SUPREME COURT OF FLORIDA

CHARLEY TOPPINO AND SONS, INC.,

Petitioners,

v.

SEAWATCH AT MARATHON CONDOMINIUM ASSOCIATION, INC.,

Respondent.

Case No. 80,872

EPIC METALS CORP., ET. AL,

Petitioners,

v.

SEAWATCH AT MARATHON CONDOMINIUM ASSOCIATION, INC., ETC.

Respondent.

Case No. 80,873

AMICUS BRIEF OF DIVISION OF FLORIDA LAND SALES, CONDOMINIUMS, AND MOBILE HOMES

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PREFACE

References in this brief to Petitioner Charley Toppino and Sons, Inc., appear as "Toppino." Petitioner Epic Metals, Inc. is referred to as "Epic Metals." Petitioner Turtle Kraals, Ltd., appears as "Turtle." The Amicus Division of Florida Land Sales, Condominiums, and Mobile Homes, is referred to as the "Division." References to the Appendix to this brief appear as (App.).

STATEMENT OF THE CASE AND FACTS

The Division adopts the Statement of the Case and Facts contained in the brief of Respondent Seawatch at Marathon Condominium Association, Inc.

SUMMARY OF ARGUMENT

A condominium association can by statute only sue the developer for defects in the common elements after turnover of control of the condominium association has occurred. Given this fact, and given the tolling provisions of Section 718.124, Florida Statutes, it is evident that the Legislature considered that the statute of limitations for warranty actions instituted by a condominium association should be tolled until turnover. This result has been consistently maintained in the caselaw, and is the only result which gives sum and substance to this statutory scheme. Any other construction of the statute would permit a developer to avoid its statutory warranty obligations in those cases in which turnover of control was effectively delayed beyond any applicable statute of limitations pertaining to unit owner actions. Prior to turnover, the developer controls the affairs of the unit owners and turnover marks the first time that unit owners through the association may effectively assert their rights.

ARGUMENT I

INTRODUCTION TO THE STATUTE

A brief review of pertinent provisions of Chapter 718, Florida Statutes, the Condominium Act, will serve to place in complete perspective the issues raised and argued by the various parties in this appeal. Most essential to an analysis of the central issue -- whether the provisions of Section 718.124, Florida Statutes, toll the time for any action which the association may have until turnover of control -- is an analysis of the plenary authority given condominium associations to regulate the use and operation of the common elements. Given the extent of this authority, it may be seen that the picture of a condominium association depicted by Petitioners is incomplete and lacking. Also crucial to this Court's analysis of the issues raised is an understanding of the significance of turnover of control of the association, from control by the developer to control by the unit owners; in many respects, turnover of control is the most significant event occurring in the life of a condominium. It is that event which marks the first time during which the unit owners may control their own affairs. The authority of the condominium association in operating the common elements and in managing the affairs of the condominium is all encompassing. The operation of the condominium must be by the condominium association which, after January 1, 1977, must be a Florida corporation.[1] The officers and directors of the association have a fiduciary relationship to the unit owners.[2] The powers and duties

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[1]Section 718.111(1)(a), Florida Statutes.

[2]Id.

of a condominium association include those set forth in Chapter 718, Florida Statutes, as well as those powers contained in Chapters 607 and 617, as applicable.[3] The association may contract, sue, or be sued with respect to the exercise or nonexercise of its authority, including matters pertaining to the maintenance, management, and operation of the condominium property.[4] The association has the power to make and collect assessments and to lease, maintain, repair, and replace the common elements.[5] The association has the right of access to the units when necessary for the maintenance, repair, or replacement of the common elements.[6] An association has the power to acquire title to property or to otherwise hold, convey, lease, and mortgage association property for the use and benefit of its members.[7] The association has the power to purchase any land or recreation lease; the power to purchase units in the condominium;[8] the authority to grant, modify, or move any

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[3]718.111(2), Florida Statutes. See also, Towerhouse v. Millman, 475 So. 2d 674 (Fla. 1985) to the effect that a condominium association is strictly a creature of statute and must exercise its authority in a manner consistent with Chapter 718, Florida Statutes. Accord: Hyde Park Condominium Association, Inc. v. Estero Island Real Estate, Inc., 486 So. 2d 1 (Fla. 2nd DCA 1986).

[4]Section 718.111(3), Florida Statutes.

[5]Section 718.111(4), Florida Statutes.

[6]Section 718.111(5), Florida Statutes.

[7]Section 718.111(7), Florida Statutes. Note that contrary to Petitioners' claims in this appeal, an association is permitted to acquire and hold title to real and personal property *in its own name*. See, Ch. 84-368, Laws of Florida, §§1, 5.

[8]Section 718.111(9), Florida Statutes.

easement on the common elements;[9] the obligation to obtain and maintain adequate insurance to protect the association, the association property, the common elements, and the condominium property;[10] the duty and obligation to maintain the official records of the association;[11] and the obligation to produce certain financial reports on an annual basis.[12] Also, an association has the power to enter into agreements, to acquire leaseholds, memberships, and other processory or use interests in lands or facilities such as country clubs, golf courses, marinas, and other recreational facilities.[13] Under Section 718.113, Florida Statutes, maintenance of the common elements is specifically made the responsibility of the association.

A unit owner does not have the authority to act for the association simply by occupying the status of unit owner.[14] Except as otherwise provided in the condominium documents, a unit owner is prohibited from making material alterations or substantial additions to the common elements,[15] and the unit owner shall not do anything within his unit or on the common elements which would adversely affect the safety or soundness of the common elements or any portion of the association or

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[9]Section 718.111(10), Florida Statutes.

[10]Section 718.111(11), Florida Statutes.

[11]Section 718.111(12), Florida Statutes.

[12]Section 718.111(13), Florida Statutes.

[13]Section 718.114, Florida Statutes.

[14]Section 718.111(1)(c), Florida Statutes.

[15]Section 718.113(2), Florida Statutes.

condominium property maintained by the association.[16] Each unit owner has, appurtenant to the unit, an undivided ownership share of the common elements as specified by the declaration, and membership in the association.[17] A unit owner is entitled to use the common elements in accordance with the purposes intended but may not hinder or encroach upon the lawful rights of other unit owners.[18] The undivided ownership share in the common elements appurtenant to a unit may not be separated from the unit and shall pass with title to the unit; the ownership share in the common elements appurtenant to a unit may not be conveyed or encumbered except together with the unit.[19]

Section 718.301, Florida Statutes, governs control of the condominium association. Upon creation of a condominium by recordation of the declaration of condominium in the public records[20], the developer of the condominium is statutorily entitled to control the operation of the association by electing or designating a majority or more of the members of the board of administration of the condominium association. The duration of the period during which a developer is entitled to control the affairs of the association is determined upon application of the sellout formula provided by Section 718.301, Florida Statutes. The developer is entitled to control

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[16]Section 718.113(3), Florida Statutes.

[17]Section 718.106, Florida Statutes.

[18]Section 718.106, Florida Statutes.

[19]Section 718.107, Florida Statutes.

[20]Section 718.104(2), Florida Statutes.

the association for up to three years after fifty percent of the units in the condominium have been sold; three months after a ninety percent sellout has occurred; or when the developer no longer offers units for sale in the condominium, whichever occurs first.[21] Once transition from developer control has been triggered, the developer is required to call a meeting of the association to formally relinquish control to the unit owners.[22] Simultaneously the developer is required to deliver to the association, at the developer's expense, all property of the unit owners and the association held or controlled by the developer, including a copy of the condominium documents; a resignation of all developer officers and members of the board who are required to resign due to turnover; the financial records[23]; the association funds; a copy of as-built plans and specifications utilized in the construction or remodeling of improvements and the supplying of equipment to the condominium and in the construction and installation of all mechanical components serving the improvements; a list of the names and addresses of all contractors, subcontractors, and suppliers utilized in the construction or remodeling of the improvements and in the landscaping

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[21]Section 718.301(1), Florida Statutes. By virtue of an amendment to that section made by Chapter 91-103, Laws of Florida, the developer may control the affairs of the association for a maximum period of seven years after recordation of the declaration. Section 718.301(1)(e), Florida Statutes. Prior to the delayed effective date of Chapter 91-103, Laws of Florida, which was for most provisions April 1, 1992, a developer could and often did control the operation of the condominium association for periods in excess of seven years.

[22]Section 718.301(2), Florida Statutes.

[23]In accordance with Section 718.301(4)(c), Florida Statutes, the developer must audit the accounts of the association for the period of developer control to verify that the developer paid assessments and that the association monies were properly expended.

of the condominium or association property; copies of any certificates of occupancy which may have been issued for the condominium property; all written warranties of the contractor, subcontractors, suppliers, and manufacturers, if any, that are still effective.[24]

It is seen, then, that the life of the condominium association comprises two distinct phases. There is a line of demarcation separating the phase of developer control from the phase during which unit owners may control the operation of the condominium. Prior to the time the developer relinquishes control of the association, the developer and not the association is responsible for any association violations of the statute or Division rules.[25] Prior to turnover, the developer may not increase assessments imposed upon the unit owners by more than 115% without a vote of the unit owners.[26] Only after turnover of control may the association institute, maintain, settle, or appeal actions in its own name on behalf of all unit owners concerning matters of common interests to all or most unit owners, including, but not limited to, the common elements; the roof and structural components of a building or improvements; mechanical, electrical, and plumbing elements serving an improvement or building; and representations of the developer pertaining to any existing or proposed commonly used facilities.[27] After control of the association passes, the

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[24]Section 718.301(4)(a)-(k), Florida Statutes.

[25]Section 718.301(5), Florida Statutes.

[26]Section 718.112(2)(e), Florida Statutes.

[27]Section 718.111(3), Florida Statutes; Bishop Associates, Ltd. v. Belkin, 521 So. 2d 158 (Fla. 1st DCA 1988).

unit owner controlled association is given the right to cancel any contract made by the developer-controlled association that provides for the operation, maintenance or management of a condominium association or of property serving the unit owners.[28] Consistent with the foregoing, the Legislature through its enactment of Section 718.124, Florida Statutes, specifically provided that the statute of limitations for any cause of action which an association may have does not begin to run until turnover.

It is obvious from the foregoing that the time prior to turnover of a condominium association is fraught with potential conflicts of interest between the interests of the developer and the interests of the association including its unit owner members.[29] As stated in 1 Gary Poliakoff, The Law of Condominium Operations, § 7:02:

> Representatives of the developer often serve on the board in a dual, and sometimes conflicting, capacity. The board members may be employees of the developer as well as fiduciaries of the unit owners. In those instances, the developer's representatives must be sensitive to the needs of the association while also representing the interest and needs of the developer. [Citations omitted].

Against this backdrop, it is now possible to examine the issue of whether, consistent with the statute, the association may maintain a warranty action for the benefit of its

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[28]Section 718.302, Florida Statutes.

[29]See, e.g., Brickell Bay Condominium Association, Inc. v. Forte, 410 So.2d 522 (Fla. 3d DCA 1982), holding that the trial court abused its discretion in refusing to permit the association to intervene in a suit brought by the developer against a contractor alleging negligent performance in the construction of the condominium. The court noted that the association's interests, derived by virtue of its responsibility to repair the common elements, could only be adequately protected by permitting intervention.

members by taking advantage of the tolling provisions contained in Section 718.124, Florida Statutes.

ARGUMENT II

SECTION 718.124, FLORIDA STATUTES, SHOULD BE GIVEN ITS INTENDED EFFECT

Section 718.124, Florida Statutes, provides:

> 718.124 Limitation on actions by association.- The statute of limitations for any actions in law or equity which a condominium association or a cooperative association may have shall not begin to run until the unit owners have elected a majority of the members of the board of administration.

The ultimate issue involved in this appeal is the effect of the aforestated provision on the warranty periods provided by Section 718.203, Florida Statutes, providing in part as follows:

> 718.203 Warranties.--
> (1) The developer shall be deemed to have granted to the purchaser of each unit an implied warranty of fitness and merchantability for the purposes or uses intended as follows:
> (a) As to each unit, a warranty for 3 years commencing with the completion of the building containing the unit.
> (b) . . ..
> (c) As to all other improvements for the use of the unit owners, a 3-year warranty commencing with the date of completion of the improvements.
> (d) . . ..
> (e) As to the roof and structural components of a building or other improvements and as to mechanical, electrical and plumbing elements serving improvements or building, ... a warranty for a period beginning with completion of construction of each building or improvement and continuing 3 years thereafter or 1 year after owners other than the developer obtain control of the association, whichever occurs last, but in no event more than 5 years.
> (f) . . ..
> (2) The contractor, and all subcontractors and suppliers, grant to the developer and to the purchaser of each unit implied warranties of fitness as to the work performed or materials supplied by them as follows: ... .

The various petitioners in this case have characterized the above stated language in a broad variety of ways. According to Petitioner Turtle, the statute constitutes both a statute of limitations and a statute of repose. (Turtle's Brief, p. 14). According to Petitioner Toppino, Section 718.203, Florida Statutes, sets forth the warranty periods (Brief of Toppino, p. 14); however, Toppino characterizes this language as setting forth a "repose-like period", (Brief of Toppino, p. 28), and finally Toppino even suggests that the warranty periods set forth in that section may themselves be a statute of limitations. (Brief of Toppino, p. 1).

In fact, under the plain meaning and operation of the section, and under the case law construing that section, the periods set forth in Section 718.203, Florida Statutes, are what they appear to be--warranty periods. See, for example, Biscayne Roofing Company v. Palmetto Fairway Condominium Association, Inc., 418 So. 2d 1109 (Fla. 3rd DCA 1982) stating that the applicable statute of limitations for that association's breach of warranty action was contained within Chapter 95; Naranja Lakes Condominium No. 2, Inc. v. Rizzo, 463 So. 2d 378 (Fla. 3rd DCA 1985) in which the court determined that Chapter 95 contained the applicable statute of limitations for a cause of action brought by a condominium association against a developer for construction defects. Also of note is Terren v. Butler, 595 A. 2d 69 (N.H. 1991) (App. 1-5) in which the Supreme Court of New Hampshire construed the following portion of that State's Condominium Act:

> . . . The declarant shall warrant or guarantee, against structural defects, each of the units for 1 year from the date each is conveyed, and all of the common areas for 1 year ... .

In deciding that the warranty provision set forth *only* the warranty period and did *not* constitute the applicable statute of limitations, the court observed:

> The defendants do not quarrel with the finding of breach. They assert that the statute and their supporting promise provide a warranty upon which an effective claim must be made within a 1-year period. They point out that the association, the plaintiff receiving the compensation for the defects to the common areas, neither made an effective claim nor moved to intervene in this lawsuit during any conceivable 1 year period.
>
> We do not construe the 1-year life of the statutory warranty to be a statute of limitations or even a time limit on the delivery of effective notice. The 1-year period describes the life of the duty, that is, the period during which breach may occur. Effective notice of breach must be afforded within a reasonable time after discovery, and the suit must be commenced within the time afforded by the appropriate statute of limitations. [Citation omitted]. [Id. at 71].

There is no evidence that the Legislature intended the maximum five year period provided by Section 718.203, Florida Statutes, to operate as a statute of repose, and there is no language in that section which remotely resembles language barring an action unless it is commenced within a given period of time.

It is beyond dispute that in accordance with Section 718.111(3), Florida Statutes and Rule 1.221, Florida Rules of Civil Procedure, a condominium association is authorized to institute actions in its own name on behalf of all unit owners concerning matters of common interest including the common elements, and the roof and structural components of a building. Hence, a condominium association is clearly authorized to maintain, on behalf of its members, an action for breach of warranties under Section 718.203, Florida Statutes. It is further beyond the dispute that a

condominium association is only authorized to maintain warranty actions *after* control of the association has been maintained by unit owners other than the developer.[30] It is also not subject to serious dispute that even if a condominium association *was* authorized to commence a warranty action against a developer during the period of developer control, it would be against the developer's self-interest to do so:

> Prior to transition, the developer has the right to nominate and elect the directors of the condominium. Because the directors are selected by the developer, they will seldom institute legal proceedings against the developer for construction defects although the association may be under an obligation to do so. [Footnotes omitted].

2 Gary Poliakoff, The Law of Condominium Operations, § 9:15 (1988). See also, in this regard, the opinion of the court below, stating:

> Clearly, it was the intent of the Legislature to give condominium associations, as representatives of individual unit owners in matters concerning common elements, the right to sue after taking control, where the developer for reasons of self-interest or oversight, failed to pursue a cause of action for breach of contract or negligent construction. From that indisputable intent, a reasonable construction of Section 718.124 will not support the conclusion that the legislature intended to limit the period in which condominium associations could sue for construction defects to the same period in which the developer could have brought suit.

Seawatch at Marathon Condominium Association, Inc. v. Charley Toppino and Sons, Inc., 17 F.L.W. D2508 (Fla. 3d DCA Nov. 3, 1992). Based on the foregoing, the construction of the statute which makes the most sense and which gives substance

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[30]Rule 1.221, Florida Rules of Civil Procedure; Section 718.111(3), Florida Statutes.

and meaning to the statute is the construction applied both by the court below and the First District Court of Appeals in Regency Wood Condominium, Inc. v. Bessent Hammack and Ruckman, Inc., 405 So.2d 440 (Fla. 1st DCA 1981).[31] It would make little sense to authorize a condominium association to pursue statutory warranty actions on behalf of its members, limit that ability to a post-turnover association, and simultaneously read into the tolling provisions of Section 718.124, Florida Statutes, a non-existent exception for warranty actions. Condominium associations are typically controlled by developers for a period of three (3) to in excess of seven (7) years, and the interpretation of the statute urged by Petitioners in this case would, in many cases, operate to preclude a condominium association from doing exactly that which the statute authorizes, to wit: maintaining actions against the developer, after turnover, concerning the common elements and the improvements constructed thereon.

Nor is it a particularly meaningful observation to state that the unit owners, prior to turnover, are authorized to maintain actions against the developer for defects

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[31]Petitioners' efforts to avoid the direct holding of Regency Wood, supra, are particularly unconvincing. Moreover, the fact that a period in excess of ten (10) years has passed since the decision in Regency Wood was reported, and the fact that the Legislature has not changed the statute in response thereto, permits this Court to conclude that the Legislature approved the holding of Regency Wood. See, e.g., White v. Johnson, 59 So.2d 532 (Fla. 1952); Davies v. Bossert, 449 So.2d 418 (Fla. 3d DCA 1984).

in the common elements and improvements thereon.[32] In any given case, a unit owner in a condominium may individually lack adequate financial resources to commission an engineering study. Also, the unit owner individually may lack the financial resources to initiate complex warranty litigation against the developer. In the case of Siller v. Hartz Mountain Associates, 461 A.2d 568 (N.J. 1983), (App. 6-13) the Supreme Court for the State of New Jersey construed that State's Condominium Act as granting exclusively to the condominium association a cause of action to remedy defects in the common elements. In the court's discussion is found the following insightful comments:

> . . . Avoidance of a multiplicity of suits, economic savings incident to one trial, elimination of contradictory adjudications, expedition and resolution of controversies, accomplishment of repairs, and the positive effect on judicial administration are supportive policy reasons. 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 the common elements. [Citations and footnotes omitted]. [Emphasis added].

Hartz Mountain, supra, at pp. 572-73. Accordingly, as a practical concern, the fact that a unit owner is free to pursue an action for defects in the common elements

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[32]Of course, this Court is presently reviewing the question certified by the Fourth District in Carlandia v. Rogers and Ford Construction Corporation, 605 So.2d 1014 (Fla. 4th DCA 1992), in which that court determined that an individual condominium unit owner could maintain an action for construction defects in the common elements of the condominium. Oral argument was heard in that case on June 3, 1993, in Case No. 80,788.

achieves significance only in those cases in which a particular unit owner has sufficient funds to initiate major litigation.

Toppino's reliance on the educational brochures and rules of the Division is entirely misplaced. Toppino states that under Rule 7D-20.002, Florida Administrative Code, the Division has taken the position that the tolling provisions in Section 718.124, Florida Statutes, do not apply to the warranty provisions of Section 718.203, Florida Statutes. (Brief of Toppino, pp. 28-9). This is erroneous for a number of reasons. First, the notes to the rule which describe the law sought to be implemented by the rule reveal that the only law implemented in the rule is Section 718.203, Florida Statutes. There is no reference or indication that the Division was seeking to implement the tolling provisions of Section 718.124, Florida Statutes. Absent such an intent, it cannot fairly be said that the Division rule describes the Division's vis-á-vis the operation of the tolling provision. Moreover, the Division has issued a declaratory statement pursuant to Section 120.565, Florida Statutes, which specifically refutes the position sought to be advanced by the Petitioners herein. In the declaratory statement styled Belkin v. Division of Florida Land Sales, Condominiums and Mobile Homes, DBR Docket No. 84A-372 (August 15, 1986), (App. 14-29), affirmed Bishop Associates Limited Partnership v. Belkin, et al., 521 So.2d 158 (Fla. 1st DCA 1988), the Division examined the conditions under which a subsequent developer may properly assert control of a condominium association. In determining that the subsequent developer in that case was not entitled to vote for a majority of the board of administration, the Division stated:

> 6. The assurances extended by Section 718.301, that at some point in time, unit owners other than the developer will control the condominium association, is significant for a number of reasons. First, the right to control decision-making is significant in itself. At some point, the non-developer residents of the residential condominium are entitled, upon gaining control, to employ a management company of their choice, and to make other decisions affecting their substantial interests. Secondly, certain aspects of the Act remain inoperative until and unless turnover actually occurs. Review, for example, Section 718.111(3), Florida Statutes (1985), providing that the association is only authorized to institute, maintain and settle lawsuits in its own name on behalf of all the unit owners *after* control of the association is obtained by unit owners other than the developer. This would include warranty actions (see, Section 718.124, Florida Statutes,) and any other matters of common interest. [Italics in original; emphasis added].

(App. 27-8). The declaratory statement of the Division, which is an official expression of the agency's position in this matter, clearly maintains that warranty actions brought by the association are subject to the tolling provision of Section 718.124, Florida Statutes. Accordingly, contrary to the assertions of Toppino, the amicus agency has specifically ruled in a manner contrary to Toppino's preferred interpretation of Division rules and statutes.

On its face, Section 718.124, Florida Statutes, is unqualified and extends the statute of limitations for any actions which the association may have. There is no distinction made between actions taken by the association in its own right and actions in which it represents its members. The statute should be given its plain and generally understood meaning. See, e.g., R. Natelson, The Law of Property Owners Associations, § 9.13 (1989) which discusses tolling provisions found in Florida and

elsewhere:

> **§9.13.3.4. Tolling cases**
>
> In a POA context, the statute of limitations most commonly is tolled for one of two reasons: (a) the defects were not discovered (either because they were allegedly concealed[29] or because they could not have been discovered in the exercise of reasonable diligence); or (b) the association has been under control of the developer, and has not, therefore, been able to bring suit against the developer. An increasing number of jurisdictions have specific statutory provisions dealing with both eventualities.[30] Additionally, some courts toll the statute of limitations for any period during which the developer was attempting to remedy construction defects.[31]
>
> [30]E.g., Fla. Stat. Ann. §718.124 (tolling all limitations during period of developer control); Ill.Ann.Stat. ch. 30, para. 318.2(f) (same); Tenn. Code Ann. §28-3-205(b) (tolling statute during period of concealment); Unif. Condominium Act §4-116 (no tolling for most claims, but tolling until discovery for certain components); N.C. Gen. Stat. §1-15(b) (tolling until injury was discovered by claimant, or ought reasonably to have been discovered). [Emphasis added].

Id. at Section 13.3.4, p. 392. Thus, as set forth above, Section 718.124, Florida Statutes has been construed as tolling all claims which an association may have against a developer. Significant also is the fact that in 1983, the State of Illinois adopted a nearly identical provision in its Condominium Act as follows:

> 318.2 Administration of Property Prior to Election of Initial Board of Managers
>
> Section 18.2(f). The statute of limitations for any actions in law or equity which the condominium association may bring shall not begin to run until the unit owners have elected a majority of the members of the board of managers.

In West's Illinois Statute Annotated appears the following historical note with reference to the Illinois statute:

> Subsection 18.2(f) is similar to a provision in the Florida Condominium Property Act. It provides that the statute of limitations for any actions which the condominium association may bring shall be tolled until such time as the unit owners elected a majority of the members of the board of managers. The latest statute of limitations case involving a condominium is Cooper v. United Development Corporation, 122 Ill.App.3d 850, 462 N.E.2d 629 (1st Dist. 1984). [App. 30-37]. This case was brought as a class action of unit owners against the developer. The court held that the implied warranty of habitability cause of action was barred because of a five (5) year statute of limitations. Practitioners should take note that the language of subsection 18.2(f) was intended to deal with exactly this kind of situation where the association is the plaintiff. [Emphasis added].

Illinois Ann. Stat. Ch. 30, para. 318.(2)(f). Thus there is an indication that when the State of Illinois adopted the substance of the Florida Act, the Illinois equivalent was designed in part to avoid the expiration of a statute of limitations applicable where associations bring an action for the developer for breach of the implied warranty of habitability. This intent is also signified with reference to the Florida Act as follows:

> Section 7-24. Warranties.
>
> Warranties, either express or implied are not affected by transition except that the statute of limitations for such warranties may be extended.[1] Therefore warranties may run during developer control.[2] [Emphasis added].
>
> [1]For further discussion of the effect of transition on statutes of limitation, see Section 7-23. For further discussion of warranties, see ch. 9.
>
> [2]Fla. Stat. Ann. Section 718.203.

1 Gary Poliakoff, The Law of Condominium Operations, §§ 7-24.(1988). Based on the foregoing, and based on the decisions of two separate District Courts of Appeal, there is an abundance of authority in favor of interpreting Section 718.124, Florida

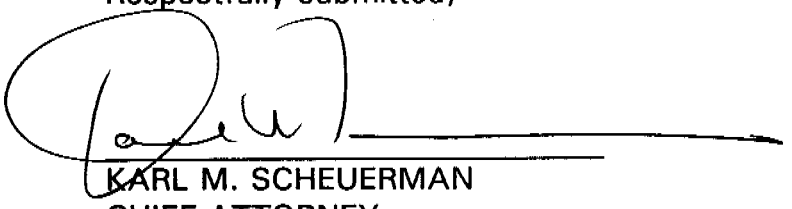
Statutes as tolling the statute of limitations applicable to the warranty periods contained in Section 718.203, Florida Statutes. The legislative history recited by Toppino at pages 16-20 of its brief, lacks persuasive force. Essentially, Toppino points to an absence of indicia of Legislative intent surrounding the enactment of Section 718.124, Florida Statutes to support its conclusion that the tolling provision does not operate in the manner apparent on its face. The fact that the tolling provision was enacted without "fanfare", and without "any legislative history to support the notion that a new cause of action for associations was being created" can support no specific finding of legislative intent. Moreover, to construe Section 718.124, Florida Statutes to apply only to non-warranty actions which the association may have, is to render that section of little effect. The 1977 statute already granted to condominium associations the right to cancel contracts providing for the operation, maintenance or management of the property, where the contract was entered into during the period of developer control. Section 718.302, Florida Statutes (1977).

In sum, the language in Section 718.203, Florida Statutes constitutes the warranty periods. Any action which the association may have including actions under Section 718.203, Florida Statutes, must be instituted after turnover, and the statute of limitations for such actions is specifically tolled by the operation of Section 718.124, Florida Statutes.

CONCLUSION

For the foregoing reasons, this Court should affirm in all respects the decision of the Third District below. No convincing rationale has been advanced by any Petitioner which would justify a reversal.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to CHARLES AUSLANDER, Esquire; ARTHUR J. ENGLAND, JR., Esquire, 1221 Brickell Avenue, Miami, Florida 33131; BETSY E. GALLAGHER, Esquire, Kubicki, Bradley, Draper, et al., 25 West Flagler Street, Penthouse Suite, Miami, Florida 33130; KARL BECKMEYER, Esquire, NICHOLAS MULICK, Esquire, Beckmeyer & Mulick, 88539 Overseas Highway, Tavernier, Florida 33020; JAMES E. TRIBBLE, Esquire, Blackwell & Walker, P.A., 2400 AmeriFirst Building, 1 S.E. 3rd Avenue, Miami, Florida 33131; H. HUGH MCCONNELL, Esquire, 201 Alhambra Circle, Suite 1102, Coral Gables, Florida 33134; RICHARD SOLOMON, Esquire, P.O. Box 2513, Orlando, Florida 32802-2513; LYNN E. WAGNER, Esquire, Olympia Place, Suite 1800, 800 North Magnolia Avenue, P.O. Box 2513, Orlando, Florida 32802-2513; and RICHARD SHERMAN, 1777 South Andrews Avenue, Suite 302, Ft. Lauderdale, Florida 33316, this 14th day of June, 1993.

KARL M. SCHEUERMAN, ESQUIRE

EPICCOVR.KMS

SUPREME COURT OF FLORIDA

CHARLEY TOPPINO AND SONS, INC., Petitioners, v. SEAWATCH AT MARATHON CONDOMINIUM ASSOCIATION, INC., Respondent.	*	Case No. 80,872
EPIC METALS CORP., ET. AL, Petitioner, v. SEAWATCH AT MARATHON CONDOMINIUM ASSOCIATION, INC., ETC. Respondent.	*	Case No. 80,873

APPENDIX TO AMICUS BRIEF OF DIVISION OF FLORIDA LAND SALES, CONDOMINIUMS, AND MOBILE HOMES

KARL M. SCHEUERMAN
CHIEF ATTORNEY
Department of Business Regulation
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KARL M. SCHEUERMAN, ESQUIRE

APPCOVR.KMS

George E. TERREN and Yacht Club Vista Condominium Association, Intervenor,

v.

Eila May BUTLER, Robert W. Butler and Yacht Club Vista, Inc.

No. 89-365.

Supreme Court of New Hampshire.

Oct. 4, 1991.

Condominium association and puchasers of individual unit brought action against condominium declarant and its shareholders for breach of warranty and misrepresentations. The Superior Court, Belknap County, Dickson, J., entered judgment against the declarant and its sole shareholders. Appeals were taken. The Supreme Court, Horton, J., held that: (1) the one-year life of warranties given by developers is not a statute of limitations, but rather, requires that the defect giving rise to the breach of warranty claim manifest itself within one year; (2) the evidence supported the trial court's decision to pierce the corporate veil and hold the shareholders liable for misrepresentations; and (3) the statute permitting an award of attorney fees to a purchaser in a rescission action did not apply.

Affirmed in part and reversed in part.

1. Contracts ⇐205.40

One-year life of statutory warranty against structural defects in condominium units or common areas describes period during which breach may occur, but is not statute of limitations or time limit on giving notice to declarant. RSA 356-B:41.

2. Contracts ⇐322(3)

Evidence permitted trial court to find that condominium unit owner gave timely notice of common area defects that allegedly breached declarant's warranty; unit owner made early general complaints about defects, and followed those complaints with detailed engineering reports, and any delay in generating notice from association was caused by declarant's shareholders' delay in transferring control of association to condominium owners. RSA 356-B:41.

3. Contracts ⇐329

Six-year statute of limitation of actions applied to condominium unit owner's breach of warranty action against declarant for defects in common areas. RSA 356-B:41, 508:4, subd. 1.

4. Corporations ⇐1.4(4)

"Alter ego doctrine" allows plaintiffs to pierce corporate veil and place liability of corporation at feet of one or more of its principals.

See publication Words and Phrases for other judicial constructions and definitions.

5. Corporations ⇐1.4(1)

Doctrine of piercing corporate veil is equitable remedy particularly within province of trial court.

6. Corporations ⇐1.7(2)

Evidence supported trial court's finding that corporate declarant of condominium was mere alter ego of its sole shareholders and, thus, that shareholders could be held individually liable for misrepresentations made by declarant to purchasers of condominium units; sole shareholders never paid consideration for their shares and received significant compensation from declarant, shareholders sold land to declarant for significantly more than they had paid for it, declarant was to assume shareholders' existing mortgage, and shareholders received stock distributions and repayment of shareholder loans at time when declarant's sole asset was single unit in complex, valued at $100,000. RSA 356-B:65.

7. Corporations ⇐1.4(1)

Setting up corporation with insufficient assets or plan for assets to meet corporation's expected debts and obligations under condominium statute can justify remedy of piercing corporate veil to hold individual organizers liable for breach of warranty or misrepresentation. RSA 356-B:41, 356-B:65.

8. Condominium ⇐17
Costs ⇐194.32

Statutory provision for attorney fees in action by purchaser for rescission or its equivalent did not apply in action against condominium declarant for misrepresentations and breach of warranty. RSA 356-B:65, subd. 2.

Wadleigh, Starr, Peters, Dunn & Chiesa, Manchester (Robert E. Murphy, Jr., on the joint brief and orally), for intervenor Yacht Club Vista Condominium Ass'n.

James O'Neill, Laconia, on the joint brief, for plaintiff George Terren.

Murphy, McLaughlin & Hemeon, Laconia (Robert L. Hemeon, on the brief and orally), for defendants.

HORTON, Justice.

The defendants appeal two verdicts of the Superior Court (*Dickson*, J.), the first in favor of Yacht Club Vista Condominium Association (Association) against Yacht Club Vista, Inc. (Declarant), Emma May Butler and Robert W. Butler in the amount of $319,428, plus costs, and the second in favor of George E. Terren against the Declarant and the Butlers for $1, plus costs and attorney's fees. We affirm the verdict in favor of the Association. We affirm damage and cost elements of the verdict in favor of Terren, but vacate the award of attorney's fees.

The Butlers, individual owners of the Saunders Bay Motel complex on Lake Winnipesaukee, incorporated the Declarant in November 1984. The corporate purpose was to hold the property for conversion into a condominium project. The Butlers were the sole shareholders and directors and also held the offices of president, vice-president and treasurer. Their attorney held the office of secretary. On January 11, 1985, the Butlers sold the motel complex to the Declarant. Following the sale and financing transaction, the complex was owned by the Declarant, encumbered by a mortgage held by Bank East of Meredith for one million dollars, and a second, purchase money mortgage held by the Butlers for 1.1 million dollars. Pursuant to RSA chapter 356-B, the condominium project was registered by the Declarant with the New Hampshire Consumer Protection and Antitrust Division of the Attorney General's office, and a public offering statement was prepared.

Based in part on this offering statement, as well as other oral representations made by the Butlers, Terren purchased six condominium units in June 1985. The construction aspects of the condominium conversion were ongoing during the summer of 1985 and were substantially completed by the end of July 1985.

George Terren's complaints about the quality of the condominium conversion began almost immediately. When his letters, sent by certified mail, were not accepted by the Butlers, he hired an engineer to document the existing problems. The engineer's report raised concerns about future damage as a result of the materials and construction techniques used. After receiving no response to his complaints, Terren filed this action in January 1986 and a complaint with the consumer protection division of the attorney general's office, seeking to have the Butlers removed as heads of the Association. In response, the Butlers made oral and written assurances that the problems would be remedied and, in fact, did make some repairs.

By June 1986, the Butlers had stepped down as heads of the Association, and the Association's new president began an investigation into defects in common areas. Again, the Butlers undertook to remedy the complaints now raised by the Association and expressed their willingness to resolve future defects.

A second comprehensive inspection by the Association's civil engineer, H. Edmund Bergeron, conducted in July 1987, questioned the foundation, support and construction of the units. A supplemental appraisal resulted in a total estimated cost of repairs to the property of $319,428. On February 25, 1988, the Association filed to intervene in this action.

At the time of trial, the condominium conversion had been completed and all

units sold, or otherwise alienated, except for Unit 6, with a value of $100,000, which remained unencumbered in the hands of the Declarant. The Declarant was otherwise without assets.

Following a lengthy bench trial, the court found various instances of misrepresentation by the Declarant, in its offering statement, and by the Butlers, in various communications. The court found breach of express and implied warranties. It adopted the Association's engineer's estimate of damages as correct. Finally, it found liability in the Butlers based on their participation in the misrepresentations and due to their conduct diverting corporate assets to their benefit when substantial notice of claims were outstanding. The stated verdicts resulted.

The defendants appeal on three general bases. First, they attack the findings regarding breach of warranty. They assert that the express warranty deemed breached flows from RSA 356–B:41, II, which carries a one-year limitation that bars the Association from recovery. They contest the finding on implied warranty due to the court's reliance on *Lempke v. Dagenais*, 130 N.H. 782, 547 A.2d 290 (1988), which they read to apply only to new construction. Second, the defendants challenge the court's findings on individual liability of the Butlers. Lastly, the defendants claim error in the award of damages to Terren and the resulting award of attorney's fees based on the authority of RSA 356–B:65, II.

I. *The Warranty Findings.*

[1] RSA 356–B:41, II, states, in part: "... the declarant shall warrant or guarantee, against structural defects, each of the units for one year from the date each is conveyed, and all of the common areas for one year. The one year referred to in the preceding sentence shall begin as to each of the common areas whenever the same has been completed or if later ... at the time the first unit therein is conveyed.... For the purpose of this paragraph, structural defects shall be those defects in components constituting any unit or common area which reduce the stability or safety of the structure below accepted standards or restrict the normal intended use of all or part of the structure and which require repair, renovation, restoration or replacement...."

The Declarant reiterated this warranty in its public offering statement, by reference in part and expressly in part. The structural defects claimed to be warranty violations were common area defects. The record contains ample evidence to allow consideration of these defects as statutory violations and to support the trial court's finding of breach.

The defendants do not quarrel with the finding of breach. They assert that the statute and their supporting promise provide a warranty upon which an effective claim must be made within a one-year period. They point out that the Association, the plaintiff receiving the compensation for defects to the common areas, neither made an effective claim nor moved to intervene in this lawsuit during any conceivable one-year period.

We do not construe the one-year life of the statutory warranty to be a statute of limitations or even a time limit on the delivery of effective notice. The one-year period describes the life of the duty, that is, the period during which breach may occur. Effective notice of breach must be afforded within a reasonable time after discovery, and suit must be commenced within the time afforded by the appropriate statute of limitations. *See Austin Co. v. Vaughn Bldg. Corp.*, 643 S.W.2d 113 (Tex.1983).

[2, 3] In the case before us, the defects accrued during the warranty period and notice was afforded the Declarant at various times, commencing with the early general complaints by Terren, followed by the detailed engineering reports. Association generated notice was delayed by the delay of the Butlers in transferring control of the Association from their hands to the condominium owners. Based on the evidence presented, the trial court would not be compelled to find the notice tardy or inadequate. RSA 508:4, I, provides the appropriate statute of limitations. Here, the cause

of action accrued prior to July 1, 1986, and the appropriate limitation for suit was six years. Laws of 1986, 227:22, II (effective date for change of limitations period from six years to three years is July 1, 1986).

Since we find that the statutory and express warranties were properly applied and support the trial court's award of damages for breach, we do not address the asserted error in finding implied warranty based on *Lempke v. Dagenais*, 130 N.H. 782, 547 A.2d 290.

II. *Individual Liability.*

[4] The trial court found that the Butlers were individually liable for the damages awarded. One basis for this finding of individual liability was, as characterized by the trial court, the "alter ego" doctrine. This doctrine allows plaintiffs to pierce the corporate veil to place the liability of the corporation at the feet of one or more of its principals. In this State, the corporate veil may be pierced by finding that the corporate identity has been used to promote an injustice or fraud on the plaintiffs. *Druding v. Allen*, 122 N.H. 823, 827, 451 A.2d 390, 393 (1982). New Hampshire courts do not "hesitate[ ] to disregard the fiction of the corporation" when circumstances would lead to an inequitable result. *Ashland Lumber Co. v. Hayes*, 119 N.H. 440, 441, 402 A.2d 201, 202 (1979) (citation omitted) (quoting *Peter R. Previte, Inc. v. McAllister Florist, Inc.*, 113 N.H. 579, 581, 311 A.2d 121, 123 (1973)).

[5, 6] The doctrine of piercing the corporate veil is an equitable remedy and, therefore, "is particularly within the province of the trial court...." 1 W. Fletcher, Cyclopedia of the Law of Private Corporations § 41, at p. 603 (rev. perm. ed. 1990). We will sustain the judge's conclusion unless clearly unsupported by the evidence. *C & M Realty Trust v. Wiedenkeller*, 133 N.H. 470, 476, 578 A.2d 354, 358 (1990). The court below found that the "substantial depletion of corporate assets by defendants Butler after being advised that defects existed in the project provides a sufficient basis to find that defendants Butler used the corporate entity to promote an injustice and/or a fraud on the plaintiffs."

The evidence shows that the Butlers were the sole shareholders and sole directors and that the Butlers held the offices of president, vice-president and treasurer; that the Butlers never paid the consideration, stated as $1,500 each, for their shares and paid themselves compensation of $152,000 in 1986 and $191,585 in 1985. The evidence also shows that the Butlers sold the land, originally purchased in 1979 for $472,000, financed with a mortgage debt of $379,000, to the Declarant for $1.1 million in debt, secured by a second mortgage for the entire amount. This mortgage was paid to the Butlers out of the lots' sales, principally the latter sales. In addition to the $1.1 million purchase price, the Declarant was required to assume and pay the $347,475 balance on the Butlers' mortgage which they used to finance their 1979 acquisition of the property. The Butlers received $241,609 in repayment of shareholder loans and $93,917 in stock distributions. Now the corporation's sole asset is a unit in the complex, valued at $100,000. This evidence is sufficient to sustain the trial court's finding.

[7] The trial court is also supported by the policies created by RSA 356–B, specifically sections 41 and 65. These policies are intended to foster confidence in condominium conversion projects. Section 41 provides an express warranty for a minimum of one year after purchase, and section 65 creates liability for misrepresentations in the sale of condominiums. Inherent in these requirements is that the corporation will stand behind its conversion and its representations for the time reasonably required by the statutory policy. Setting up a corporation with insufficient assets or plan for assets to meet its expected debts and obligations under the condominium statute can justify the remedy of piercing the corporate veil. *Directors Guild of Amer. v. Garrison Productions*, 733 F.Supp. 755, 762 (S.D.N.Y.1990) (Shareholder dominating corporation and "carrying on a business without substantial assets to meet its debts can justify piercing the cor-

porate veil" (citations omitted)). Permitting Yacht Club Vista's structure, set up solely by the Butlers, to protect the Butlers while depriving the plaintiffs of relief would be to undermine the purposes of the statute. *See Publicker Industries v. Roman Ceramics*, 603 F.2d 1065, 1069 (3d Cir.1979) (piercing appropriate when to recognize corporation as separate entity would defeat public policy). That the corporation continued to distribute its assets at a time when several claims were made against it by purchasers supports the actions of the trial court. These factors, and the evidence submitted, amply support the judge's decision that the Butlers should be held personally liable. Because we have concluded that the Butlers are liable under the "alter ego" theory, we need determine neither whether, nor to what extent, they personally made misrepresentations nor whether they are liable for misrepresentations in the offering statement.

III. *The Terren Verdict.*

[8] The record contains sufficient evidence to sustain an award of $1 in damages to the plaintiff Terren, separate and apart from the Association's award. In addition to the award of damages, Terren was awarded his attorney's fees. The trial court made this award without any supporting findings. A review of the record does not permit us to imply that any of the trial court's findings support any recognized exception to the general rule in this State that "one suffering from such a wrong cannot recover counsel fees incurred in the resistance of it...." *Guay v. Association*, 87 N.H. 216, 220–21, 177 A. 409, 412–13 (1935). The *Guay* exceptions as expanded over the years, *see Harkeem v. Adams*, 117 N.H. 687, 690, 377 A.2d 617, 619 (1977), and as recently reported in *Town of Nottingham v. Bonser*, 131 N.H. 120, 132, 552 A.2d 58, 65 (1988), *cert. denied*, 490 U.S. 1109, 109 S.Ct. 3163, 104 L.Ed.2d 1026 (1989), are not present in this case. A statutory provision for attorney's fees exists under RSA 356–B:65, II. This authority for awarding attorney's fees, however, refers to the actions brought under section II. These are actions brought for rescission, or its equivalent, a special civil remedy tailored for elective use by a condominium purchaser. Terren did not elect this form of relief. The statutory authority is not applicable. The award of attorney's fees was improper.

Verdict for the Association affirmed. Verdict for Terren affirmed in part and reversed in part.

All concurred.

The STATE of New Hampshire

v.

Norberto PEREZ.

No. 90–290.

Supreme Court of New Hampshire.

Oct. 4, 1991.

Defendant was convicted in the Superior Court, Merrimack County, McHugh, J., of conspiracy to sell cocaine, and he appealed. The Supreme Court, Brock, C.J., held that failure to indict defendant until 69 days after his arrest was not unreasonable in light of showing that county attorney's office obtained indictment within 24 hours of becoming aware of clerical error which had delayed sending of reports.

Affirmed.

Indictment and Information ⇐7

State showed that indictment which was not brought within 60 days of date of arrest was not unreasonably delayed by presenting evidence that, due to personnel change in administration at state narcotics unit, reports were not sent to appropriate county attorney's office in timely fashion; evidence showed that county attorney's office obtained indictment within 24 hours of

93 N.J. 370

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. –

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. Condominium ⇐8

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.

2. Condominium ⇐17

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.

3. Condominium ⇐17

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.

4. Condominium ⇐17

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.

5. Condominium ⇐8, 17

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.

6. Condominium ⇐17

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.

7. Condominium ⇐17

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.

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 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.[1] 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.

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

1. 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.

had planned and 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 [2] 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 [3] 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 settling claims pertaining to the individual units as well as the common elements.

I

The Legislature recognized a new form of ownership of real property in enacting the Condominium Act.[4] *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*, § 1.

2. 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.

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

4. 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).

The Act also provides that the condominium will be administered and managed by the association. *N.J.S.A.* 46:8B–3(b); 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).[5] Once that occurs, the developer is required to "relinquish control of the association." *N.J.S.A.* 46:8B–12.1(d).

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)]

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).[6] 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 offi-

5. 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)]

6. 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.

cers." *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).

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. The statutory provisions empowering the association to sue, imposing the duty on it to repair, and authorizing it to charge and collect "common expenses,"[7] 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.

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 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 adminis-

7. 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).

tration are supportive policy reasons.[8] 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.[9] *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. 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.*, 347 *So.*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).

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. 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

8. 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.

9. 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* § 7 of FHA Model Statute reprinted in Rohan and Reskin, 1A *Condominium Law & Practice* Appendix B–3

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 of the unit owners, other than the developer.[10] *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.

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.[11] 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.

[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*, 167 *N.J.Super.* 516, 527, 401 *A.*2d 280 (Ch.Div.1979); *Ryan v. Baptiste*, 565 *S.W.*2d 196, 198 (Mo.Ct.App. 1976); *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 De-

10. 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.

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

veloper 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 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.

93 N.J. 384

GLOUCESTER COUNTY WELFARE BOARD, Respondent,

v.

STATE of New Jersey CIVIL SERVICE COMMISSION, Appellant.

Supreme Court of New Jersey.

Argued March 7, 1983.

Decided June 21, 1983.

Job applicant who could not satisfy prescribed educational requirements sought to substitute other educational qualifications. The Superior Court, Appellate Division, held that actions of the Civil Service Commission in refusing such substitution were unreasonable. On certification to the

STATE OF FLORIDA
DEPARTMENT OF BUSINESS REGULATION
DIVISION OF FLORIDA LAND SALES, CONDOMINIUMS AND MOBILE HOMES
725 SOUTH BRONOUGH STREET - JOHNS BUILDING
TALLAHASSEE, FLORIDA 32301-1927

ARNOLD BELKIN,

Petitioner,

v.

DIVISION OF FLORIDA LAND SALES, CONDOMINIUMS AND MOBILE HOMES, et al.,

Respondents.

DOAH CASE NO. 85-0828
Div. Case No. 84A-372

FILED
DIVISION OF FLORIDA
LAND SALES, CONDOMINIUMS
AND MOBILE HOMES
DATE 8/15/86
CLERK B. Smith

DECLARATORY STATEMENT

1. This Order is entered by the Director of the Division of Florida Land Sales, Condominiums and Mobile Homes, Department of Business Regulation, pursuant to Sections 120.59 and 120.565, Florida Statutes, following a review of the record and the Recommended Order entered in this cause by Hearing Officer Michael M. Parrish, Division of Administrative Hearings, on April 9, 1986.

2. Both the Petitioner Arnold Belkin and Intervenors filed exceptions to the Recommended Order which exceptions have been considered and ruled upon to the extent permitted under applicable rules. Since, in accordance with Rule 28-5.404, Florida Administrative Code, parties may only file exceptions to the Findings of Fact contained in a Recommended Order, those exceptions concerning the Conclusions of Law contained in the Recommended Order will not be addressed.

3. The Joint Intervenors filed an exception relating to paragraph 33 of the Findings of Fact which provides that "...for all practical purposes relevant to this case, the Joint Intervenors may be regarded as a single entity." Joint Intervenors have failed to explain their objections to this statement, but merely recite that Joint Intervenors "...take exception to the statement...." To the extent that Joint Intervenors seek to attack the factual predicate for the finding, upon review of pertinent portions of the record, it is hereby determined that the statement is supported by substantial competent evidence. Joint Intervenors, through a collective course of activity, may be

properly considered to be a single entity for purposes of this proceeding. First, the partnerships, in two bulk purchases, collectively purchased their respective condominium units. (Transcript, pp. 49-50; hereinafter T.) Secondly, Intervenors acted collectively in the turnover election held in July of 1984, such that all voting interests of all partnerships were voted jointly. (T. 204). Thirdly, each partnership has at least several general partners in common, (T. 175-183, 249), each has entered into the management contract with the closely related management company (T. 211), and the business activities and business motives of each Joint Intervenor are identical. (T. 218-219, 249). Accordingly, this exception is overruled.

4. Mr. Belkin objects to paragraph 1 of the Findings of Fact and states that the original developer, Winston Capital, Inc., "...is not offering condominium parcels for sale or lease in the ordinary course of business...." The Recommended Order does not make the finding of fact that the original developer is offering condominium parcels for sale or lease in the ordinary course of business. Rather, the Recommended Order recites the stipulation of the parties that the original developer still owns units for sale in the condominium. (Recommended Order, Finding of Fact No. 1). Consequently, Belkin's exception that the original developer is not offering units for sale or lease in the ordinary course of business was not determined by the Hearing Officer, and further, is not supported by the record. The only evidence in the record is that the original developer still owns units for sale in the condominium. Therefore, since Mr. Belkin objects to a finding which was not in fact made, the objection is overruled.

5. In his next exception, Mr. Belkin states that, regarding Finding of Fact No. 23, Mr. Craig Hall is also a general partner in each of the ten limited partnerships. The Hearing Officer did not find that Mr. Hall was not a general partner, but instead made no finding regarding this individual. Mrs. Erdody, a general partner in each of the ten limited partnerships, testified that Mr. Hall was a general partner in each of the limited partnerships. (T. 183). However, since the issue of whether Mr.

Hall was a general partner is cumulative and not essentially relevant to the legal issues presented, Mr. Belkin's objection is overruled.

6. Mr. Belkin next takes exception with paragraph 27 of the Findings of Fact which determines that the limited partnerships employed Hall Management Company and that the rental office used by the management company consists of a unit owned by one of the limited partnerships. Mr. Belkin's exception notes that the unit used as the rental office is a condominium unit in a residential condominium. Since it was specifically found in Fact No. 11 of the Recommended Order that the condominium is a residential condominium, it follows that the unit used as a rental office is a residential unit. Accordingly, this exception is overruled.

7. Mr. Belkin next takes exception to Finding of Fact No. 34 that the Joint Intervenors, in voting at association meetings, have never thought or acted on the understanding that they were developers. The exception which states that Joint Intervenors acted as developers is rejected as irrelevant and is overruled. Similarly, Finding of Fact No. 34 which provides that Intervenors had never thought or acted on the understanding that they were developers is also irrelevant.

8. Finally, Mr. Belkin takes exception to the Finding of Fact contained in paragraph 37 which provides that a substantial number of purchasers of Florida condominium units are non-residents of Florida, and which further provides that a substantial number of purchasers of condominium units intend to rent their condominiums under leases with a duration of two years or less. Mr. Belkin states that purchasers of condominium units usually purchase for their own occupancy. This is not inconsistent with the indicated finding of fact which merely recites that a substantial number (exact number not specified) of purchasers intend to rent their units, and the exception is overruled. Additionally, there was no evidence presented that purchasers usually purchase for their own occupancy, and the exception is overruled on that basis.

9. The Findings of Fact contained in the Recommended Order are hereby adopted, as are the Conclusions of Law numbered 1 through 5. Conclusions of Law number 6 through 9, as well as that portion of the Recommendation which expresses the conclusion that Intervenors are entitled to control the association, are rejected. That portion of the Recommended Order adopted in this Final Order is as follows:

"RECOMMENDED ORDER

Pursuant to notice, a formal hearing was conducted in this case on December 5, 1985, in Miami, Florida, before Michael M. Parrish, a duly designated Hearing Officer of the Division of Administrative Hearings. At the hearing the parties were represented as follows:

FOR PETITIONER: Mr. Arnold Belkin, pro se
Apartment 912
210 - 174 Street
Miami, Florida 33160

FOR DIVISION: Thomas A. Bell, Esquire
Deputy General Counsel
Department of Business Regulation
725 South Bronough Street
Tallahassee, Florida 32301

FOR INTERVENORS: Joseph D. Bolton, Esquire
Stephen Gillman, Esquire
SHUTTS & BOWEN
1500 Edward Ball Building
Miami Center
100 Chopin Plaza
Miami, Florida 33131

BACKGROUND AND ISSUES

On or about August 13, 1984, Mr. Arnold Belkin petitioned the Division of Florida Land Sales, Condominiums and Mobile Homes for the issuance of a declaratory statement. Thereafter, on October 2, 1984, a Joint Motion to Intervene and Request for Public Hearing was filed with that agency by certain limited partnerships that own units in the condominium building that was the subject of Mr. Belkin's petition. The Joint Motion to Intervene was granted by order rendered by the Division Director on October 22, 1984. Thereafter, due to existence of possible factual disputes, the matter was referred to the Division of Administrative Hearings for a formal hearing.

The issues raised by Mr. Belkin's petition for a declaratory statement may be summarized as follows:

1. Whether the limited partnerships that ultimately became the Joint Intervenors in this case constitute a developer as defined by Section 718.103(14), Florida Statutes;

2. Whether the alleged use by Hall Management Company of a condominium unit as a rental office constitutes a violation of certain portions of the declaration of condominium; and

3. If the Joint Intervenors are determined to constitute a successor developer, whether they are entitled to control the board of administration of the condominium association pursuant to Section 718.301, Florida Statutes.

Subsequent to the formal hearing a transcript of the proceedings at the hearing was filed with the Hearing Officer and thereafter all parties filed post-hearing submissions containing proposed findings of fact, proposed conclusions of law, proposed recommended disposition of this matter, and legal arguments. In the formulation of this Recommended Order, I have given careful consideration to all of the post-hearing documents submitted by all of the parties. Specific rulings on all proposed findings of fact submitted by all parties are contained in the Appendix which is attached to and incorporated into this Recommended Order.

FINDINGS OF FACT

Based on the stipulations of the parties, on the exhibits received in evidence, and on the testimony of the witnesses at the hearing, I make the following findings of fact.

Facts Stipulated to by the Parties

1. Winston Towers 600 condominium was created by Winston Capital, Inc., which still owns units for sale in the condominium.

2. Control of the association has been relinquished by the creator/developer and turned over to the unit owners including joint intervenors.

3. In May of 1983, six Michigan limited partnerships each purchased a number of units in the condominium from Winston Capital, Inc. In March of 1984, four Texas limited partnerships each purchased a number of units in the condominium from Winston Capital, Inc.

4. The joint intervenors consist of the six Michigan limited partnerships and the four Texas limited partnerships.

5. The number of units so purchased gives the joint intervenors, as a block, a controlling interest in the condominium association.

6. The association is controlled by the joint intervenors, who elected two of the three directors of the association.

7. The association hired Hall Management Company, Kent Security Services, Inc., and an unnamed cleaning company.

8. Records of the Secretary of State reveal that among other officers of Hall Management Company are Craig Hall, President and Director, and Christine Erdody, Vice-President.

9. The records of the Secretary of State reveal no entity known as the Hall Real Estate Group.

10. The public records of Dade County, Florida, reveal no fictitious name affidavit for any entity trading as the Hall Real Estate Group.

11. The records of the Division of Florida Land Sales, Condominiums and Mobile Homes reflect that Winston Tower's 600 is a residential condominium, located in Dade County, Florida.

12. The joint intervenors are not now offering and have not ever offered condominium units for sale.

13. The joint intervenors are not now offering and have not ever offered condominium units for lease for periods in excess of five years.

14. Winston Towers 600 Condominium Association, Inc., is the non-profit condominium association established to maintain and operate the condominium.

15. In July, 1984, a meeting of the condominium association was held upon instructions of the developer, Winston Capital, Inc.

16. Winston Capital, Inc., scheduled and held the condominium association meeting in July 1984, under the good faith impression and belief that the threshold requirements in Section 718.301 mandating turnover of control of the association board of directors had been met.

17. Joint intervenors, collectively, own more than 50 per cent [sic] of the units in the condominium.

18. Joint intervenors, as developers, did not turn over control of the condominium association in July 1984.

19. The declaration of condominium for the condominium and the Florida Statutes grant certain rights and privileges to the developers.

20. The joint intervenors have a substantial economic investment in the condominium. The joint intervenors desire to have the condominium operated and maintained by competent professional management so as to protect and enhance the condominium project.

21. The annual fee being paid to Hall Management Company for management of the condominium is the same fee as had been previously paid by the developer, Winston Capital, Inc., to the prior manager, Keyes Management Company.

22. The names of the board of directors elected to the board of administrators of the association on July 16, 1985, were Ms. Christine Erdody, Mr. James Sherry, and Mr. Joseph Pereira.

23. Ms. Christine Erdody and Mr. James Sherry are general partners in each of the ten limited partnerships. Mr. Craig Hall is President and Ms. Christine Erdody is Vice-President.

Other findings based on evidence adduced at hearing

24. At the turnover meeting in July of 1984, Ms. Erdody cast votes on behalf of each of the ten limited partnerships, voting once for each unit owned by all ten of the limited partnerships.

25. There has never been a meeting of the unit owners in which the limited partnerships turned over control of the association to unit owners other than the ten limited partnerships.

26. The ten limited partnerships have no business ventures [illegible] income producing activities other than attempting to offset [illegible] penses of operations by leasing the units owned by the limited [illegible]rtnerships and attempting to increase their equity in the [illegible]ndominium units. The units acquired by the joint intervenors [illegible]re not acquired for their own occupancy.

27. The limited partnerships, while in control of the association, employed Hall Management Company, pursuant to contract, to manage the condominium and to lease the units owned by the limited partnerships. The rental office used by the management company consists of a unit owned by one of the limited partnerships.

28. The contract specifically requires that Hall Management Company attempt to lease those condominium units owned by the limited partnerships.

29. The limited partnerships have no income producing mechanism other than the disposition of condominium units owned by the limited partnerships pursuant to the contract with the Hall Management Company.

30. A regular, normal, and common activity of each of the ten limited partnerships is to offer to lease and to enter into leases of the condominium units owned by the limited partnerships. They typically engage in this activity through their agent, the Hall Management Company.

31. None of the ten limited partnerships have ever offered any of their units for sale. None of the ten limited partnerships have ever offered any of their condominium units for leases in excess of five years. Ultimately, all of the ten limited partnerships intend to sell all of their condominium units.

32. There is no relationship or affiliation between the creator/developer, Winston Capital, Inc., and any of the joint intervenors.

33. Each of the joint intervenors is a separate limited partnership. However, due to the facts that each of the joint intervenors have a common purpose, each has at least several general partners in common, each has entered into a management contract with a closely related management company, and each has acted in concert with the others in prior matters concerning the condominium facility and the association, for all practical purposes relevant to this case, the joint intervenors may be regarded as a single entity. This is true even though there is no agreement or contract between the joint intervenors requiring them

to act collectively in any matter involving or affecting their vote in condominium association matters at Winston Towers 600 Condominium.

34. In all the actions of the joint intervenors in voting their interests at association meetings, they have never thought or acted on the understanding that the joint intervenors were developers of the condominium.

35. The unit owners other than the joint intervenors have selected one-third of the Board of Directors of the Association.

36. The right to vote for a majority of the board of directors of the condominium association is a significant and valuable right which the joint intervenors believed they would be entitled to upon purchasing a majority of the units in the condominium.

37. A substantial number of the purchasers of Florida condominium units are non-residents of Florida. A substantial number of purchasers of condominium units intend to rent their condominiums under leases with a duration of two years or less.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact and on the applicable legal principles, I make the following conclusions of law.

1. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this case.

2. The initial legal issue to be resolved is whether the joint intervenors, consisting of ten limited partnerships owning condominium units, constitute a developer or developers as defined by statute. The applicable statutory provision, Section 718.103 (14), Florida Statutes, reads as follows in pertinent part:

> "Developer" means a person who creates a condominium or offers condominium parcels for sale or lease in the ordinary course of business, but does not include an owner or lessee of a condominium or cooperative unit who has acquired his unit for his own occupancy....

3. Upon consideration of the statutory definition set above, it is evident that the Legislature statutorily contemplated the existence of two classes of persons which constitute a "developer": (1) a person who creates a condominium or a creating developer, and (2) a person who offers units for sale or lease in the ordinary course of business, or a successor developer. The originating or initial developer in this condominium has been previously identified as Winston Capital, Inc. Since no evidence suggests that the joint intervenors acted in concert with the original developer in the creation of the condominium pursuant to Section 718.104(2), then the joint intervenors, if "developers" within the definition, must occupy the second category of developer as defined to mean one who offers condominium parcels for sale or lease in the ordinary course of business. Moreover, because it was found that the joint intervenors are not offering parcels for sale, in order to come within the definition of developer, it must be shown that the joint intervenors are offering condominium parcels for lease and in the ordinary course of business.

4. Based upon the findings of fact that joint intervenors are offering condominium parcels for lease in the ordinary course of business, it is concluded that the joint intervenors constitute developers as defined by statute. In reaching this conclusion, I have not overlooked the argument of the joint intervenors that Section 718.103(14) must be read in pari materia with Section 718.502, Florida Statutes, and that such a reading of the two statutory provisions compels a conclusion that only a lease for more than five years is sufficient to bring an owner of condominium units within the scope of the statutory definition of "developer." Upon careful consideration of the two statutory provisions, I am persuaded that the interpretation urged by the joint intervenors is not warranted. The definition at Section 718.103(14) encompasses all leases in the ordinary course of business, regardless of the length of the lease period. The fact that Section 718.502 only applies to some leases does not modify the clear language of the earlier definition of "developer."

5. The second issue upon which Mr. Belkin requested a declaratory statement, to wit: whether the alleged use by Hall Management Company of a condominium unit as a rental office constitutes a violation of the declaration, is an improper subject for issuance of a declaratory statement. Section 120.565, Florida Statutes, provides that a declaratory statement shall set forth the agency's opinion as to the applicability of a specified statutory provision or rule or order of the agency. Since a declaration of condominium is not listed among the possible subjects of a declaratory statement, where, as here, any violation of the declaration is not tied directly to a statutory or rule violation, issuance of a statement on this issue would be inappropriate."

Substituted Conclusions of Law

1. The third issue upon which Petitioner Belkin requested issuance of a declaratory statement is whether Joint Intevernors are entitled to elect a majority of the members of the board of administration of the association.

2. The hearing officer ruled, in essence, that since the original developer still owned units for sale in the condominium, the turnover provisions of Section 718.301 were not triggered. In addition, the hearing officer expressed the opinion that the turnover which occurred in July of 1984 was without legal effect. Conclusions of Law 6 through and including 9, as well as the recommendation, are hereby rejected and the following conclusions of law are substituted therefor.

3. The resolution of the third issue is governed by Section 718.301, which provides in relevant part:

> 718.301 Transfer of association control. -
>
> (1) When unit owners other than the developer own 15 percent or more of the units..., the unit owners other than the developer shall be entitled to elect no less than one-third of the members of the

> board.... Unit owners other than the developer are entitled to elect not less than a majority of the members of the board...:
>
> (a) Three years after 50% of the units that will be operated ultimately by the association have been conveyed to purchasers;
>
> (b) Three months after 90% of the units that will be operated ultimately by the association have been conveyed to purchasers;
>
> (c) When all the units that will be operated ultimately by the association have been completed, some some of them have been conveyed to purchasers, and none of the others are being offered for sale by the developer in the ordinary course of business; or
>
> (d) When some of the units have been conveyed to purchasers and none of the others are being constructed or offered for sale by the developer in the ordinary course of business,
>
> whichever occurs first. The developer is entitled to elect at least one member of the board... as long as the developer holds for sale in the ordinary course of business at least 5%, in condominiums with fewer than 500 units, and 2% in condominiums with more than 500 units, of the units in a condominium operated by the association.

The portion of the Condominium Act set forth above describes the process by which unit owners other than the developer gain a voice in the administration of their condominium. When 15% of the units have been conveyed from a developer to unit owners other than the developer, unit owners other than the developer are entitled to control one-third of the board of administration. Unit owners other than the developer are, pursuant to the section set forth above, entitled to control a majority of the board of administration upon the occurrence of any of the four conditions set forth in Section 718.301(1)(a-d), whichever occurs first.

4._ The hearing officer below ruled that since the original developer still owned units for sale in the condominium, the initial turnover which occurred in 1984 was improper. In this respect, the hearing officer erred. Section 718.301 clearly contemplates that transition may be properly triggered despite the fact that the original developer may still own units in the

condominium. According to Section 718.301(1)(a), Florida Statutes, unit owners other than the developer are statutorily entitled to elect at least a majority of the members of the board three years after 50% of the total units in the condominium have been sold. Obviously, in the scenario depicted in subsection 718.301(1)(a), the original developer, three years after 50% of the condominium is sold out, may still own condominium units. This does not vitiate the turnover requirement. Similarly, the provision in Section 718.301(1)(b) which requires turnover three months after 90% sellout is achieved, is not abated if, three months after 90% sellout, the developer still owns units within the condominium. Review also, Section 718.301(1)(d) which provides that the developer, after turnover, is still entitled to minority representation on the board so long as the developer holds for sale in the ordinary course of business at least 5 or 2 percent of the units within the condominium, depending on the size of the condominium. Clearly, Section 718.301(1) in its entirety contemplates that transition is required regardles of whether the developer, upon transition, still holds units for sale in the condominium. To suggest, as did the hearing officer, that the turnover which occurred in 1984 was not required by law, is to read an exception into the turnover requirements of Section 718.301 which does not exist in the statute. Additionally, the hearing officer's conclusion that the Intervenors were entitled to control the condominium because the original developer continues to hold units for sale in the condominium is an interpretation of the statute which is not justified.

5. Section 718.301, Florida Statutes, makes no distinction among the various types of developers when in its operation it mandates that unit owners other than the developer are entitled to control a majority of the board of administration of a condominium. Because the word "developer" as utilized throughout this section is unqualified, it applies equally to creating developers as well as subsequent developers. Accordingly, one who offers condominium parcels for sale in the ordinary course of business (see, the definition of developer provided in Section 718.103(14),

Florida Statutes (1985)), is only entitled to control the operation of the association until the occurrence of any of the four conditions set forth in Section 718.301(1). Most pertinent in the instant case is that portion of Section 718.301 which provides:

> (1) ...Unit owners other than the developer are entitled to elect not less than a majority of the members of the board...:
>
> (a) ...
>
> (b) ...
>
> (c) When all the units that will be operated ultimately by the association have been completed, some of them have been conveyed to purchasers, and none of others the are being offered for sale by the developer in the ordinary course of business; or
>
> (d) When some of the units have been conveyed to purchasers and none of the others are being constructed or offered for sale by the developer in the ordinary course of business,
>
> whichever occurs first...

Construing Section 718.301 in conjunction with the full statutory definition of developer, as applied to the subsequent developer in this case, Section 718.301 requires that unit owners other than the developer control the association when the subsequent developer fails to offer units for sale in the ordinary course of business. Section 718.301 was designed to ensure that unit owners other than the developer, at some point in the future, would be entitled to control their own affairs upon a cessation of sales activity by a developer or a certain percentage sellout. The theory urged by Intervenors seeks to fend off the turnover requirements of the statute during the course of Joint Intervenors' rental program, during which no units are offered for sale. The end result of such a theory is that turnover will be indefinitely postponed. This result is not contemplated by the statute.

6. The assurances extended by Section 718.301, that at some point in time, unit owners other than the developer will control the condominium association, is significant for a number of reasons. First, the right to control decision-making is

significant in itself. At some point, the non-developer residents of the residential condominium are entitled, upon gaining control, to employ a management company of their choice, and to make other decisions affecting their substantial interests. Secondly, certain aspects of the Act remain inoperative until and unless turnover actually occurs. Review, for example, Section 718.111(3), Florida Statutes (1985) providing that the association is only authorized to institute, maintain and settle lawsuits in its own name on behalf of all of the unit owners after control of the association is obtained by unit owners other than the developer. This would include warranty actions (see, Section 718.124, Florida Statutes) and any other matters of common interest.

7. In conclusion, it is determined that Joint Intervenors, individually and collectively, constitute concurrent and successor developers who are not entitled, pursuant to Section 718.301, to elect a majority of the members of the board of administration.

8. This Final Order may be appealed pursuant to Section 120.68, Florida Statutes and Rule 9.110, Florida Rules of Appellate Procedure, by filing a Notice of Appeal conforming to the requirements of Rule 9.110(d), Florida Rules of Appellate Procedure, both with the appropriate district court of appeal accompanied by the appropriate filing fees, and with this agency within 30 days of rendition of this Order.

DONE AND ORDERED this 15th day of August, 1986.

Richard E. Coates

RICHARD E. COATES, DIRECTOR
Division of Florida Land Sales,
Condominiums and Mobile Homes
Department of Business Regulation
State of Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to JOSEPH D. BOLTON, ESQUIRE, Shutts & Bowen, 1500 Edward Ball Building, Miami Center, 100 Chopin Plaza, Miami, Florida 33131, MR. ARNOLD BELKIN, Apartment 912, 210 - 174th Street, Miami, Florida 33160, and LINDA McMULLEN, ESQUIRE, McFarlain, Bobo, Sternstein, Wiley & Cassedy, Post Office Box 2174, Tallahassee, Florida 32301, this 15th day of August, 1986.

Sarah Smith
SARAH SMITH, CLERK

Ill.2d 99, 106–07, 28 Ill.Dec. 166, 390 N.E.2d 333 (equal protection claim waived by failure to present contention in timely fashion to appropriate tribunal).

For the foregoing reasons we have affirmed the order of the circuit court.

Affirmed.

WILSON and LORENZ, JJ., concur.

122 Ill.App.3d 850
78 Ill.Dec. 510

Edgar H. COOPER, Jewelle Cooper, Robert C. Webb and Claire Webb, individually and as representatives of a class consisting of all unit owners of "the Park of River Oaks," a condominium, Plaintiffs-Appellants,

v.

UNITED DEVELOPMENT COMPANY and Inland-Robbins Construction, Inc., Defendants-Appellees,

and

River Oaks West Development Company and Westinghouse Electric Company, Defendants.

No. 83–727.

Appellate Court of Illinois, First District, Second Division.

March 20, 1984.

Condominium owners brought action against developer, contractor, subcontractor, and beneficial owner for breach of implied warranty of habitability. The Circuit Court, Cook County, Thomas J. O'Brien, J., dismissed claims against contractor, subcontractor, and developer, and condominium owners appealed. The Appellate Court, Downing, J., held that: (1) judgment was not void for failure to give plaintiffs notice; (2) plaintiffs had not acted with due diligence in filing motion for relief from judgment after learning of entry of dismissal order; (3) implied warranty of habitability is governed by five-year statute of limitations on implied contracts; and (4) refusal to grant leave to amend is not an abuse of discretion where no amendment is presented with the motion.

Affirmed.

1. Judgment ⇐346, 486(1)

Void judgment may be attacked and vacated at any time; judgment or order is characterized as "void" where court lacks jurisdiction of the parties or subject matter or lacks the inherent power to enter the contested order.

See publication Words and Phrases for other judicial constructions and definitions.

2. Judgment ⇐113

Alleged failure to notify defendant of entry of default judgment will not render the judgment void.

3. Judgment ⇐335(1)

Because failure to give plaintiff notice of order of dismissal did not render the order void, trial court was without jurisdiction to review it after expiration of 30 days.

4. Judgment ⇐335(2)

To warrant relief from judgment, petitioner must demonstrate meritorious defense or claim, due diligence in presenting the defense or claim in the original action, trial court's misapprehension of the facts or a valid defense through no fault or negligence of petitioner at the time judgment was entered, and due diligence in filing the petition for relief. S.H.A. ch. 110, ¶ 2–1401.

5. Judgment ⇐335(2)

Plaintiffs who were not given notice of entry of order of dismissal until more than 30 days after dismissal order were entitled to file motion for relief from judgment. S.H.A. ch. 110, ¶ 2–1401; Ill.Rev.Stat.1979, ch. 110, ¶ 72.

court's entry of two orders that: (1) dismissed their complaint with prejudice since it was barred by the applicable statute of limitations; (2) allegedly denied them leave to amend said complaint; (3) dismissed, for jurisdictional reasons, their motion to quash an allegedly void order; and (4) denied, for lack of diligence and a meritorious claim, their section 72 petition for relief from judgment. (Ill.Rev.Stat.1979, ch. 110, par. 72.)[2] A summary of the pertinent procedural matters follows.

On January 26, 1982, plaintiffs instituted a class action seeking to recover damages for an alleged breach of an implied warranty of habitability. The named defendants were: United Development Company ("United"), the agent-developer for the condominium project; Inland-Robbins Construction, Inc. ("Inland"), the general contractor; Westinghouse Electric Company ("Westinghouse"), the subcontractor; and River Oaks West Development Company ("River Oaks"), the beneficial owner of the property. On March 30, 1982, United and Inland filed a motion to dismiss which was premised on plaintiffs' failure to state a cause of action, as well as their failure to file suit within the limitation period provided for in Ill.Rev.Stat.1979, ch. 83, par. 16.[3] An agreed order was entered on May 14, 1982 setting July 8, 1982 as the hearing date for defendants' motion to dismiss.

Following presentation of plaintiffs' motion on July 8, 1982 for a continuance, the trial court entered an order reciting that defendants' motion would be "taken under advisement until Wednesday, July 14, 1982 * * *. Ruling on said motion to be given after said date." Thereupon, plaintiffs were given until 9 a.m. on July 14, 1982 to submit law in opposition to the motion to dismiss. A memorandum was filed by plaintiffs on July 14, 1982 in response to defendants' motion; however, the actual time of filing was not recorded on this document.

On July 20, 1982, pursuant to United and Inland's motion to dismiss, as well as an analogous motion previously filed by Westinghouse, the trial court entered an order[4] dismissing plaintiffs' complaint with prejudice for the reason that it was "barred on its face by the applicable statute of limitations." It was further ordered that the cause remain pending "against any and all remaining defendants," *i.e.*, River Oaks. In the record filed with this court is the aforesaid signed order which contains the name of the attorney for United. The attorney for the plaintiffs was not present when the order was entered. Counsel for defendants, after becoming aware on or before July 27, 1982 that such a dispositive order had been entered, did not advise plaintiffs' counsel of this critical fact until August 31, 1982. The record also contains a three-page, hand-written memo signed by the trial court explaining its reason for the order. This memo does not contain any date of filing and was never furnished to counsel for plaintiffs.

At a progress call held on July 27, 1982 before the Honorable Alan Morrill, an order was entered dismissing the instant cause for want of prosecution. Plaintiffs thereafter filed a motion to vacate Judge Morrill's order; however, this motion was withdrawn after plaintiffs' counsel became aware on August 31, 1982 of the entry of the July 20 dismissal order. Copies of this order of dismissal were received by plaintiffs' counsel on September 7, 1982.

On December 9, 1982, plaintiffs filed their petition for section 72 relief along with a motion to quash the July 20 order as void. These motions claimed, essentially, that the trial court entered the dismissal order as to United and Inland without hav-

2. Now codified as section 2-1401 of the Illinois Code of Civil Procedure. Ill.Rev.Stat.1981, ch. 110, par. 2-1401.

3. Now known as Ill.Rev.Stat.1981, ch. 110, par. 13-205.

4. Although this order was also stamped July 21, 1982, the parties all indicate July 20, 1982 as the actual date of entry. Thus, since a circuit court half-sheet has not been incorporated into the instant record, we will hereinafter regard the dismissal order as having been entered on July 20, 1982.

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ing provided plaintiffs with proper notice. However, an order was subsequently entered on February 16, 1983 which dismissed, for lack of jurisdiction, plaintiffs' motion to quash; this order also denied, for lack of diligence and a meritorious claim, their section 72 petition for relief from judgment. It is the propriety of this order which plaintiffs now contest on appeal. Westinghouse has not been joined as an appellee in this matter.

I.

Initially, plaintiffs argue that the trial court erroneously dismissed, for want of jurisdiction, their motion to quash the dismissal order entered on July 20, 1982. Specifically, the trial court ruled that it could not entertain this motion since it was filed more than 30 days after the entry of the dismissal order. Plaintiffs now contend that such order was void and, therefore, subject to challenge at any time. We disagree.

[1, 2] Without question, a void judgment may be attacked and vacated at any time. (*Fox v. Department of Revenue* (1966), 34 Ill.2d 358, 361, 215 N.E.2d 271; *Federal Sign & Signal Corp. v. Czubak* (1st Dist.1978), 57 Ill.App.3d 176, 178, 14 Ill.Dec. 686, 372 N.E.2d 965.) Such a judgment or order is characterized as void where the court lacks jurisdiction of the parties or subject matter, or lacks the inherent power to enter the contested order. (*Horzely v. Horzely* (1st Dist.1979), 71 Ill. App.3d 542, 545, 28 Ill.Dec. 46, 390 N.E.2d 28.) However, an alleged failure to notify a defendant of the entry of a default judgment will not render such judgment void. (*American Consulting Association, Inc. v. Spencer* (1st Dist.1981), 100 Ill.App.3d 917, 920, 56 Ill.Dec. 384, 427 N.E.2d 579, *cert. denied*, 458 U.S. 1112, 102 S.Ct. 3495, 73 L.Ed.2d 1375.) Likewise, an "alleged failure to notify plaintiff that [a] dismissal order had been entered did not make the order void." *Watts v. Medusa Portland Cement Co.* (2d Dist.1971), 132 Ill.App.2d 227, 230, 268 N.E.2d 721, *appeal denied*, 47 Ill.2d 592.

The two cases relied upon by plaintiffs in support of their argument for retention of jurisdiction to review the order are, in fact, inapposite. *In re Franklin* (1st Dist.1976), 42 Ill.App.3d 129, 355 N.E.2d 570, was concerned solely with an order of probation and commitment which was held void since the trial court, having failed to adjudicate a minor as a ward of the court, did not have jurisdiction to enter the dispositional order. *Lowy v. Filosa* (1st Dist.1974), 18 Ill. App.3d 123, 309 N.E.2d 356, dealt with section 72 petitions for relief from void consent decrees, rather than post-judgment motions to quash an allegedly void dismissal order.

[3] Since, in accordance with Illinois decisional law, the instant dismissal order cannot be characterized as void, the trial court was without jurisdiction to review it after the expiration of 30 days. (*Board of Managers of Dunbar Lakes Condominium Association II v. Beringer* (1st Dist. 1981), 94 Ill.App.3d 442, 446, 50 Ill.Dec. 105, 418 N.E.2d 1099; *Lurie Co. v. Teichner* (1st Dist.1978), 63 Ill.App.3d 950, 951–52, 20 Ill.Dec. 750, 380 N.E.2d 959.) Thereafter, plaintiffs' sole source of relief from the order of dismissal was to proceed under Section 72 of the Illinois Civil Practice Act. *Halleck v. Trumfio* (1st Dist.1980), 85 Ill. App.3d 1051, 1053, 41 Ill.Dec. 369, 407 N.E.2d 867; *Lurie Co.*, 63 Ill.App.3d at 952, 20 Ill.Dec. 750, 380 N.E.2d 959.

It is averred that plaintiffs received no documentation of the July 20 dismissal order until September 7, 1982. Nonetheless, the fact remains that their motion to quash this order was not filed until December 9, 1982, well after the 30-day review period had expired. Consequently, the trial court correctly ruled that it lacked jurisdiction to consider the post-trial motion to quash tendered by plaintiffs.

II.

The next issue for resolution focuses on the propriety of the lower court's denial of plaintiffs' petition for section 72 relief. This denial was predicated on the court's

conclusion that the requisite elements of due diligence and a meritorious claim were not satisfied.

Section 72 of the Illinois Civil Practice Act, now known as section 2–1401 of the Illinois Code of Civil Procedure, provides a comprehensive statutory procedure for obtaining relief from final orders, judgments and decrees after the expiration of 30 days from the entry thereof. (*Davis v. Chicago Transit Authority* (1st Dist.1980), 82 Ill. App.3d 987, 989, 38 Ill.Dec. 384, 403 N.E.2d 615.) The purpose of a section 72 petition is to bring to the court's attention "matters of fact not appearing in the record, which, if known to the court at the time the judgment was rendered, would have prevented its rendition." *Peoples Gas Light & Coke Co. v. Rubin* (1st Dist.1980), 89 Ill.App.3d 244, 246, 44 Ill.Dec. 520, 411 N.E.2d 886.

[4] To warrant relief under section 72, a petitioner must demonstrate: (1) a meritorious defense or claim; (2) due diligence in presenting this defense or claim in the original action; (3) the trial court's misapprehension of the facts or a valid defense, through no fault or negligence of petitioner, at the time judgment was entered; and (4) due diligence in filing the petition for section 72 relief. (*American Consulting Association, Inc.*, 100 Ill.App.3d at 921, 56 Ill.Dec. 384, 427 N.E.2d 579; *Canton v. Chorbajian* (2d Dist.1980), 88 Ill.App.3d 1015, 1021, 44 Ill.Dec. 74, 410 N.E.2d 1166, *appeal denied* (1981), 82 Ill.2d 583.) "In addition, the petitioner must set forth specific factual allegations supporting each of the above elements [citation], and must prove his right to the relief sought by a preponderance of the evidence." *Stallworth v. Thomas* (1st Dist.1980), 83 Ill. App.3d 747, 751, 39 Ill.Dec. 170, 404 N.E.2d 554.

[5] Plaintiffs' section 72 petition alleged that notice of the order of dismissal was not received until over a month after its entry. "Fundamental fairness requires that notice of * * * a dismissal be given to a party of record." (*Carlstedt v. Kaufmann* (1st Dist.1970), 119 Ill.App.2d 322, 327, 256 N.E.2d 146.) The initial question to examine is whether plaintiffs, under the circumstances presented to the trial court, were entitled to use a section 72 proceeding. The answer is "yes."

[6] The gist of plaintiffs' complaint is that notice of the court's order was not received until more than 30 days after its entry. Plaintiffs claim they had no notice of the filing of the trial court's unstamped memorandum or the entry of the July 20 order. There is nothing in the record to dispute those allegations. Under such circumstances, a trial court should desire and hasten to entertain a section 72 petition to investigate the allegations. Trial courts have been urged to document the reasons for their actions in the record. The trial court's memorandum in this case clearly and correctly sets forth the court's reasons. However, in doing so, a procedure should be followed so that the record is clear that all parties know of, and have the equal opportunity to simultaneously receive a copy of, the court's memorandum. Final disposition orders should only be entered after due notice has been served upon all parties. Had this procedure been followed in the instant case, plaintiffs could not have rightfully complained about lack of proper notice. Trial courts must carefully ascertain that all counsel of record receive notice of the court's disposition, memoranda or orders so that the due process rights of all parties are not violated.

The record indicates the July 20 order was drafted by an attorney for United. We attempted to determine at oral argument before this court exactly when United's trial attorney obtained knowledge of the court's memorandum and the entry of the July 20 order, and why copies of such documents were not immediately forwarded to counsel for plaintiffs. Unfortunately, the trial attorney was not available in court and United's appellate counsel could not provide this information. Yet, these are facts the trial court should have been interested in and could have ascertained before disposing of the section 72 petition.

[7] Once opposing counsel became aware on or before July 27, 1982 that such a dispositive order had been entered, they were clothed with the professional responsibility to not only *promptly* inform their opponents of the order and its content, but also to *promptly* send plaintiffs' counsel a copy of the order and to provide an affidavit or other support confirming that such copy was, in fact, sent. See, *Sanchez v. Phillips* (1st Dist.1977), 46 Ill.App.3d 430, 433, 5 Ill.Dec. 36, 361 N.E.2d 36, *appeal denied*, 66 Ill.2d 628.

However, in light of plaintiffs' procrastinative conduct in this matter, we are left with no other choice than to affirm the denial of plaintiffs' section 72 petition.

It "is well established that a litigant has to follow the progress of his case [citation], and inadvertent failure to do so is not a ground for relief, [citation]." (*Stallworth*, 83 Ill.App.3d at 751, 39 Ill.Dec. 170, 404 N.E.2d 554.) Section 72 does not afford a remedy to relieve a litigant of the consequences of his lawyer's negligence. (*American Consulting Association*, 100 Ill.App.3d at 922, 56 Ill.Dec. 384, 427 N.E.2d 579.) The following periods of delay in filing section 72 petitions have been regarded by Illinois courts as constituting such a lack of due diligence as to justify denial of the requested post-judgment relief: *Westphall v. Trailers, Campers, Campgrounds, Inc.* (2d Dist.1979), 76 Ill. App.3d 205, 30 Ill.Dec. 86, 392 N.E.2d 741, *appeal denied*, 79 Ill.2d 624 (delay of approximately two months); *Department of Public Works & Buildings v. O'Hare International Bank* (1st Dist.1976), 44 Ill. App.3d 934, 3 Ill.Dec. 623, 358 N.E.2d 1308 (delay of slightly more than three months).

[8] Regarding the instant matter, plaintiffs' petition was not filed in the Law Division of the circuit court of Cook County until December 9, 1982, well over three months after they admittedly became aware of the entry of the dismissal order. In fact, plaintiffs concede that they were not precluded from filing their petition at an earlier date, and that they could have discovered the existence of the July 20 order sooner had they inquired of either the trial court or defendants.

In essence, the totality of facts evidence in the case at bar attest to a lack of due diligence on the part of plaintiffs in filing their petition for section 72 relief. Plaintiffs argue that a meritorious claim was stated by focusing the court's attention on the fact of its "glaring oversight" in considering *Mowatt v. City of Chicago* (1920), 292 Ill. 578, 127 N.E. 176, to be dispositive of the motion to dismiss their complaint. In *Mowatt*, the supreme court held that where an action is brought upon a mere implied understanding, the five-year statute of limitation applied. (*Mowatt*, at 582, 127 N.E. 176.) This argument lacks merit since the essence of a section 72 petition "is addressed to errors of fact, now law." *In re Charles S.* (1st Dist.1980), 83 Ill.App.3d 515, 517, 39 Ill.Dec. 51, 404 N.E.2d 435, *appeal denied*, 81 Ill.2d 594.

[9] The disposition of a section 72 petition rests within the sound discretion of the trial court. (*Tatosian v. Graudins* (1st Dist.1980), 86 Ill.App.3d 661, 664, 41 Ill. Dec. 809, 408 N.E.2d 231.) Since plaintiffs did not prove their right to the relief sought by a preponderance of the evidence, we find no abuse of discretion here which would otherwise necessitate reversal of the trial court's decision not to vacate its order of dismissal.

III.

Plaintiffs' next claim of error concerns the trial court's dismissal of their complaint with prejudice on the grounds that it was barred on its face by the applicable statute of limitations. Specifically, plaintiffs assert that an action for breach of an implied warranty of habitability is governed by the 10-year period of limitations for actions on written contracts. (Ill.Rev.Stat.1981, ch. 110, par. 13–206.)[5] Defendants, on the other hand, maintain that such a suit is governed by the five-year period of limita-

5. Formerly known as Ill.Rev.Stat.1979, ch. 83, par. 17.

tions for actions on oral contracts or for property damage. Ill.Rev.Stat.1981, ch. 110, par. 13–205.[6]

In *Altevogt v. Brinkoetter* (1981), 85 Ill.2d 44, 51 Ill.Dec. 674, 421 N.E.2d 182, our supreme court was confronted with the identical issue. Although it was acknowledged that this question has not received a uniform answer in the courts of other states, the *Altevogt* court held that "[i]t need not be resolved here, however, for the plaintiffs agree in their brief that the case should be governed by the five-year period." (*Altevogt*, at 49, 51 Ill.Dec. 674, 421 N.E.2d 182.) Therefore, we shall resolve this interesting question of law which, heretofore, has not received an expository answer in Illinois.

[10, 11] The implied warranty of habitability is a judicial innovation which evolved, as a matter of public policy, to protect purchasers of new houses upon discovery of latent defects in their homes. (*Redarowicz v. Ohlendorf* (1982), 92 Ill.2d 171, 183, 65 Ill.Dec. 411, 441 N.E.2d 324.) This implied warranty existing between builder-vendors and purchasers has been extended so as to also exist between developer-vendors and condominium purchasers. *Herlihy v. Dunbar Builders Corp.* (1st Dist. 1980), 92 Ill.App.3d 310, 315, 47 Ill.Dec. 911, 415 N.E.2d 1224; *Tassan v. United Development Co.* (1st Dist.1980), 88 Ill. App.3d 581, 587, 43 Ill.Dec. 769, 410 N.E.2d 902, *appeal denied* (1981), 82 Ill.2d 588.

[12, 13] Our supreme court has consistently held that the warranty of habitability does not arise as a result of the execution of a deed; rather, it exists *independently* as an undertaking collateral to the covenant to convey. (*Petersen v. Hubschman Construction Co.* (1979), 76 Ill.2d 31, 41, 27 Ill.Dec. 746, 389 N.E.2d 1154; *Redarowicz*, 92 Ill.2d at 183, 65 Ill.Dec. 411, 441 N.E.2d 324.) As long ago as 1892, it was judicially determined that an action on an implied undertaking, arising by virtue of a written agreement, constitutes an action on an unwritten contract and, consequently, must be brought within the five-year limitation period. (*Knight v. St. Louis Mountain & Southern Ry. Co.* (1892), 141 Ill. 110, 115, 30 N.E. 543.) As a result, Illinois courts have applied the 10-year limitation period "only when a cause of action is *upon* a contract in writing or *upon* other evidences of indebtedness in writing * * *." (Emphasis supplied.) *Bates v. Bates Machine Co.* (1907), 230 Ill. 619, 622, 82 N.E. 911; see also, *Ames v. Crown Life Insurance Co. of Toronto, Canada* (3d Dist.1980), 85 Ill.App.3d 203, 207, 40 Ill.Dec. 521, 406 N.E.2d 222.

In the recent Illinois decision of *Briarcliffe West Townhouse Owners Association v. Wiseman Construction Co.* (2d Dist.1983), 118 Ill.App.3d 163, 73 Ill.Dec. 503, 454 N.E.2d 363, it was held that a townhouse owner's association had standing to bring an action against a developer because the suit was filed within "[t]he five-year statute of limitations *applicable* to an implied warranty of habitability * *." (Emphasis supplied.) (*Briarcliffe*, at 172, 73 Ill.Dec. 503, 454 N.E.2d 363.) Thus, contrary to plaintiffs' claim here, a review of Illinois decisional law did not mandate application by the lower court of the 10-year limitation period governing actions on written contracts.

[14] In filing their class action for breach of an implied warranty of habitability, plaintiffs sought judgment in a sum sufficient to compensate them for the damages they allegedly sustained. They did not seek enforcement of any specific provisions of their written contracts for sale; rather, their suit was premised upon an alleged breach of defendants' implied undertaking collateral to the covenant to convey. It is our opinion, therefore, that the trial court properly dismissed plaintiffs' complaint on the grounds that it was barred by the five-year limitation period governing actions on implied contracts. We find direct support for our conclusion in the recent decision of *Lato v. Concord Homes, Inc.* (Mo.Ct.App.1983), 659 S.W.2d 593. In *Lato*, the Missouri Court of Ap-

6. Formerly known as Ill.Rev.Stat.1979, ch. 83, par. 16.

peals held that a breach of implied warranty of habitability claim was governed by the five-year limitation period applicable to actions based upon breach of incidental or implied terms of a contract,[7] as opposed to the 10-year limitation period applicable to actions based upon written contracts.[8] *Lato*, at 594.

IV.

The final issue for consideration concerns the propriety of an alleged denial of plaintiffs' requests on July 8, 1982 and December 9, 1982 for leave to file their first amended complaint.

A.

Regarding the averred denial of the July 8 request, the only evidence in the record of the trial court's reasons in support thereof is an undated memorandum written by the court in connection with the motion filed by Westinghouse to dismiss plaintiffs' complaint. The last sentence of section I of this memorandum recites that: "[T]he court will not entertain a motion to amend w/o a tender of the amended complaint."

[15] We regard this particular ruling to be correct. A trial court's refusal to grant leave to amend cannot constitute an abuse of discretion where no amendment is presented with the motion, and where no specific indication is given to the court as to the contents of the proposed amendatory document. *Botti v. Avenue Bank & Trust Co. of Oak Park* (2d Dist.1982), 103 Ill. App.3d 1052, 1055, 59 Ill.Dec. 711, 432 N.E.2d 295, *appeal denied*, 91 Ill.2d 558.

B.

Pertaining to the alleged denial of the December 9 request, the transcript of record for the hearing held on that date does not indicate a disallowance of leave to amend; rather, the only reference to this proposed amendatory pleading is a comment made by the trial court that: "The first amended complaint, of course, is something that would have to be decided even beyond that point [February 15, 1983]." There is no further indication of any activity, much less consideration, of the amended complaint until August 19, 1983—the date on which it was filed with the clerk of the circuit court of Cook County. This occurred over five months after plaintiffs filed the notice of appeal.

[16, 17] It is uncontroverted that every appellant has the duty of presenting to a reviewing court the entire record of trial proceedings so that an informed review of the issues can be made. (*Marshall E. Winokur, Ltd. v. Shane* (1st Dist.1980), 89 Ill.App.3d 551, 552, 44 Ill.Dec. 776, 411 N.E.2d 1142; *In re Estate of McGaughey* (1st Dist.1978), 60 Ill.App.3d 150, 155, 17 Ill.Dec. 260, 376 N.E.2d 259.) Since error is never presumed by a court of review (*Flynn v. Vancil* (1968), 41 Ill.2d 236, 241, 242 N.E.2d 237), any doubt arising from the incompleteness of the record must be resolved against the appellant (*In re Marriage of Macaluso* (2d Dist.1982), 110 Ill. App.3d 838, 846, 66 Ill.Dec. 478, 443 N.E.2d 1).

Regarding the case at bar, plaintiffs have failed to provide this court with a single reference to the record evincing both the averred denial of leave to amend, as well as the facts upon which it was premised. We are therefore required to assume that such facts were sufficient to support the alleged disallowance. *In re Estate of Rice* (2d Dist.1982), 108 Ill.App.3d 751, 762, 64 Ill.Dec. 456, 439 N.E.2d 1264; *McGaughey*, 60 Ill.App.3d at 155, 17 Ill. Dec. 260, 376 N.E.2d 259.

For the reasons set out herein, the judgment of the circuit court of Cook County is affirmed.

AFFIRMED.

HARTMAN, P.J., and PERLIN, J., concur.

7. Mo.Rev.Stat. § 516.120 (1978).

8. Mo.Rev.Stat. § 516.110 (1978).