IN THE SUPREME COURT OF FLORIDA

CASE NO. 80,872 & 80,873
Florida Bar No: 184170

CHARLEY TOPPINO & SONS, INC., a dissolved Florida corporation,

Petitioner,

vs.

SEAWATCH AT MARATHON CONDOMINIUM ASSOCIATION, INC., ETC., TURTLE KRAALS, LTD.; ET AL.

Respondents.

EPIC METALS CORP., and TURTLE KRAALS, LTD.,

Petitioners,

vs.

SEAWATCH AT MARATHON CONDOMINIUM ASSOCIATION, INC., ETC., ET AL.,

Respondents.

FILED
SID J. WHITE
JUL 14 1993
CLERK, SUPREME COURT
By Chief Deputy Clerk

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE THIRD DISTRICT COURT OF APPEAL

REPLY BRIEF OF PETITIONER ON THE MERITS TO RESPONDENT'S (SEAWATCH) ANSWER BRIEF ON THE MERITS

TURTLE KRAALS, LTD., a Florida limited partnership

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TABLE OF CONTENTS

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SUITE 302, 1777 SOUTH ANDREWS AVE., FORT LAUDERDALE, FLA. 33316 • TEL. (305) 525-5885
SUITE 206 BISCAYNE BUILDING, 19 WEST FLAGLER STREET, MIAMI, FLA. 33130 • TEL. (305) 940-7557

TABLE OF CITATIONS

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REPLY ARGUMENT

Even if this court agrees that §718.124 gives an association an extended period of time to sue beyond the warranty statute, §718.203, the Seawatch Complaint was still properly dismissed as time barred against Turtle Kraals. The tolling period for the breach of implied warranty action would run from April 8, 1983, the completion of the construction, to August 10, 1985, the date of turnover to the Association. Adding these 28 months to the date of turnover meant the Association still had until October 1987 to file a breach of implied warranty action against Turtle Kraals. Seawatch sat on its rights and did nothing, in spite of four unit owners bringing a similar suit years before. Seawatch did not sue until May 1988 and its Complaint was time barred.

Assuming arguendo that the three year warranty period began to run on August 10, 1985, at turnover, the Complaint was still time barred. Seawatches' right to bring an action for breach of warranty ended on April 8, 1988, under the five year repose provision in §718.203(1)(e). After April 8, 1988, the developer, Turtle Kraals, no longer was legally deemed to have granted any statutory implied warranty of fitness and merchantability. Therefore, when Seawatch eventually sued, it had waited too late, as no warranty existed to sue on. The legislature made it totally clear that "in no event" would an implied warranty exist more than five years after completion of construction. The trial judge correctly found Seawatches' Complaint time barred and dismissal must be reinstated.

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In one breath Seawatch claims that its individual unit owners had knowledge of the defective construction at the Seawatch Condominium well before 1983; and then in the other breath says, nobody at Seawatch could have discovered the defects in the construction, because even the unit owners' engineers got it wrong. As Seawatch is well aware, the cause of a particular construction defect is of no legal consequence. Once a homeowner, or unit owner, is on notice of a construction defect, the statute of limitations begins to run. It makes no difference whatsoever when the cause of the defect is discovered. Almand Construction Co., Inc. v. Evans, 547 So. 2d 626 (Fla. 1989) (homeowner's knowledge of settling of the house, which they conceded they had as early as 1978, was sufficient to put them on notice that they had, or might have had, a cause of action; and satisfied discovery component of §95.11(3)(c), even though the purchasers claimed they did not know the structural damage was caused by unsuitable fill until 1982); Kelley v. School Board of Seminole County, 435 So. 2d 804 (Fla. 1983); Havatampa Corporation v. McElvy, Jennewein, Stefany & Howard Architects/ Planners, Inc., 417 So. 2d 703 (Fla. 2d DCA), rev. denied, 430 So. 2d 451 (Fla. 1983)(claim of latent defects in roof structure barred by four year statute of limitations, where owner had knowledge of problem with roof, but did not know specific cause of problem).

All of this discussion by Seawatch is simply to engender sympathy for the Seawatch condominium Association, which sat on

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its rights for 32 months and did absolutely nothing. It is interesting that the Association admits that unit owner members of the Association were aware of defects in the condominium and had brought suit; and had actually won against the developer; but the Association did absolutely nothing. More important is the fact that the Association brought breach of implied warranty claims against the developer. These warranties are dependent on the date of completion of construction and not on any discovery date. Therefore, all of Seawatches' back pedaling regarding the allegations of its Complaint and the fact that it had knowledge of the defects, no later than April 8, 1984, is totally irrelevant to the legal issues on appeal. Again, it is simply an effort to distract this court from the fact that Seawatch sat on its rights for nearly three years, letting both the statute of limitations and repose period pass, before it filed its claim against the developer.

Finally, Seawatches' complaints and speculation, as to what really occurred in the trial court, overlooks the fact that, as the Appellant, it was the duty of Seawatch to make the proper Record to bring to this court for review. Therefore, Seawatches' references to matters outside the Record and its pure speculation as to what might have happened in the proceedings below are completely improper, and have no place in this appeal.

Like the Division, Seawatch completely ignores the expressed legislative intent presented to the trial court below, and cited to this court in the Briefs of Petitioners. Instead, Seawatch

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goes through a lengthy discussion of how §718.124 can only make sense if it allows the Association an extended period of time to sue developers for construction defects. Of course, this discussion begs the question, since the warranty period expressly states that no action exists more than five years after the completion of construction. §718.203(1)(e). Once the five year period runs, there simply is no warranty and no cause of action. Therefore, the dismissal of Seawatches' Complaint against the Developer, Turtle Kraals, was legally correct and must be affirmed.

All the verbiage contained in Seawatches' Brief, about the fact that the Association does not have the ability to find out about construction defects, or that unit owners may be ill equipped to recognize problems in construction, is belied by the facts in Seawatches' Brief. Seawatch concedes that four individual unit owners, long before turnover to the Association, were aware of defects in the construction; hired an expert; and successfully sued the developer. Callihan v. Turtle Kraals, Ltd., 523 So. 2d 800 (Fla. 3d DCA 1988). Therefore, the unit owners which comprise the Association certainly were aware of the fact that there were construction defects well before the Association took over. Seawatch has not cited a single case that states that only after turnover can an association "actually" discover construction defects. This is truly putting form over substance, as the unit owners are the Association and at Seawatch they knew for years of the defects - they just did not know the

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exact cause. The Association/corporation can only act through these same homeowners. One day after turnover, there was a sufficient basis to sue and Seawatch did nothing!

Again, conspicuously absent from the discussion on the application of §718.124 is any recognition that the legislative history of the enactment of that statute clearly showed that §718.124 was designed to allow an extended period of time for condominium associations to bring breach of contract actions; and that §718.203, the statutory warranty statute, was specifically intended to have a five year limitation, at which point the statutory warranty simply no longer existed.

Seawatches' argument that there would be 100 statute of limitations, again, ignores the fact that it brought a breach of warranty suit against the developer; and that breach of warranty period is triggered by the completion date of construction, regardless of the entity suing. The legal question before this court is whether §718.124 tolls the warranty period. Therefore the pages, and pages, and pages of discussion regarding discovery of defects, latent defects, whether the discovery of one defect would be implied to another unit owner, etc., again, is simply an effort to distract the court from the real legal issue and the fact that Seawatch had ample time to sue under <u>all</u> the statutory time periods and did not.

Furthermore, Seawatch concedes that the breach of implied warranty of fitness and merchantability occurred immediately upon completion of construction; again, rendering all the discussion

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regarding discovery of defects, or the cause of defects, completely superfluous and irrelevant (See, Respondent's Answer Brief on the Merits, 33).

Seawatch also attempts to distract this court from the legal issue by repeatedly asserting that its common law actions for implied warranty were somehow preserved, when the Third District ruled that §718.124 tolled the period of time for the condominium Association to bring its statutory breach of warranty claim. However, while Seawatch appealed the dismissal of all the claims with prejudice, only three rulings of the trial court were raised as error by Seawatch. Seawatch At Marathon Condominium Association, Inc. v. Charley Toppino And Sons, Inc., 610 So. 2d 470, 471 (Fla. 3d DCA 1992). The only issues raised as error on appeal were that the damage to the condominium buildings did not give rise to an action in tort; that neither Toppino nor Epic were subject to liability for the violation of the building code; and the claims for breach of statutory implied warranty were time barred. Seawatch, 471. Therefore, any claims that Seawatch is now making that it can go forward with common law breach of implied warranties against the Defendant have been waived, as they were not appealed to the Third District. Furthermore, this court's recent decision in Casa Clara Condominium Association, Inc. v. Charley Toppino And Sons, Inc., 18 Fla. L. Weekly S357 (Fla. June 24, 1993) puts all of the speculation by Seawatch to rest.

Finally, Seawatch has not cited any case law that supports

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it proposition that somehow the statutory warranty provision §718.203 did away with the element of privity required in bringing a common law implied warranty claim. The Association is not a successor/owner; and, therefore, the common law implied warranties simply do not inure to the benefit of the Association, which is why the legislature enacted §718.203.

Seawatch concedes that the breach of implied warranty occurred no later than April 3, 1983, when the last CO was issued. Seawatch also concedes that this began the statute of limitations running (Respondent's Brief, 34). However, Seawatch claims that this statute of limitations period was tolled between the occurrence of the breach and the turnover to the Association (Respondent's Brief, 34). This means that if §718.124 could toll the effect of the warranty statute, it would be tolled from April 8, 1983 to August 10, 1985; thus, approximately 28 months would be added on to the Association's time to file suit. However, even accepting Seawatches' argument, this would mean that the Association would have had to file suit by October 1987, even applying the tolling provision. Since the Association did not file suit until May 13, 1988, it is clear that even if §718.124 tolled the warranty statute, the Complaint in this case was still time barred. Therefore, regardless of whether the certified question is answered yes or no, the Complaint in the present case was properly dismissed.

Of course, the same result is required when the express language of §718.203 is given full force and effect. The

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warranty statute extends the implied warranty period up to five years after the completion of construction. At the end of that five year period, the developer is no longer deemed to have granted any implied warranty and any cause of action for breach of warranty ceased to exist. Therefore, any tolling provision in §718.124 can have absolutely no effect whatsoever on the warranty period, which clearly ended in the present case on April 8, 1988. At the time Seawatch filed its Complaint, no cause of action for breach of warranty existed as the warranty had statutorily expired.

Seawatches' claim that §718.203 is not a statute of limitations or statute of repose is based solely on the fact that it asserts that the statute must contain certain magic language. However, none of the cases cited by Seawatch stand for that proposition. This is simply Seawatches' attempt to get around the clear language of the statute that cut off any cause of action for breach of implied warranty five years after the completion of the construction.

Furthermore, whether §718.203(1)(e) is a "real" statute of repose, or simply a repose period, is irrelevant because the language "but in no event more than five years" must be given full force and effect. If Seawatches' argument is correct that §718.124 tolls the warranty period, then in effect it is arguing that §718.124 has repealed, or made superfluous, the language in §718.203(1)(c).

The legislative history, cited by Turtle Kraals and relied

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on by the trial court, clearly established that the legislature intended to provide a "limited" warranty period for condominium owners. This warranty period expired long before the Seawatch Association filed suit. The Association had ample opportunity to timely file, but instead it chose to do nothing whatsoever. The thought that §718.203 could constitute a shorter statute of repose than the one contained in §95.11 does not make it unreasonable. It is important to remember that the legislature created this breach of implied warranty cause of action and had the right to limit it to five years from completion of construction.

Seawatches' argument that it is absurd for a cause of action to cease to exist before the principal is aware of it, overlooks the fact that the legislature has done this exact thing in other statutes of repose. For example, a medical malpractice cause of action can cease to exist before the patient is even aware that malpractice has occurred. More importantly, this result, which Seawatch labels as "absurd" has been held to be constitutional. University of Miami v. Bogorff, 583 So. 2d 1000 (Fla. 1991).

The sensible construction of §718.203 and §718.124 is that the legislature meant what it said in both of the statutes. Any cause of action the Association may be tolled by §718.124. However, under §718.203, the Association, in this case, simply had no cause of action for breach of implied warranty, as this cause of action ceased to exist prior to the time that Seawatch filed suit. Since Seawatch sued for breach of implied warranty,

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it was bound by the express language of §718.203; which is neither superfluous language, nor language overruled by §718.124. The five year repose period contained in the warranty statute must be given full force and effect and Seawatches' Complaint must be dismissed as it is time barred.

CONCLUSION

The Seawatch Complaint against the developer, Turtle Kraals, Ltd., must be dismissed as it is time barred.

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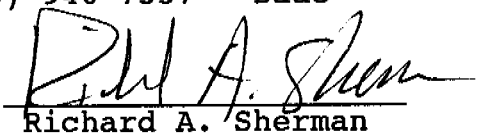
By: 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 12th day of July, 1993 to:

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