the project's common elements.

Moreover, an individual unit owner is not the real party in interest to sue for alleged construction defects in the common elements of the condominium project. The individual unit owner is not the party in whom rests, by substantive law, the claims sought to be enforced. Moreover, allowing individual unit owners to pursue individual claims would defeat the purpose of the rule.

The condominium association is a corporation where the individual unit owners are the members or shareholders. Under the Condominium Act, members or shareholders have vested control over the common elements in the association. The law is clear that a

shareholder of a corporation has no standing to sue for damages allegedly suffered by the corporation.

A logical construction of Chapter 718, as a whole, leads to the conclusion that the reservation clause relied on by the District Court relate to an individual unit owner's rights to: (1) bring a class action against the developer and/or contractor for the alleged defects under Rule 1.220 of the Florida Rules of Civil Procedure; (2) bring a derivative action; and (3) bring a lawsuit against the condominium association for failing to or for refusing to act.

Finally, the language relied upon from the case of Wittington Condominium Association, Inc. is dicta and does not support the District Court's decision.

ARGUMENT

I. **ALLOWING AN INDIVIDUAL CONDOMINIUM UNIT OWNER TO PURSUE AN INDIVIDUAL CLAIM FOR CONSTRUCTION DEFECTS TO THE CONDOMINIUM'S COMMON ELEMENTS CONFLICTS WITH AND CANNOT BE RECONCILED WITH THE NATURE OF THE CONDOMINIUM FORM OF OWNERSHIP OF REAL PROPERTY AND THE FLORIDA RULES OF CIVIL PROCEDURE.**

A. The District Court's Holding.

The District Court's holding held that:

> [t]here can be no question but that each unit owner OWNS an undivided share in the common elements and, as such, is a "real party in interest" and 'may sue in his own name'. Fla.R.Civ.P. 1.210(a).

(App. -3.).

This holding conflicts with and cannot be reconciled with the underlying principles of: condominium ownership of real property, the rights assigned to the condominium association by statute, and the Florida Rules of Civil Procedure.

The question certified in this case is one of first impression for the courts of this state. The District Court's holding will lead to a multiplicity of lawsuits and contradictory adjudications on the issues of whether there are construction defects in the common elements. The decision, as the District Court itself recognized, will lead to questions regarding the appropriate measure of damages. The holding will also frustrate the accomplishment of repairs. Given the number of condominiums in Florida, and the many difficulties with the District Court's decision, this issue is one of great public importance. The

multitude of problems with the appellate decision, subjudice, can be resolved by overruling the opinion of the District Court and affirming the Trial Court's decision.

B. The Legislature intended that the Association and not the unit owner have standing in a case like this.

By way of background, in 1963, Florida adopted a statute authorizing condominium ownership. See: Chapter 711, Fla.Stat. (1963). The condominium form of ownership is a creature of statute and, as such, is subject to the control and regulation of the Legislature. §§718.102, 718.104, Fla. Stat. (1991); Century Village, Inc. v. Wellington, E, F, K, L, H, J, M & G Condominium Ass'n, 361 So. 2d 128, 133 (Fla. 1978).

The condominium form of ownership is a statutorily-created system of real property ownership of realty whereby the ownership of a parcel and the buildings, improvements and other appurtenances is divided among many owners, each of whom receive two separate and distinct interests: (1) fee simple ownership of a unit or apartment, (§718.103(24), Fla. Stat. (1991)) and (2) an undivided interest, together with all other unit owners in the common elements. (§718.103(10), Fla. Stat. (1991)). These condominium ownership interests have separate and distinct rights and obligations, which, by necessity, differ from the rights attendant to the common-law real property estates.

Common elements are those "portions of the condominium property which are not included in the units." §718.103(6), Fla.

Stat. (1991). In most condominiums, the "common elements" include the structural elements, exterior walls and roofs of the principal buildings. Additionally, common elements include parking areas, sidewalks, landscaping and any recreational facilities that are part of the condominium project.

The condominium brings together in a hybrid form of ownership two distinct tenures, one in severalty and the other in common. Both types of ownership, although well-established separately, are inseparably joined in a condominium. §718.106(2), Fla. Stat. (1991). Because of this unique feature of the condominium form of ownership, a person who owns a condominium does not possess the same rights in the property as a person who holds land in fee simple, or in any other common-law estate.

Condominium owners relinquish many rights possessed by fee owners. This relinquishment of rights -- for the sake of the whole -- is the basis of condominium ownership. For example, condominium owners may not convey or encumber their undivided interest in the common elements except together with the unit. §718.107(2), Fla. Stat. (1991). In addition, the undivided shares in the common elements are not subject to an action for partition. §718.107(3), Fla. Stat. (1991). Condominium ownership is distinguishable from a tenancy-in-common on this basis, which may be conveyed or encumbered at the discretion of the owner and which may also be partitioned. Andrews v. Andrews, 155 Fla. 654, 21 So. 2d 205 (Fla. 1945); ITT Rayonier, Inc. v. Wadsworth, 346 So. 2d 1004 (Fla. 1977).

Condominium unit owners, by statute, vest management power over the common elements in the condominium association. §718.111(1)(a), Fla. Stat. (1991); Naranja Lakes Condominium No. Two, Inc. v. Rizzo, 463 So. 2d 378, 379 (Fla. 3d DCA 1985) (because a condominium association is the contractually and statutorily designated agent of the unit owners with respect to the maintenance and repair of the common elements, notice to association of defects to those areas is deemed notice to the owners).

Chapter 718 provides that there will be an "association" for the operation and maintenance of the common elements. §718.111(3), Fla. Stat. (1991). Section 718.111(1)(a) requires the condominium association to be either a for-profit or not-for-profit Florida corporation, and further provides that individual unit owners are the shareholders or members of the association.

The condominium statute also grants to the condominium association rights in the common elements normally given to fee owners. The association is responsible for managing and maintaining the common elements. §§718.111(4) and 718.113(1), Fla. Stat. (1991). Associations are granted the power to make and collect assessments and to lease, maintain, repair and replace common elements. §718.111(4), Fla. Stat. (1991). The association, as opposed to an individual unit owner, is obligated to use its best effort to obtain and maintain insurance to protect

the common elements. §718.111(11)(a), Fla. Stat. (1991). The association has the power to contract, sue or be sued with respect to the exercise of its powers. §718.111(3), Fla. Stat. (1991). The association also has an irrevocable right of access to each individual unit during reasonable hours, when such access is necessary for the maintenance, repairs or replacement of any common elements or for making emergency repairs necessary to prevent damage to the common elements or to another unit or units. §718.111(5), Fla. Stat. (1991).

The condominium statute unequivocally states that an individual "unit owner does not have any authority to act for the association by reason of being a unit owner." §718.111(1)(c), Fla. Stat. (1991). A unit owner cannot seek partition of the common elements and cannot transfer or encumber his or her share of the common elements except by selling or encumbering his or her individual unit. §718.107, Fla. Stat. (1991). Individual unit owners may not make any alterations to their unit which would remove any portion of or make any additions to the common elements. They may not do anything which would adversely affect the safety or soundness of common elements or any portion of the condominium property which is to be maintained by the association. §718.113(3), Fla. Stat. (1991).

Courts in this state have long recognized that the condominium form of ownership requires the relinquishing of certain rights by the owners and the exercising of certain rights

by the association. In Sterling Village Condominium, Inc. v. Breitenbach, 251 So. 2d 685 (Fla. 4th DCA 1971), cert. den., 254 So.2d 789 (1971), the Court stated that:

> Every man may justly consider his home his castle and himself as the king thereof; nonetheless his sovereign fiat to use his property as he pleases must yield, at least in degree, where ownership is in common or cooperation with others. The benefits of condominium living and ownership demand no less. The individual ought not be permitted to disrupt the integrity of the common scheme through his desire for change, however laudable that change might be.

Id. at 688.

This theme has been carried forward in many other decisions. The following quotations are illustrative of the point.

Hidden Harbour Estates, Inc. v. Norman, 309 So. 2d 180, 72 A.L.R.3d 305 (Fla. 4th DCA 1975):

> It appears to us that inherent in the condominium concept is the principle that to promote the health, happiness, and peace of mind of the majority of the unit owners since they are living in such close proximity and using facilities in common, each unit owner must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property. Condominium unit owners comprise a little democratic sub society of necessity more restrictive as it pertains to use of condominium property than may be existent outside the condominium organization.

Id. at 181-182.

Holiday Out in America at St. Lucie, Inc. v. Bowes, 285 So. 2d 63 (Fla. 4th DCA 1973):

> The very nature of the condominium concept of ownership requires a degree of control in the management to oversee use of the common elements.

Id. at 65.

The nature of the condominium form of ownership and the rights assigned to the condominium association by statute logically leads to the conclusion that an individual unit owner may not pursue an individual claim for alleged construction defects to the project's common elements predicated upon their undivided interest in the common elements. Accordingly, the Fourth District Court of Appeal's decision should be reversed and the Trial Court's order dismissing Plaintiff's Amended Complaint should be affirmed.

C. An individual condominium unit owner is not the real party in interest under Rule 1.210 of the Florida Rules of Civil Procedure in a suit alleging defects to the project's common elements.

An individual condominium unit owner is not the real party in interest to sue for alleged construction defects in the common elements of a condominium project. The general rule is that a claim must be brought by or on behalf of one who is recognized in the law as a "real party in interest". Kumar Corp. v. Nopal Lines, Ltd., 462 So. 2d 1178, 1183 (Fla. 3d DCA 1985). The real parties in interest is "the person in whom rests, by substantive law, the claim sought to be enforced." Author's Comment to Rule 1.210 of the Florida Rules of Civil Procedure, 30 Fla. Stat. Ann. 304, 306-307 (1967). As the Court notes in Kumar Corp.:

> The basic purpose of rules requiring that every action be prosecuted by or on behalf of the real party in interest is merely "to protect a defendant from facing a subsequent similar action brought by one not a party to the present proceeding and to ensure that any action taken to judgment will have its proper effect as res judicata...."

462 So. 2d at 1183. (quoting Prevor-Mayorsohn Caribbean, Inc. v. Puerto Rico Marine Management, Inc., 620 F.2d 1, 4 (1st Cir. 1980)). From the discussion above, it is clear that the condominium association, or all of the unit owners acting jointly, is the real party in interest with respect to claim for defects to the common elements.

Allowing individual unit owners to pursue individual claims for alleged construction defects in the condominium's common element would defeat this purpose. The principle of res judicata will not apply to the individual claims because of the lack of complete identity of parties. Multiple lawsuits by individual unit owners could lead to potentially contradictory adjudications. Albrecht v. State, 444 So. 2d 8, 12 (Fla. 1984) (several conditions must occur simultaneously if a matter is to be made res judicata: identity of things sued for; identity of cause of action; identity of parties; and identity of quality in person for or against whom claim is made).

Rule 1.210(a) of the Florida Rules of Civil Procedure also permits an action to be prosecuted in the name of someone other than, but acting for, the real party in interest. See: Durrant v. Dayton, 396 So. 2d 1225 (Fla. 4th DCA 1981). However, this is

not the situation in the present case. Plaintiff is seeking damages as the real party in interest, and not on behalf of the condominium association (R.-57-69.).

Because Plaintiff is neither the real party in interest nor maintaining the action on behalf of the real party in interest, the Trial Court was correct in terminating the lawsuit on the grounds that Plaintiff lacked standing. Accordingly, the District Court's decision should be reversed and the Trial Court's order dismissing Plaintiff's Amended Complaint should be affirmed.

II. CONDOMINIUM ASSOCIATIONS ARE CORPORATIONS WHERE UNIT OWNERS ARE THE MEMBERS OR SHAREHOLDERS.

A. Under the Condominium Act, the members or shareholders have vested control over the common elements in the association.

The operation of the condominium shall be by the association, which must be a Florida corporation for-profit or a Florida corporation not-for-profit. §718.111(1), Fla. Stat. (1991). The owner of units shall be shareholders or members of the association. §718.111(1) Fla. Stat. (1991). That is, the unit owners are shareholders or members of the corporation in which they have vested control and management of the common elements.

B. An action to enforce corporate rights or to redress injuries to the corporation cannot be maintained by a shareholder or member.

Under Florida law, "a stockholder has no right to sue for damages to the corporation, unless the suit is a derivative action." Grandin Industries, Inc. v. Florida National Bank at Orlando, 267 So. 2d 26, 31 (Fla. 4th DCA 1972). In Grandin, the court held that the sole shareholder of a corporation had no standing to sue a bank for breach of a financing agreement. In affirming the dismissal of the complaint with prejudice, the court stated:

> Furthermore, Count II did not plead any right in plaintiff to recover on said contract. If [sic] proceeded solely on the basis of plaintiff's standing as a stockholder of CMC, Inc. It is, therefore, apparent that the trial judge correctly applied the law in disposing of Count II.

Id. at 31.

Another Florida court has stated:

> If the damages are only indirectly sustained by the stockholder as a result of injury to the corporation, the stockholder does not have a cause of action as an individual.

Alario v. Miller, 354 So. 2d 925, 926 (Fla. 2d DCA 1978).

Likewise, in James Talcott, Inc. v. McDowell, 148 So. 2d 36 (Fla. 3d DCA 1962), the court stated:

> As a general rule, an action to enforce corporate rights or to redress injuries to the corporation cannot be maintained by a stockholder in his own name or in the name of the corporation, but must be brought by, and in the name of the corporation itself.

Id. at 37.

As a shareholder or member of the condominium association, the Plaintiff has no standing to bring this action. Accordingly, the Trial Court was correct in dismissing Plaintiff's suit. Accordingly, the Fourth District Court of Appeal's decision should

be reversed and the Trial Court's order dismissing of Plaintiff's Amended Complaint should be affirmed.

III. NEITHER CHAPTER 718 NOR CASE LAW SUPPORTS THE FOURTH DISTRICT COURT OF APPEAL'S DECISION.

A. Chapter 718 does not support the conclusion that condominium owners can pursue an individual claim for construction defects to the condominium project's common elements.

The Fourth District Court of Appeal supports its conclusion that an individual condominium unit owner has standing to sue in this case with the last sentence of §718.111(3), Fla. Stat. (1991). (App. -3.). That section concludes:

> Nothing herein limits any statutory or common-law right of any individual unit owner or class of unit owners to bring any action without participation by the association which may otherwise be available.

The Fourth District Court of Appeal cites this language to distinguish the present case from an opinion by the Supreme Court of the State of New Jersey that dealt with a question similar to the certified question in this case.

In Siller v. Hartz Mountain Associates, Inc., 93 N.J. 370, 461 A.2d 568, cert. den., 464 U.S. 961, 104 S.Ct. 395, 78 L.Ed.2d 337 (1983), (App. -5-13.), the New Jersey Supreme Court in applying a legislative act very similar to Chapter 718, held that causes of action to remedy defects in common elements of a condominium belong exclusively to the condominium association.

Unlike the Fourth District Court of Appeal's opinion, neither Flagler nor Rogers have ever argued that a condominium

association "has the exclusive right to sue concerning maintenance and repair of the common elements." (App. -1.). The Defendants argued to Fourth District Court of Appeal, to the Trial Court, and make the argument here, that individual unit owners do have recourse for construction defects, just not through individual lawsuits, such as instituted by Plaintiff.

In Siller, Id., the New Jersey Court reasoned, as Flagler argues in the present context, that it would be impractical to sanction multiple lawsuits by individual unit owners to remedy defects in the common elements, since each owner's damage would represent but a fraction of the whole. The Court noted that if individual owners were permitted to prosecute claims regarding common elements, any recovery equitably would have to be transmitted to the association to pay for the repairs and the replacements. The Court held that a sensible reading of the statute, as a whole, leads to the conclusion that such causes of action belong exclusively to the association which, unlike an individual unit owner, could apply the funds recovered on behalf of all the owners of the common elements. Although Defendants do not argue that the association has the exclusive right, Defendants do argue that the same reasoning applies with equal force to the present case for a number of reasons.

First, it is highly suspect whether condominium ownership was legal in Florida at common law. As one authority has noted:

> [p]rior to the passage of the Condominium Act, some attorneys had expressed the view

> that the condominium form of ownership was legal in Florida in the absence of statute. Even if such opinion had been accepted without objection, it was still unconfirmed by judicial or legislative sanction.

McCaughan, Russell, The Florida Condominium Act Applied, U. Fla. L. Rev. XVII, 1-57 at 2 (1964); see, also: Note: Pittman, Charles W. Land Without Earth - The Condominium, U. Fla. L. Rev. XV 203-219 at 208-209 (1962). Accordingly, the common-law rights of condominium owners are, for the most part, unknown in this state.

Second, a reading of Chapter 718 as a whole supports the conclusion that an individual condominium owner does not have the statutory right to bring an individual claim. (See, above: pp. 9-12). Moreover, Chapter 718 suggests that an individual unit owner has at least three means for recourse for an individual unit owner to pursue a claim for alleged construction defects to the common elements when the condominium association fails or refuses to bring suit.

First, an individual unit owner could bring a class action against the developer and/or contractor for the alleged defects under Rule 1.220 of the Florida Rules of Civil Procedure. A class action by one or more unit owners on behalf of all the unit owners would be treated no differently than any other class action. See: Harrell v. Hess Oil & Chemical Corp., 287 So. 2d 291 (Fla. 1973) (representative of class brought action pursuant to Fla.R.Civ.P. 1.220(a) and had to plead the seven criteria for properly maintaining a class action).

Second, an individual unit owner, as a member or shareholder of the condominium association, could bring a derivative action. In such a suit, the corporation is the real party in interest and the shareholder or member is only a nominal plaintiff. James Talcott, Inc. v. McDowell, 148 So. 2d 36 (Fla. 3d DCA 1962) (to state a cause of action in a shareholder derivative action, two distinct wrongs must be alleged: first, the act whereby the corporation was damaged, and second, a wrongful refusal by the corporation to seek redress for the injurious act).

Third, an individual unit owner could bring a lawsuit against the condominium association for failing to or for refusing to act. See: Hidden Harbour Estates, Inc. v. Norman, 309 So. 2d 180, 182 (Fla. 4th DCA 1975) (arbitrary and capricious conduct by condominium association may subject association to exposure and relief).

Flagler submits that these are the rights of the individual unit owner that are recognized and referred to in both §718.113(3), Fla. Stat. (1991) and in that section's civil procedure counterpart, Fla.R.Civ.P. 1.221. Under both, a condominium association is allowed to bring an action on behalf of all unit owners concerning matters of common interest; however, the statutory or common-law rights of the individual or class of unit owners to bring actions are not limited. A logical construction of Chapter 718, as a whole, leads to the conclusion that the reservation clause, relied on by the District Court,

relates only to an individual unit owner's rights, as commented above, and does not grant an individual unit owner the additional rights to act independently as to its undivided interests in the common elements contrary to the intent of Chapter 718.

A number of sound policy reasons also support this conclusion. First, it would be impractical to allow multiple lawsuits by individual unit owners in which their damages would be measured by their undivided fractional interest of the common elements (in this case 1/49th). For example, if the individual unit owner were permitted to pursue individual claims regarding construction defects to common elements, any recovery would have to, under the clear terms of Chapter 718, be transmitted to the association to pay for repairs and replacements. Thus, a more sensible reading of the statute leads to the conclusion, as correctly reached by the Trial Court, that such causes of action belong to the association, or to all unit owners suing together, which, unlike the individual unit owner, could apply the funds recovered on behalf of all of the unit owners of the condominium.

Second, allowing unit owners to pursue individual claims for defects to common elements will lead to a multiplicity of lawsuits. As noted above, because the principles of res judicata will not apply, multiple lawsuits by individual unit owners could lead to potentially contradictory adjudications. (See, above: p. 14). Moreover, individual unit owners could strategically stagger their suits wasting judicial resources and allowing further delay in the final resolution of controversies.

B. Dicta from Wittington Condominium Apts. v. Braemar Corp., 313 So. 2d 463 (Fla. 4th DCA 1975) cert. den., 327 So. 2d 31 (Fla. 1976) also does not support the conclusion.

The District Court states that its conclusion is supported by language, "dicta though it may be," in Wittington Condominium Apts., Inc. v. Braemar Corp., 313 So. 2d 463, (Fla. 4th DCA 1975), cert. den., 327 So. 2d 31 (Fla. 1976). (App. 3-4.). The dicta cited is:

> As to the status of the [the unit owner] individually, we are satisfied that the allegations contained in the complaint (in particular the allegation that he is a condominium unit owner) are sufficient to demonstrate his interest and standing...

Id. at 468.

The Wittington decision involved a complaint containing numerous counts against the developer and the contractor for improper design and construction of the apartment units and of the common elements. Id. at 464, 468, n.5. It is unclear from the decision as to which of the various counts in the complaint under which the individual unit owner, based upon his individual unit ownership, was allowed to sue under. Because of this uncertainty within the opinion, coupled with the fact that the opinion has never been cited to support the conclusion the Fourth District Court of Appeal puts forth, it is just as likely (if not more) that the unit owner was allowed to sue for defects to his individual unit.

Because neither Chapter 718 of the Florida Statutes nor case law holds otherwise, the Trial Court was correct in dismissing the

lawsuit on the grounds that Plaintiff lacks standing. Accordingly, the District Court's decision should be reversed and the Trial Court's order dismissing the Plaintiff's Amended Complaint should be affirmed.

CONCLUSION

An individual condominium unit owner does not have standing to maintain an action for construction defects in the common elements or common areas of the condominium.

Accordingly, Petitioner, Flagler Properties, Inc., respectfully submits that the District Court's decision should be reversed and that the Trial Court's order dismissing Plaintiff's Amended Complaint with prejudice should be affirmed.

CASE NO.: 80,788
4TH DCA NO.: 91-2142

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished via U.S. Mail to **THOMAS D. DAIELLO, ESQ.**, LAWRENCE J. MARCHBANKS, P.A., Suite #101-E, 4800 North Federal Highway, Boca Raton, FL 33431 and via hand delivery to **J. KORY PARKHURST, ESQ.**, BOOSE CASEY CIKLIN LUBITZ MARTENS McBANE & O'CONNELL, 515 North Flagler Drive, 19th Floor, West Palm Beach, FL 33401 on this 14th day of December, 1992.

GUNSTER, YOAKLEY & STEWART, P.A.
777 South Flagler Drive
Phillips Point - Suite #500E
West Palm Beach, FL 33401
(407) 650-0523

By: _____
ROY E. FITZGERALD
Florida Bar No. 856540

1428/409

IN THE SUPREME COURT OF THE STATE OF FLORIDA
500 SOUTH DUVAL STREET, TALLAHASSEE, FLORIDA 32399-1927

ROGERS AND FORD CONSTRUCTION COMPANY, a Florida corporation, and FLAGLER PROPERTIES, INC., a Florida corporation,

Petitioners,

v.

CARLANDIA CORPORATION,

Respondent.

_____/

CASE NO.: 80,788
DISTRICT COURT OF APPEALS
FOURTH DISTRICT - NO. 91-2142

APPENDIX TO
INITIAL BRIEF OF PETITIONER, FLAGLER PROPERTIES, INC.

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JULY TERM 1992

CARLANDIA CORPORATION,

Appellant,

v.

ROGERS AND FORD CONSTRUCTION CORP., a Florida Corporation, and FLAGLER PROPERTIES, INC., a Florida Corporation,

Appellees.

CASE NO. 91-2142.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DISPOSED OF.

Opinion filed October 14, 1992

Appeal from the Circuit Court for Palm Beach County; Edward Rodgers, Judge.

J. Kory Parkhurst and Louis R. McBane of Boose Casey Ciklin Lubitz Martens McBane & O'Connell, West Palm Beach, for appellant.

Thomas D. Daiello of Lawrence J. Marchbanks, P.A., Boca Raton, for Appellee-Rogers and Ford Construction Corp., a Florida Corporation.

Roy E. Fitzgerald of Gunster, Yoakley & Stewart, P.A., West Palm Beach, for Appellee-Flagler Properties, Inc., a Florida Corporation.

ON MOTION FOR REHEARING

LETTS, J.

We grant appellees' motion for rehearing, withdraw our opinion of August 26, 1992, and substitute the following therefor.

In this case, the trial court granted a final judgment dismissing the complaint as follows: "the court finds that an

individual unit owner may not maintain a claim for [construction] defects in the common elements or common areas of the condominium." We reverse.

The builder and developer defend the favorable ruling from the court below claiming the condominium association is the agent, contractually and by statute, for the individual unit owners and that it has the exclusive right to sue concerning maintenance and repair of the common areas. In this respect, the appellees liken the individual unit owners to mere shareholders in a corporation and argue, citing Grandin Indus., Inc. v. Florida Nat'l Bank at Orlando, 267 So.2d 26 (Fla. 4th DCA 1972), that shareholders have no standing to sue in their individual capacity. We agree that individual condominium unit owners are akin to shareholders in a condominium association, see Condominiums on the Intracoastal Ass'n., Inc. v. Barnett Bank of Palm Beach County, 502 So.2d 84 (Fla. 4th DCA 1987), but we disagree that they have no standing to sue under the circumstances sub judice. Under section 718.103(10), Florida Statutes (1991), the word "condominium" is defined:

> "Condominium" means that form of ownership of real property which is created pursuant to the provisions of this chapter, which is comprised of units that may be owned by one or more persons and in which there is appurtenant to each unit, an undivided share in common elements.

(Emphasis supplied.)

A simpler definition appears in the ensuing sub-paragraph (11), where a "condominium parcel" is defined to include "a unit, together with the undivided share in the common

elements which is appurtenant to the unit." There can be no question but that each unit owner OWNS an undivided share in the common elements and, as such, is a "real party in interest" and "may sue in his own name." Fla. R. Civ. P. 1.210(a).

We also note that section 718.111(3), Florida Statutes (1991), which authorizes a condominium association to sue on behalf of all unit owners, concludes in its ultimate sentence: "Nothing herein limits any statutory or common law right of any individual unit owner . . . to bring any action without participation by the association . . . ."

The appellees concede that no Florida court has yet directly ruled that an individual unit owner does not have standing to sue individually for construction defects to the common elements. However, they cite, appropriately, to a New Jersey case which held that causes of action to remedy such defects belong exclusively to condominium associations unless the suit filed is derivative or the association refuses to act. Siller v. Hartz Mountain Assocs., 93 N.J. 370, 461 A.2d 568, (N.J.), cert. denied, 464 U.S. 961, 78 L.Ed.2d 337, 104 S.Ct. 395 (1983).[1] We decline to follow Hartz and would note in passing that, unlike Florida, the New Jersey statute quoted in Hartz does not contain a reservation of common law rights.

Notwithstanding the paucity of Florida law, there is language out of this court which expresses support for our conclusion, dicta though it may be. In Wittington Condominium

[1] In the case at bar, the record is silent as to whether the association refused to act upon the derivative.

Apts., Inc. v. Bracmer Corp., 313 So.2d 463, 468 (Fla. 4th DCA 1975), cert. denied, 327 So.2d 31 (Fla. 1976), it was said:

> As to the status of [the unit owner] individually, we are satisfied that the allegations contained in the complaint (in particular the allegation that he is a condominium unit owner) are sufficient to demonstrate his interest and standing.

We concede that practical difficulties are inherent in our conclusion, several of which are discussed in the above-cited New Jersey decision. For example, if the individual unit owner is ultimately successful, what is the measure of damages to that unit as distinct from the remaining units? Therefore, pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(v), we certify 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?

REVERSED AND REMANDED.

STONE and FARMER, JJ., concur.

Sidney SILLER and Shirley Siller, his wife; Irving Gaines and Coralie J. Gaines, his wife; Marshall Natapoff and Janet Natapoff, his wife; Francis Clark and Lucille Clark, his wife; and Joel Kramer, single, Plaintiffs-Appellants,
and
Harmon Cove Condominium II Association, Inc., Plaintiff-Intervenor,
v.
HARTZ MOUNTAIN ASSOCIATES, a corporation; Harmon Cove I Condominium Association, Inc., a corporation; and Harmon Cove Recreation Association, Inc., a corporation,
Defendants-Respondents.

Supreme Court of New Jersey.
Argued Feb. 9, 1983.
Decided June 16, 1983.

SYNOPSIS

Individual condominium unit owners brought suit seeking temporary restraints to prevent consummation of settlement between condominium developer and condominium association with respect to defects in common elements of condominium project. The Superior Court, Chancery Division, Hudson County, Gaulkin, J.S.C., 184 N.J.Super. 450, 446 A.2d 551, entered an order dismissing complaint, and an appeal was taken. The Superior Court, Appellate Division, 184 N.J.Super. 442, 446 A.2d 547, affirmed. Petition for certification was granted. The Supreme Court, Schreiber, J., held that: (1) where claims against condominium developer were confined to common areas and facilities, association had exclusive standing to maintain action against developer, barring suit; (2) individual unit owners were entitled to proceed against condominium association because of allegedly wrongful actions taken by board of directors in approving settlement with developer; and (3) individual unit owners were entitled to continue with individual causes of action based upon damages to their individual units.

Affirmed in part, reversed in part and remanded.

[1]
89Ak8
CONDOMINIUM
⇦ Condominium associations.
N.J. 1983.
Causes of action to remedy defects in common elements of condominium development belong exclusively to condominium association. N.J.S.A. 46:8B-1 to 46:8B-38.
Siller v. Hartz Mountain Associates
461 A.2d 568, 93 N.J. 370

[2]
89Ak17
CONDOMINIUM
⇦ Actions.
N.J. 1983.
An individual condominium unit owner may act on a common element claim, even though causes of action to remedy defects in common elements belong exclusively to condominium association, upon association's failure to do so, and in that event, unit owner's claim would be considered derivative in nature, requiring that association be named as a party. N.J.S.A. 46:8B-1 to 46:8B-38; R. 4:32- 5.
Siller v. Hartz Mountain Associates
461 A.2d 568, 93 N.J. 370

[3]
89Ak17
CONDOMINIUM
⇦ Actions.
N.J. 1983.
Individual condominium unit owner may sue developer on behalf of condominium association irrespective of its governing board's willingness to sue during period of time that association remains under control of developer. N.J.S.A. 46:8B-1 to 46:8B-38.
Siller v. Hartz Mountain Associates
461 A.2d 568, 93 N.J. 370

[4]
89Ak17
CONDOMINIUM
⇦ Actions.
N.J. 1983.
Condominium association's primary right to sue to remedy defects in common elements does not diminish any claim that individual unit owner may have against association.

N.J.S.A. 46:8B-1 to 46:8B-38.
Siller v. Hartz Mountain Associates
461 A.2d 568, 93 N.J. 370

[5]
89Ak8
CONDOMINIUM
⇦ Condominium associations.
N.J. 1983.
Where claims against condominium developer were confined to common areas and facilities, association had exclusive standing to maintain action against developer, barring suit by individual unit owners. N.J.S.A. 46:8B-1 to 46:8B- 38.
Siller v. Hartz Mountain Associates
461 A.2d 568, 93 N.J. 370

[5]
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CONDOMINIUM
⇦ Actions.
N.J. 1983.
Where claims against condominium developer were confined to common areas and facilities, association had exclusive standing to maintain action against developer, barring suit by individual unit owners. N.J.S.A. 46:8B-1 to 46:8B- 38.
Siller v. Hartz Mountain Associates
461 A.2d 568, 93 N.J. 370

[6]
89Ak17
CONDOMINIUM
⇦ Actions.
N.J. 1983.
Individual condominium unit owners were entitled to proceed against condominium association because of allegedly wrongful actions taken by board of directors with respect to claim for damages against developer for defects in common elements of condominium project, even though individual unit owners were not entitled to proceed directly against developer. N.J.S.A. 46:8B-1 to 46:8B-38.
Siller v. Hartz Mountain Associates
461 A.2d 568, 93 N.J. 370

[7]
89Ak17
CONDOMINIUM
⇦ Actions.
N.J. 1983.
Individual condominium unit owners were entitled to continue with individual causes of action against condominium developer based on damages to their individual units, even though unit owners were precluded from maintaining suit against developer for defects in common elements. N.J.S.A. 46:8B-1 to 46:8B- 38.
Siller v. Hartz Mountain Associates
461 A.2d 568, 93 N.J. 370

**569 *372 John Tomasin, Union City, for plaintiffs-appellants.

Jerome A. Vogel, Hawthorne, for defendant-respondent Hartz Mountain Associates, etc. (Jeffer, Hopkinson & Vogel, Hawthorne, attorneys).

Richard S. Miller, Wayne, for defendants-respondents Harmon Cove I Condominium Ass'n, Inc., etc., et al. (Williams, Caliri, Miller & Otley, Wayne, attorneys).

The opinion of the Court was delivered by

SCHREIBER, J.

We are called upon in this case to consider certain aspects of the Condominium Act, N.J.S.A. 46:8B-1 through -38, in particular those concerning the relationship of the owner of a unit to the associations representing all unit owners with respect to claims against the builder of the condominium. Plaintiffs, owners and inhabitants of housing units in the condominium community "Harmon Cove" in Secaucus, New Jersey, sued the developer, Hartz Mountain Associates (Developer), and the unit owner associations, Harmon Cove I Condominium Association, Inc. (Association), and Harmon Cove Recreation Association, Inc. (Recreation Association) (collectively the Associations). The suit related to alleged defects in and about the units and common *373 areas and facilities and to a settlement that the two associations were prepared to effectuate on behalf of all unit owners, including plaintiffs, with the Developer.

The plaintiffs, as individual unit owners and on behalf of others similarly situated, had instituted the suit by filing a verified complaint and an order to show cause, in which they sought temporary restraints to prevent consummation of the settlement between the Developer and the Associations. The trial court denied any temporary restraints, signed an order directing the parties to file briefs "as to the standing of plaintiffs to bring this action" and set a date for a hearing on the standing issue. In addition to the briefs, the plaintiffs submitted an affidavit of one unit owner with copies of various documents including the master deed. Defendant Hartz Mountain also submitted a certificate of the director of its residential department with certain attachments and the defendant Association submitted a certified statement of its president with certain attachments. [FN1] The parties and the trial court considered the matter as if defendants had filed a motion for summary judgment on the ground that plaintiffs lacked standing to institute and maintain the action.

FN1. The trial court had not examined the defendants' certificates at the time of oral argument because they were submitted shortly before the hearing. It undoubtedly considered them before filing its written opinion.

The trial court dismissed the complaint against the Developer and permitted the defendants to consummate the settlement at their own risk. It sustained part of one count of plaintiff's complaint against the Associations. 184 N.J.Super. 450, 446 A.2d 551 (Ch.Div.1981). Plaintiffs appealed and the Appellate Division affirmed. 184 N.J.Super. 442, 446 A.2d 547 (1982). We granted plaintiffs' petition for certification. 91 N.J. 264, 450 A.2d 578 (1982).

The complaint contained five counts. The first, second, third and fifth counts were directed solely against the Developer. Generally they asserted that the Developer **570 had planned and *374 built the condominium known as Harmon Cove I in Secaucus and had sold units to the five plaintiffs. They alleged that the condominiums and the common elements had numerous defects and deficiencies, all attributable to the Developer. The complaint specified improper insulation of the individual units; inadequate caulking of windows and doors; improper heating system; inadequate driveways and sound insulation; defects in the marina dock area, swimming pool, and boardwalk; and soil settlement problems throughout the entire development. It is important to note that, though most complaints in these counts pertained to the common elements and areas, some related to the individual units. The trial court dismissed these four counts (first, second, third and fifth) with prejudice.

The fourth count, directed solely against the Associations, alleged that settlement negotiations between the Association, the Recreation Association [FN2] and the Developer with respect to claims arising from the design and building of the "condominiums and the common elements" were near completion. The trial court sustained that part of the fourth count [FN3] that challenged the actions taken by both Associations on procedural and substantive grounds and permitted the plaintiffs to amend the complaint to express this clearly. This count, as subsequently amended by plaintiffs, charged that the proposed settlement was unreasonable, unlawful, and inadequate, that the Associations had breached their fiduciary duties and responsibilities to plaintiffs, and that the Developer, which at one time properly controlled the Associations, had continued unlawfully to exercise control and influence over the Associations. Moreover, the plaintiffs asserted that the Associations and the Developer were *375 settling claims pertaining to the individual units as well as the common elements.

FN2. The Association, composed of all unit owners, managed the condominium property. The Recreation Association, also composed of all unit owners, managed the common recreation

facilities.

FN3. The original fourth count also charged that the Associations had no authority to settle the claims against the Developer.

I

The Legislature recognized a new form of ownership of real property in enacting the Condominium Act. [FN4] N.J.S.A. 46:8B-1 through -38. The Act requires the developer to execute and file a master deed describing the land, identifying the units, defining the common elements, and providing for an association of unit owners. The condominium property consists of the land and all improvements. N.J.S.A. 46:8B-3(i). The individual condominium purchaser owns his unit together with an undivided interest in common elements. Each unit is a separate parcel of real property which the owner may deal with "in the same manner as is otherwise permitted by law for any parcel of real property." N.J.S.A. 46:8B-4. The result is that the unit owner, having a fee simple title, enjoys exclusive ownership of his individual apartment or unit, while retaining an undivided interest as a tenant in common in the common facilities and grounds used by all the residents. Kerr, "Condominium-- Statutory Implementation," 38 St. Johns L.Rev. 1, 2 (1963); Berger, "Condominium: Shelter on a Statutory Foundation," 63 Colum.L.Rev. 987, 989 (1963); 15A Am.Jur.2d, Condominiums and Cooperative Apartments, s 1.

FN4. The history of condominiums has been traced back to ancient Rome, Note, "Land Without Earth--Condominium," 15 U.Fla. L.Rev. 203, 205 (1962), though this has been disputed, Berger, "Condominium: Shelter on a Statutory Foundation," 63 Colum.L.Rev. 987, 987 n. 5 (1963). Others contend that the concept can be traced back to the ancient Hebrews in the Fifth Century B.C., Kerr, "Condominium--Statutory Implementation," 38 St. Johns L.Rev. 1, 3 (1963); Note, "The FHA Condominium," 31 Geo.Wash.L.Rev. 1014, 1015 (1963). There is recognition of the concept in common law. Coke on Littleton, quoted in Ball, "Division in Horizontal Strata of the Landscape Above the Surface," 39 Yale L.J. 616, 621 (1930).

**571 The Act also provides that the condominium will be administered and managed by the association. N.J.S.A. 46:8B-3(b); *376 46:8B-12. The business form of the association is unrestricted. N.J.S.A. 46:8B-12. The developer initially controls the association. When 25% of the units have been sold, the unit owners are entitled to elect at least 25% of the association's governing body. N.J.S.A. 46:8B-12.1(a). The unit owners' authority is increased to 40% when half of the units have been sold. When the unit owners own 75%, they are entitled to elect all the members of the governing body. N.J.S.A. 46:8B-12.1(a). [FN5] Once that occurs, the developer is required to "relinquish control of the association." N.J.S.A. 46:8B-12.1(d).

FN5. The developer can retain one representative on the governing body in certain circumstances. Notwithstanding any of the provisions of subsection a of this section, the developer shall be entitled to elect at least one member of the governing board or other form of administration of an association as long as the developer holds for sale in the ordinary course of business one or more units in a condominium operated by the association. [N.J.S.A. 46:8B- 12.1(a)]

The association is charged with the "maintenance, repair, replacement, cleaning and sanitation of the common elements." N.J.S.A. 46:8B-14(a). The common elements are defined as follows: "Common elements" means: (i) the land described in the master deed; (ii) as to any improvement, the foundations, structural and bearing parts, supports, main walls, roofs, basements, halls, corridors, lobbies, stairways, elevators, entrances, exits and other means of access, excluding any specifically reserved or limited

to a particular unit or group of units; (iii) yards, gardens, walkways, parking areas and driveways, excluding any specifically reserved or limited to a particular unit or group of units; (iv) portions of the land or any improvement or appurtenance reserved exclusively for the management, operation or maintenance of the common elements or of the condominium property; (v) installations of all central services and utilities; (vi) all apparatus and installations existing or intended for common use; (vii) all other elements of any improvement necessary or convenient to the existence, management, operation, maintenance and safety of the condominium property or normally in common use; and (viii) such other elements and facilities as are designated in the master deed as common elements. [N.J.S.A. 46:8B-3(d)] *377 It should be noted that under subsection (d)(viii) above, the common elements may be expanded to include other "elements and facilities" designated in the master deed. The association has a right of access to each unit "as may be necessary for the maintenance, repair or replacement of any common elements therein or accessible therefrom." N.J.S.A. 46:8B-15(b).

The association is empowered to assess and collect funds from unit owners for common expenses, to maintain accounting records, and to obtain insurance against loss by fire or other casualties damaging the common elements and all structural portions of the condominium property. N.J.S.A. 46:8B-14(b), (d) and (g). The statute authorizes the association to "enter into contracts, bring suit and be sued." N.J.S.A. 46:8B-15(a). [FN6] No unit owner, except as an officer of the association, may bind the association. N.J.S.A. 46:8B- 16(a). Nor may a unit owner "contract for or perform any maintenance, repair, replacement, removal, alteration or modification of the common elements or any additions thereto, except through the association and its officers." **572 N.J.S.A. 46:8B-18. If a unit owner fails to comply with the rules and regulations or any of the provisions in the master deed, he may be subject to a suit for injunctive relief by the association or by any other unit owner. N.J.S.A. 46:8B-16(b).

FN6. In this case the Association is a nonprofit corporation. As such it may, under the terms of N.J.S.A. 15:1-4(b), "sue and be sued, complain and defend in any court" any action. Unincorporated associations consisting of seven or more persons may sue or be sued "in any civil action affecting [the unincorporated association's] common property, rights and liabilities." N.J.S.A. 2A:64-1.

II

All parties agree that the clear import, express and implied, of the statutory scheme is that the association may sue third parties for damages to the common elements, collect the funds when successful, and apply the proceeds for repair of the property. *378 The statutory provisions empowering the association to sue, imposing the duty on it to repair, and authorizing it to charge and collect "common expenses," [FN7] coupled with the prohibition against a unit owner performing any such work on common elements, are compelling indicia that the association may institute legal action on behalf of the unit owners for damages to common elements caused by third persons.

FN7. Common expenses are defined as "expenses for which the unit owners are proportionately liable, including but not limited to: (i) all expenses of administration, maintenance, repair and replacement of the common elements; (ii) expenses agreed upon as common by all unit owners; and (iii) expenses declared common by provisions of this act or by the master deed or by the bylaws." [N.J.S.A. 46:8B-3(e)] It has been held that an association by virtue of its assessment power may include the litigation costs as a common expense. See Margate Village Condominium Ass'n, Inc. v. Wilfred, Inc., 350 So.2d 16, 17 (Fla.App.1977) (upholding association's right to assess all owners, including developer, for litigation expenses, including those of an action against

developer).

In the absence of any statutory plan, we have acknowledged the standing of an association of tenants in an apartment building to sue their landlord. Crescent Pk. Tenants Assoc. v. Realty Eq. Corp. of N.Y., 58 N.J. 98, 275 A.2d 433 (1971). The plaintiff tenant association in Crescent Park was a nonprofit organization composed of tenants of a high-rise luxury apartment building. It charged the landlord with responsibility for defects in various parts of the common elements, such as the air conditioning system, elevators, laundry rooms and swimming pool. The complaint was dismissed on the ground that the plaintiff had no standing. Justice Jacobs, writing on behalf of this Court, reversed. He observed that the individual tenants could have brought such a suit and that by acting together their bargaining power was enhanced. Id. at 108, 275 A.2d 433. He noted that the complaint was "confined strictly to matters of common interest and [did] not include any individual grievance which might perhaps be dealt with more appropriately in a proceeding between the individual tenant and the landlord. So far as common grievances are concerned they may readily and indeed more appropriately be ***379** dealt with in a proceeding between the Association, on the one hand, and the landlord, on the other, thus incidentally avoiding the procedural burdens accompanying multiple party litigation." [Id. at 109, 275 A.2d 433] Justice Jacobs concluded that "it [was] difficult to conceive of any policy consideration or any consideration of justice which would fairly preclude the Association from maintaining, on behalf of its member tenants, the present proceeding between itself as plaintiff and the landlord and its parent company as defendants." Id. See, e.g., Piscataway Apt. Assoc. v. Tp. of Piscataway, 66 N.J. 106, 328 A.2d 608 (1974) (nonprofit association of apartment house owners maintained action).

We find nothing in the legislative scheme governing condominiums to indicate policy considerations different from those expressed in Crescent Park. Avoidance of a multiplicity of suits, economic savings incident to one trial, elimination of contradictory adjudications, expedition in resolution of controversies, accomplishment of repairs, and the positive effect on judicial administration ****573** are supportive policy reasons. [FN8] Moreover, the financial burden on an individual owner may be so great and so disproportionate to his potential recovery that he could not or would not proceed with litigation. Other jurisdictions have also interpreted their statutes governing condominiums to authorize unit owner associations to sue with respect to claims pertaining to common elements. [FN9] 1000 Grandview Ass'n v. Mt. Washington Associates, 290 Pa.Super. 365, 434 A.2d 796 (Pa.Super.1981); Governors Grove Condominium Ass'n, Inc. v. ***380** Hill Development Corp., 35 Conn.Sup. 199, 404 A.2d 131, 134 (Conn.Super.Ct.1979); see also Avila South Condominium Ass'n v. Kappa Corp., 347So.2d 599, 607-09 (Fla.Sup.Ct.1979), in which the Florida Supreme Court held that the legislature did not have authority to empower the association to sue, but accomplished the same effect by promulgating a court rule. Contra, Deal v. 999 Lakeshore Ass'n, 579 P.2d 775, 777-78 (Nev.1978) (dictum); Friendly Village Community Ass'n, Inc. v. Silva & Hill Constr. Co., 31 Cal.App.3d 220, 225, 107 Cal.Rptr. 123, 126, 69 A.L.R.3d 1142, 1146 (1973). See generally Annot., "Standing to bring act relating to real property of condominiums," 72 A.L.R.3d 314 (1976); Annot., "Proper party plaintiff in action for injury to common areas of condominium development," 69 A.L.R.3d 1148 (1976); Note, "Condominium Class Actions," 48 St.Johns L.Rev. 1168, 1180-81 (1974).

FN8. The plaintiffs, though not addressing the issue squarely, have implicitly indicated that the Legislature would have no authority to determine whether associations would have a right to sue because this is "procedural" and exclusively within the jurisdiction of the Supreme Court. Winberry v. Salisbury, 5 N.J. 240, 255, 74 A.2d 406 (1950). It is not necessary for us to address that question since we are in full agreement

with the policy expressed.

FN9. Many condominium statutes were modeled after the Federal Housing Administration's Model Statute for the Creation of Apartment Ownership, which acknowledges the right of the association to sue on behalf of the unit owner. See s 7 of FHA Model Statute reprinted in Rohan and Reskin, 1A Condominium Law & Practice, Appendix B-3.

III

If, as we have held, the association may sue to protect the rights and interests of the unit owners in the common elements, does it have the exclusive right to maintain those actions? Obviously the unit owner has an interest in claims against the developer arising out of damages to or defects in the common elements. However, the association has been charged with and delegated the primary responsibility to protect those interests. "The association ... shall be responsible for the ... maintenance, repair, replacement, cleaning, and sanitation of the common elements." N.J.S.A. 46:8B-14. So long as it carries out those functions and duties, the unit owners may not pursue individual claims for damages to or defects in the common elements predicated upon their tenant in common interest. The Condominium Act contemplates as much. The association, not the individual unit owner, may maintain and repair the common elements. "No unit owner shall contract for or perform any maintenance, repair, replacement, removal, alteration or modification of the common elements or any additions thereto, except through the association and its officers." N.J.S.A. 46:8B-18. *381 Indeed the statute authorizes the association to assess the membership to raise those funds designated as "common expenses." N.J.S.A. 46:8B-3(e). "A unit owner [is], by acceptance of title ... conclusively presumed to have agreed to pay his proportionate share of common expenses." N.J.S.A. 46:8B-17.

[1] It would be impractical indeed to sanction lawsuits by individual unit owners in which their damages would represent but a fraction of the whole. If the individual owner were permitted to prosecute claims regarding common elements, any recovery equitably would have to be transmitted to the association to pay for repairs and replacements. A sensible reading of the statute leads to the conclusion that such causes **574 of action belong exclusively to the association, which, unlike the individual unit owner, may apply the funds recovered on behalf of all the owners of the common elements. See W. Hyatt, Condominium and Homeowner Association Practice: Community Association Law 105 (1981), suggesting that only association be permitted to maintain action.

[2] This is not to say that a unit owner may not act on a common element claim upon the association's failure to do so. In that event the unit owner's claim should be considered derivative in nature and the association must be named as a party. Rule 4:32-5 would be applicable. That Rule governs actions "brought to enforce a secondary right on the part of one or more shareholders in an association, incorporated or unincorporated, because the association refuses to enforce rights which may properly be asserted by it."

[3] The unit owner may also sue the developer on behalf of the association irrespective of its governing board's willingness to sue during the period of time that the association remains under the control of the developer. The inherent conflict of interest is such that the association would not be in a position to resolve conflicts with the developer in the absence of the approval *382 of the unit owners, other than the developer. [FN10] See Berman v. Gurwicz, 189 N.J.Super. 89, 458 A.2d 1311 (Ch.Div.1981), aff'd o.b., 189 N.J.Super. 49, 458 A.2d 1289 (App.Div.1983), certif. denied, --- N.J. ---- (1983). In this situation the procedure of R. 4:32-5 would also appear to be appropriate.

FN10. A similar concern about overreaching by the developer led the Legislature to establish a rebuttable presumption of unconscionability of

> leases not executed by representatives of condominium unit owners other than the developer. N.J.S.A. 46:8B-32(a). Rebuttable presumptions of unconscionability also apply to numerous provisions that may be found in "leases involving condominium property, including ... recreational or other common facilities or areas." N.J.S.A. 46:8B-32.

The unit owner, of course, does have primary rights to safeguard his interests in the unit he owns. N.J.S.A. 48:8B-4. [FN11] The physical extent of that property depends upon what has been included in the common elements. This may be ascertained by examination of the statutory definition and the master deed. Moreover, defective conditions in the common elements may also result in injury to the unit owner and damages to his personal property and the unit. For example, a faulty roof may result in personal property damage in the unit. The unit owner's right to maintain an action for compensation for that loss against the wrongdoer is not extinguished or abridged by the association's exclusive right to seek compensation for damage to the common element.

> FN11. This is expressly recognized in the instant case in the Association's by-laws. Art. 6, s 3, p. 75.

[4] Further, the association's primary right to sue does not diminish any claim that the unit owner may have against the association. The association's board of directors, trustees or other governing body have a fiduciary relationship to the unit owners, comparable to the obligation that a board of directors of a corporation owes to its stockholders. Acts of the governing body should be properly authorized. Fraud, self-dealing or unconscionable conduct at the very least should be subject to exposure and relief. See, e.g., Papalexiou v. Tower West Condominium, *383 167 N.J.Super. 516, 527, 401 A.2d 280 (Ch.Div.1979); Ryan v. Baptiste, 565 S.W.2d 196, 198 (Mo.App.1978); Hidden Harbour Estates, Inc. v. Norman, 309 So.2d 180, 182 (Fla.D.Ct.App.1975).

IV

Our attention must next be directed to the application of the stated principles to the facts of this case. Beginning with the election of November 10, 1977, Hartz Mountain selected only one of nine of the Association's board of directors. Further, the Developer **575 had no directors on the board of the Recreation Association after October 19, 1978. In January 1978 the Association's board of directors designated a Legal Action Committee chaired by Sidney Siller, a plaintiff in this case, to investigate claims against the Developer relating to (a) construction and design and (b) misrepresentation or fraud. This Committee reported to the Board of Directors in June 1978 that major deficiencies attributable to the Developer involved heat, air conditioning and insulation; noise, leaks and erosion; and inadequate parking, clubhouse, swimming and marina facilities. There were also questions concerning shrubbery and foliage. The Committee recommended engaging an attorney, who later became plaintiffs' attorney in this action, to institute the necessary litigation. The board of directors adopted this recommendation, but shortly thereafter the board rescinded the action engaging that attorney and instead utilized the Association's general counsel in its negotiations with the Developer.

[5, 6] A settlement was negotiated providing for the Developer to pay $400,000 to the Association and Recreation Association and for the Developer to receive a general release except for "repair and replacement" of underground utility breaks on that part of the common elements known as Sea Isle for a period of three years. Insofar as the claims and general release are confined to the common areas and facilities, we agree with the trial court and the Appellate Division that the Association had exclusive standing to maintain the action. We also agree with the trial court and the Appellate Division that plaintiffs *384 are entitled to proceed under the fourth count of the complaint against the

Association and Recreation Association because of allegedly wrongful actions taken by their respective boards of directors.

[7] Plaintiffs as unit owners may also continue with their individual causes of actions based upon damages to their individual units. Their complaint referred to such damages. The common elements as defined in the statute, N.J.S.A. 46:8B-3(d), and in the master deed, do not include certain items peculiar to the individual units, such as doors and windows that open from a unit. The Associations cannot preclude plaintiffs from pursuing these claims. Each plaintiff should be prepared at the pretrial conference to itemize these individual unit owner claims. We do not pass upon the propriety of the class action, an issue which is not before us.

The judgment of the Appellate Division is affirmed in part and reversed in part. The cause is remanded for trial, costs to abide the event.

For affirmance in part; reversal in part and remandment --Chief Justice WILENTZ, and Justices CLIFFORD, SCHREIBER, POLLOCK, O'HERN and GARIBALDI--6.

Opposed --None.

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