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

REPLY BRIEF OF PETITIONER, FLAGLER PROPERTIES, INC.

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PREFACE

Plaintiff makes an important concession in its Answer Brief by agreeing that individual unit owners may maintain such suits as class actions. If Plaintiff had taken such a position before the Trial Court or the District Court, this case would not be in the present posture. However, Plaintiff chose to frame its lawsuit (and the ensuing appeals) solely based on its claim for defects to the common elements. Plaintiff, in effect, is claiming an unfettered right to sue individually for the alleged defects in the common elements, even though many others also hold an undivided interest in the same common elements.

Flagler will use the same references as in its Initial Brief. References to its Initial Brief will be made as "(In. Br.-_____.)". References to Plaintiff's Answer Brief will be made as "(Ans. Br.-_____.)".

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 FACT

Flagler objects to Plaintiff's factual and legal interpretation of the quoted colloquy between Mr. Young and the Trial Court that occurred at the very end of the oral argument on Plaintiff's Motion for Rehearing. (Ans. Br.-2-3.). Plaintiff's interpretation and analysis are incorrect.

The colloquy must be viewed in the procedural context that it occurred. The Trial Court dismissed the Plaintiff's original complaint. (R.-55-56.). Rather than amending to correct the deficiencies in its Complaint as the Trial Court's order set forth in detail, Plaintiff voluntarily removed those claims that the Trial Court found it could assert alone and realleged only those claims that the Trial Court ruled it could not assert for itself alone. The Plaintiff at no time presented the Trial Court with a motion for leave to amend or an amended complaint that sought status as a class representative or class certification or joinder of the association. Plaintiff's rendition of and histrionical interpretation of the significance of the hearing on Plaintiff's Motion for Rehearing is not supported by the record on appeal. Because of Plaintiff's deliberate actions, the only issue before the Trial Court, and the District Court, was whether an individual unit owner could maintain an action for construction defects in the common elements of the condominium project without provision for protection of the interests of the other undivided owners thereof.

SUMMARY OF ARGUMENT

The Trial Court did not hold that an individual unit owner could not, under any circumstance, maintain an action for construction defects in the common elements. The Trial Court held that an individual unit owner could not maintain an individual claim for defects in the common elements or common areas of the condominiums. Because of the prevalence of the condominium form of real property ownership in Florida, far-reaching and potential adverse effects on the condominium construction industry in the State of Florida, the public does have an intense concern in the certified question and this Court should exercise jurisdiction and issue a written opinion reversing the District Court.

An individual unit owner is not the proper party to bring an action relating exclusively to undivided interests in the common elements. Neither Chapter 718 of the Florida statutes nor case law logically or legally support any other conclusion.

A logical construction of Chapter 718, as a whole, leads to the conclusion that the reservation clause relied on by the Plaintiff relates to an individual unit owner's rights to: (1) bring a class action against the developers and/or contractor for 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 refusing to act.

The potential of multiplicity of lawsuits is a valid consideration by a trial court in determining whether a plaintiff is a proper party and whether to exercise its jurisdiction in circumstances where the Plaintiff's individual interest is co-joined with those of others and the Plaintiff gives no reason to the court why it will be prejudiced if required to bring the action in a manner which resolves the matter as to all who are jointly concerned.

ARGUMENT

THE TRIAL COURT DID NOT RULE THAT AN INDIVIDUAL CONDOMINIUM UNIT OWNER COULD NEVER MAINTAIN SUIT, IN ANY FASHION, FOR DAMAGES TO THE CONDOMINIUM'S COMMON ELEMENTS, RATHER THE TRIAL COURT RULED THAT AN INDIVIDUAL CONDOMINIUM UNIT OWNER COULD NOT MAINTAIN AN INDIVIDUAL ACTION FOR CONSTRUCTION DEFECTS IN THE COMMON ELEMENTS.

The Trial Court did not hold that an individual unit owner could not, under any circumstances, maintain an action for construction defects in the common elements "given it was the association that had to bring suit pursuant to §718.111(3), Fla.Stat. (1987)." (Ans. Br.-6.). The language of the Trial Court's two orders granting Defendants' motions to dismiss belie Plaintiff's arguments to the contrary. The Trial Court held that an individual unit owner could not maintain an individual claim for defects in the common elements or common areas of the condominium. (R.-55;-77.). Plaintiff's arguments about the "essence" of the opinion cannot alter this fact or the record on appeal.

The Trial Court's orders do not address the Plaintiff's ability to bring these claims as a class action, which has never been at issue sub judice or in this appeal. In fact, the District Court's opinion is silent on this issue. It deals only with an individual unit owner's ability to bring suit as an individual. Defendants have argued for the last thirty-three months that a class action by the individual owners or a suit by the association are the options available to the Plaintiff and the correct

mechanism by which this suit should have been instituted. (See: e.g., In. Br.-19-20.). Plaintiff has steadfastly argued that it could maintain this lawsuit in its individual capacity.

For the first time in this lawsuit, Plaintiff now recognizes and argues that the proper vehicle for bringing the lawsuit would have been to join the association or by seeking to be declared a proper representative of the owners as a class. (Ans. Br.-7.). Defendants have never taken issue with Plaintiff's ability to bring suit in either of these means. However, Defendants' position has been that an individual may not maintain this type of lawsuit for alleged defects in the common elements. It was Plaintiff who refused to amend its Complaint after the Trial Court's original order of dismissal and who, thereby, unnecessarily framed the single issue in this appeal.

A. The instant case does present a question of great public importance.

Notwithstanding the Plaintiff's efforts to re-create the record on appeal, the question certified by the District Court is one of great public importance. First, as set forth in Defendants' Initial Briefs, the decision will have far-reaching and adverse effects on the condominium construction industry in the State of Florida, will potentially turn Circuit Courts into "condo courts" and will delay the completion of repair under meritorious claims. (In. Br.-7-8.). Because of the prevalence of the condominium form of real property ownership in Florida, the

public does have an intense concern in the certified question and this Court should exercise jurisdiction.

Second, Plaintiff is incorrect in its contention that a written opinion from this Court would serve no useful purpose (Ans. Br.-8.). The District Court's decision is incorrect and should not be allowed to stand as substantive law. Because of its far-reaching and adverse effects, the District Court's decision should be reversed and the Trial Court's order dismissing Plaintiff's Amended Complaint should be affirmed for the reasons set forth in the Initial Brief of Petitioner, Flagler.

B. The Trial Court never ruled that the action must be maintained by the association under §718.111(3).

The Trial Court did give the Plaintiff the opportunity to amend to join either the association or other owners as a class. The Plaintiff was offered an opportunity to amend its Complaint, and the Plaintiff refused to amend its complaint to correct the pleading deficiencies. Instead, the Plaintiff reasserted that an individual had the right to bring the action by filing an "amended" complaint that contained only allegations pertaining to the common elements. Plaintiff has now, for the first time, taken the position that the Trial Court should have entertained a motion to amend to do those things that the Plaintiff had previously chosen not to do.

Moreover, the Trial Court never held that the "only vehicle by which to bring such a suit is by and through the association, as the sole party plaintiff under 718.111(3)." (Ans. Br.-9,

emphasis supplied.). Plaintiff makes this allegation unsupported by record citation. Rather, the two orders entered by the Trial Court dismissing Plaintiff's Complaint clearly held that an individual unit owner could not maintain an individual claim for defects in the common elements or areas of the condominium. (R.-55-56; 77-78.). In fact, the question certified by the District Court is taken directly from the language of the Trial Court's order. Plaintiff's argument in this regard is incorrect and is unsupported by the record.

C. An individual unit owner is not the proper party to bring an action relating exclusively to undivided interests in the common elements.

Plaintiff claims that "it is clear in Florida that individual unit owners have an actionable interest in their condominiums' common elements." (Ans. Br.-9.). Plaintiff supports this contention by citing, without page citation or quotation, to two district court opinions. Nowhere in those cases is Plaintiff's proposition supported. In fact, Plaintiff's reading of these cases is plainly wrong.

Plaintiff contends that the case of Avila South Condominium Association, Inc. v. Kappa Corporation, 347 So.2d 599 (Fla. 1977), recognizes "that individual unit owners had standing to attack the legality of their condominium's common element recreational leases...by virtue of their ownership interests in the common elements." (Ans. Br.-11.). This is wrong and not supported by the case. In Avila, the complaint filed by the association, in

its own right and on behalf of the association members, and by individual members of the association, challenged the legality of recreational leases based upon several theories.

One of the theories was that the recreational lease was unconscionable in violation of §711.66(5)(e), Fla.Stat. (1975). The trial court dismissed that count, and this Court affirmed the dismissal, reasoning that the statute was not intended to be retroactive. The Supreme Court further ruled that in the event that the unconscionability count was amended to state a cause of action on remand, that the named individual plaintiffs might be able to state a claim, either as individuals or as a class, as third party beneficiaries under the contract. Thus, the Court was referring to contractual rights; not real property rights. The ability to sue in Avila was not based upon the plaintiffs' ownership interests in the common elements. In the instant case, only real property rights are involved and, thus, the Avila decision is inapplicable and Plaintiff's reliance on the case is misguided.

This Court did not hold in Avila, as Plaintiff contends, that the individual unit owners had standing to sue as third party beneficiaries by virtue of their ownership interests in the common elements. This would be contrary to well settled law. Under Florida law, a third party is an intended beneficiary and thus able to sue on a contract, only if the parties to the contract

intended to primarily and directly benefit the third party. Aetna Casualty and Surety Co. v. Jelac Corp., 505 So.2d 37, 38 (Fla. 4th DCA 1987). See, also, Publix Supermarkets, Inc. v. Cheesbro Roofing, Inc., 502 So.2d 484 (Fla. 5th DCA 1987) (The court held the property owner was merely an incidental beneficiary to a contract between contractor and subcontractor and had no rights to enforce the venue provision in the agreement.)

Second, the Plaintiff mischaracterizes and overstates the court's holding in Wittington Condominium Apartments, Inc. v. Braemar Corp., 313 So.2d 463 (Fla. 4th DCA 1975) cert. den., 327 So.2d 31 (1976). Plaintiff applies the Wittington decision as if the decision dealt only with design and construction defects in the condominiums project's common elements. As is demonstrated in the Initial Brief of Petitioner, this is not a correct description of the case. (In. Br.-22-23.). Rather, the case involved a Complaint containing numerous Counts against the developer and contractor for improper design and construction to apartment units and to the common elements. Wittington at 464; 468, n. 5.

It is unclear as to which of the various counts in the complaint that the individual unit owner, based upon his individual unit ownership, was allowed to sue under. Because of this uncertainty, it is far from being "clear" that in Florida individual unit owners have an actionable interest in their condominium common elements.

Plaintiff next attempts to support its claim that an individual unit owner has an actionable interest in the condominium common elements by stating that "prior to the enactment of the predecessor statute to §718.111(3), individual unit owners were deemed to be the only proper parties in interest in suits affecting common elements." (Ans. Br.-9.; emphasis supplied.). Plaintiff supports this claim with a general reference, without page citation or quotation, to two cases: Commodore Plaza at Century 21 Condominium Association, Inc. v. Saul J. Morgan Enterprises, Inc., 301 So.2d 783 (Fla. 3d DCA 1974), dismissed, 308 So.2d 538 (Fla. 1975), and Hendler v. Rogers House Condominium, Inc., 234 So.2d 128 (Fla. 4th DCA 1970). However, those cases do not involve claims for construction defects in the common elements. Rather, in both cases, the condominium association brought an action to quiet title in the common elements. In both cases, the court found that the association did not have standing in a representative capacity to bring suit to quiet title in the common elements of the condominium projects. Commodore at 784; Hendler at 130. This is not equivalent to stating that individual unit owners are the "only proper parties in interest in suits affecting common elements."

Neither of these opinions support the position that an individual unit owner has the ability to maintain a lawsuit for alleged construction defects in the common elements. These

opinions hold that an association lacks authority to bring a lawsuit to quiet title in the common elements. These decisions were pre-1974 amendments to the Condominium Act. The 1974 Act expressly allowed such a lawsuit. These opinions do not comment upon the right, or lack thereof, of an individual unit owner to maintain an individual lawsuit to quiet title in the common elements. Because such an issue was not involved, the opinions are inapposite.

At least one court has held that under the post-1974 amendment to the Condominium Act individual unit owners are not the proper party in suits affecting common elements. See: Bay Park Towers Condominium Association, Inc. v. H.J. Ross & Assoc., 503 So. 2d 1333 (Fla. 3d DCA 1987). In Bay Park, the condominium association sought to intervene as the proper or real party in interest in an action brought by an individual unit owner against an engineering firm which had warranted the plumbing system for the building as not defective. The Circuit Court had denied the association's motion to intervene and the association appealed. The District Court held that the association should have been allowed to intervene in the lawsuit. The District Court reasoned that the power to manage condominium property and to sue with respect to the exercise of such power is expressly granted to the association by §718.111(3) of the Florida Statutes and Florida Rule of Civil Procedure 1.221. The Court went on to hold that the association should have been allowed to intervene because the

association's interest with regard to the common elements would not adequately be protected by the individual unit owner. Specifically, the Court found that "the individual unit owners have no direct interest in damages caused to the common elements." Id. at 1335.

Finally, Plaintiff contends that the nature of the condominium form of ownership of real properly "does not include the relinquishment of an owner's right to seek redress in Florida Courts." (Ans. Br.-10.). The Defendants have never suggested such a position. Flagler argues 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. Br.-11.). Defendants have always maintained that Plaintiff has access to the Court in the form of a class action or in the form of derivative action but not in the form of an individual lawsuit.

D. It has never been argued that §718.111(3) of the Florida Statutes confers the sole authority to sue upon Condominium Associations.

Plaintiff spends a large portion of its Answer Brief arguing that the Trial Court erred because of "its determination that §718.111(3) conveys upon condominium associations the sole and exclusive right to maintain such actions." (Ans. Br.-11-17; emphasis supplied.). The Trial Court did not make such a ruling and Plaintiff contentions are not supported by the record. Plaintiff places great emphasis on the so-called

"retention of rights" sentence of §718.111(3). (Ans. Br.-14.). Although the sentence states that an individual unit owner (or class of unit owners) has the ability to bring any action without participation by the association, this does not equate to or support an owner's right to maintain an individual action for alleged construction defects in the common elements.

Under §718.111(3) (and its civil procedure counterpart Fla.R.Civ.P. 1.221), a condominium association is allowed to bring an action on behalf of all unit owners concerning matters of common interest, but, "statutory or common law rights" of the individual owner or a class of unit owners to bring actions are not limited. A reading of Chapter 718 as a whole leads to the logical conclusion that this reservation clause relates to an individual unit owners right to bring a separate class action under Rule 1.220 of the Florida Rules of Civil Procedure or a derivative action against the association for its failure to act. (See In. Br.-18-22.). This conclusion is supported by the fact that it is highly suspect whether condominium ownership was legal in Florida at common law (see: In. Br.-19-20.).

Finally, Plaintiff contends the "retention of rights" clause of 718.111(3) makes the holding of Siller v. Hartz Mountain Associates, 93 N.J. 370, 461 A.2d 568, cert. den., 464 U.S. 961, 104 S.Ct. 395, 78 L.Ed.2d 337 (1983) inapposite. The Court in Siller held that causes of action to remedy defects in common elements of a condominium belong exclusively to the

condominium association. Flagler does not argue for such a result sub judice. Rather, Flagler realizes and has consistently argued that individual unit owners do have recourse for construction defects, just not through individual lawsuits, such as instituted by Plaintiff. Flagler cites to Siller for the Court's reasoning process not the ultimate holding (see: In. Br.-18.).

E. Defendants do not argue that multiplicity of suits deprives Plaintiff of standing.

Plaintiff contends, without citation to Defendants' Initial Briefs or the record on appeal, that the Defendants have taken the position "that the potential for multiple suits denies Plaintiff standing, despite Plaintiff's acknowledged ownership interest in the common elements." (Ans. Br.-17; emphasis supplied.). This statement is wrong. Defendants argue that Plaintiff is not the proper party as an individual merely because it has an undivided ownership interest.

Plaintiff contends that it has the ability to maintain this action individually based upon its undivided ownership interest in the common elements. (Ans. Br.-18.). Plaintiff argues that its undivided one forty-ninth interest in the common elements allows it to maintain an individual action for alleged construction to those common elements.

Although Plaintiff has a quantitative interest in the common element (i.e., 1/49th ownership), it is not the type of

qualitative interest that allows it to maintain such an action alone. See: Bay Park Towers Condominium Association, Inc. v. H.J. Ross & Assoc., 503 So. 2d 1333, 1335 (Fla. 3d DCA 1987) (individual unit owners have no direct interest in damages caused to the condominium common elements).

Defendants do not argue that the potential of multiplicity of lawsuits deprives Plaintiff of its interest which would give it standing to bring this suit if otherwise properly maintained. However, the potential of multiplicity of lawsuits is a valid consideration by a trial court in determining whether a plaintiff is a proper party and whether to exercise its jurisdiction in circumstances where the plaintiff's individual interest is cojoined with those of others and the plaintiff gives no reason to the court why it will be prejudiced if required to bring the action in a manner which resolves the matter as to all who are jointly concerned. Without such a showing, the Trial Court was correct in dismissing the lawsuit on the grounds that the Plaintiff lacks standing.

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, for the reasons stated above and in its Initial Brief, 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.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished via U.S. Mail to **THOMAS D. DAIELLO, ESQUIRE,** MARCHBANKS, DAILLO & LEIDER, P.A., Sanctuary Centre, Suite #101-E, 4800 North Federal Highway, Boca Raton, FL 33431 and **J. KORY PARKHURST, ESQUIRE,** BOOSE CASEY CIKLIN LUBITZ MARTENS McBANE & O'CONNELL, Northbridge Tower, 19th Floor, 515 North Flagler Drive, West Palm Beach, FL 33401 on this 11th day of February, 1993.

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