CONSTRUCTive Talk

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Construction Law Committee Newsletter, a committee of the Florida Bar Real Property, Probate & Trust Law Section

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The Challenge of Aging Florida Condominiums

By Alan E. Tannenbaum, Esq., Tannenbaum Scro, P.L., Sarasota, FL

In the early 80's, Robert Crain, a well-known engineer in the condo construction defect world, was asked by HUD to opine on the anticipated useful life of condominium buildings built in Florida. His conclusion was 50 years. Especially for a number of beachfront condos built in the 1970's, engineer Crain seems to have predicted well.

The definition of useful life that I will use for purposes of this article is the point where the cost of trying to rehabilitate a structure becomes excessive making demo and reconstruction, or even abandonment, the better business decision.

The challenge with Florida condo buildings reaching the end of their useful lives is that condo associations are highly regulated, and boards and management in dealing with aging buildings are constrained under both statute and declarations of condominium.

The Duty to Repair

Pursuant to §718.113 (1), Fla. Stat., "[m]aintenance of the common elements [of a condominium] is the *responsibility* of the association. Declarations of condominium similarly oblige associations through their boards to repair and maintain the common elements.

An association's shirking of its maintenance responsibility could invite a suit by an owner, pursuant to §718.303, Fla. Stat., seeking a mandatory injunction to require neces-

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Articles and Submissions:

Here at CONSTRUCTive Talk, we are always looking for timely articles, news and announcements relevant to Construction Law and the Construction Law Committee. If you have an article, an idea for an article, news or other information that you think would be of interest to Construction Law Committee members, please contact: Peter Kapsales at pkapsales@milnelawgroup.com or Avery Sander at adsander@mdwcg.com

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sary common element repairs, a monetary award for resulting damages, and an award of attorney's fees and costs. Both a mandatory injunction requiring repair, and monetary damages awarded to a unit owner against an association, were affirmed on appeal by the Third DCA in *Coronado Condominium Association, Inc. v. Scher*, 533 So. 2d. 295 (1988).

Deterioration Constituting a Material Alteration

Pursuant to §718.113 (2)(a), Fla. Stat., ". . . there shall be no material alteration of . . . the common elements" without the requisite vote of the membership as provided in the declaration of condominium, or by a vote of 75% of the membership if no percentage is set forth in the documents.

Have common elements deteriorated by years of wear, insect infestation, hurricane damage, etc., and not rehabilitated by the association back to their original condition, been materially altered as defined in §718.113(2)(a), Fla. Stat.? So thought one Tampa federal district judge sitting in an appellate capacity in *In re Colony Beach & Tennis Club Association, Inc., 456 B.R. 545 (2011).*

The Colony Beach & Tennis Club ("The Colony") was (it has been torn down by order of the Town of Longboat Key) a 237-unit hotel condominium on Longboat Key. (The Colony as a footnote to history was set to accommodate President George W. Bush and his entourage the evening of 9/11.) Per the documents, control of the use of units was delegated to a management entity which ran the hotel operation. The unit owners were limited partners in the management entity, and were entitled to the use of their unit for one month a year. The condo association was obliged by the documents to maintain and repair the common elements.

The Colony operated successfully until 2006. The problem was that most of the buildings were townhouses of wood construction, and no reserves had been collected during the 30-year life of the property. In 2006, the management entity requested that the association pass a $50,000 per unit special assessment to rehabilitate the common elements and the unit interiors. The board of the association, and many of the owners, believed that the management entity should share a portion of the rehabilitation cost. The parties reached an impasse.

By 2010, the structures had deteriorated to the point where they were no longer habitable. The management entity filed for bankruptcy, and in those proceedings brought a claim against the association seeking $23 million for its loss of profits from the hotel operation. The management entity's main argument was that the association had failed to meet its repair obligations under statute and the declaration. The bankruptcy judge found that the association had no legal obligation to the management entity to undertake the repairs.

In reversing the bankruptcy court, Federal District Court Judge Steven Merryday applied *Coronado* and found that the association indeed had an obligation to undertake the repairs, and its failure to do so was the proximate cause of the management entity's losses. But Judge Merryday independently found that the abandonment of repairs by the association also represented a material alteration of the common elements:

> Further, by allowing the Colony to deteriorate, the Board and the majority of the members impermissibly altered the common elements to the detriment of a minority of the members…The Condominium Act requires that "no mate-

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> rial alteration…to the common elements [occur] except in a manner provided in the declaration…" Fla. Stat. §718.113(2)(a). "The purpose of [this] provision [is] to protect the [unit] purchaser against unanticipated changes in the common elements which could dramatically affect the cost and enjoyment associated with owning a condominium." *Wellington Prop. Mgmt. v. Parc Corniche Condo.Ass'n, Inc.,* 755 So.2d 824, 826 (Fla. 5th DCA 2000). Deterioration of the common elements is an "alteration" and a "change" against which the Condominium Act protects the members who favor repairing the common elements.
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> *Id.* at 563.

Deterioration Affecting Insurability

Pursuant to Florida Statute §718.111(11)(a), a condo association is required to insure the common elements for the "replacement cost of the insured property as determined by an independent insurance appraisal or update of a prior appraisal." "Replacement cost coverage" means coverage for the full cost of repairing and/or replacing damaged property without deduction for depreciation. Most declarations also make it mandatory that the association secure adequate insurance coverage for the common elements.

It is typical upon renewal for property insurance for carriers to inspect the property and require repairs as a condition of renewal. Applications for new coverage or renewal also carry an affirmative obligation on the insured to report any conditions at the property which would create enhanced risk for the carrier. The failure of associations to rehabilitate aging buildings can lead to the rejection of coverage, or denial of a claim due to non-disclosure of known defects in the buildings at time of application.

The Fact Rehabilitation is Costly is No Excuse

Many older associations lack adequate reserves. Deferred maintenance may have also been neglected. Then, major damage may be discovered, sometimes when a new owner is renovating a unit. The board then conducts an engineering investigation and gets the bad news that major and very costly work is required. Often, when repairs begin and the building is opened up, the full extent of the problems are revealed and the cost to rehabilitate the buildings correctly becomes exorbitant.

Boards then often try to get away with a scaled-down project which merely "puts the thumb in the proverbial dike." Based upon the statutory mandate, the language of most declarations and established case law, this won't cut it. So, for boards to be compliant, it's either pass a special assessment that may be tens of thousands of dollars a unit, or consider termination.

Voluntary Termination as an Alternative to Major Repairs

The author is aware of an older condominium in Tampa where the units sold for $35,000 to $75,000, there had been little deferred maintenance performed, reserves were woefully inadequate and necessary repairs were to cost $30,000 a

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unit, a figure that most of the owners could not afford. At the same time, the land upon which the condominium sat was very valuable, like $300,000 a unit valuable. The Board took a serious look at termination as an alternative to trying to collect a huge special assessment.

Although termination may be an attractive alternative under these circumstances, voluntary termination is not easy to achieve. Voluntary termination of a condominium in Florida is governed by §718.117, Fla. Stat. It is not the author's intent in this article to unwind what is a very complex statute, rather it is to focus on the elements of the statute which render termination quite difficult and expensive to achieve. These are the major challenges in successfully initiating and completing a voluntary termination under §718.117, Fla. Stat.

1. A detailed, formal plan off termination must be created by the Board;
2. A high percentage of the membership must vote to terminate;
3. In an optional termination, which is the alternative that most groups would be limited to, 5% of the membership can block the termination;
4. Mortgage holders can object to the plan under certain circumstances;
5. The proposed allocation of proceeds of the sale of the condominium property is subject to legal challenge by any owner, which could tie up the termination for years;
6. There are multiple layers of costs which must be paid before the proceeds are distributed to the owners; and
7. The Association is not excused from its repair obligations while termination is attempted.

As far as the Tampa group mentioned above, despite it being painfully obvious that termination was the far more logical solution to the association's predicament, more than 5% of the membership made it clear that they would block the termination, so it never got off the ground.

Involuntary Termination

There is a little known, short provision of the Florida Condominium Act which provides for the possibility of the involuntary termination of a condominium.

> "**718.118 Equitable relief.**—In the event of substantial damage to or destruction of all or a substantial part of the condominium property, and if the property is not repaired, reconstructed, or rebuilt within a reasonable period of time, any unit owner may petition a court for equitable relief, which may include a termination of the condominium and a partition."

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At first glance, it would appear that the statute was intended to cover board inaction in the wake of damage from a catastrophic weather event or fire. However, the possibility certainly exists that a creative unit owner could try to utilize the statute to seek the involuntary termination of a condominium where the condo buildings had been "damaged" as a result of long–term wear and tear, and there was a sufficient minority of the membership who would not support voluntary termination. Such was the case with The Colony.

A developer purchased a portion of The Colony which was the subject of a recreational lease. The developer then purchased several units, creating standing for itself as a unit owner aggrieved by board non-action on repairs. The developer proceeded to bring an action under §718.118, Fla. Stat. seeking involuntary termination. *Unicorp Colony Units, LLC v. Colony Beach & Tennis Club Association, Inc. et al,* Case No. 2018-CA-000360, Circuit Court for Sarasota County. All unit owners opposed to voluntary termination were sued.

The trial court in the *Unicorp Colony Units, LLC* action has ruled that the statute does apply to long-term wear and tear, and terminated the condominium. The battle presently is by what method the condominium property will be sold, how the rights of the contesting owners will be protected, and whether the other protections of §718.117, Fla. Stat., including the right to contest the net proceed distribution plan, will be adopted by the trial court.

Conclusion

Something has to give, as the challenges for aging condominium will only increase as the buildings continue to deteriorate. Associations administering older condominiums face significant risks by not either taking on major rehabilitation projects, or leading an effort to terminate. Of course, since repair obligations continue during what may be a lengthy termination effort, scrapping necessary repair efforts in deference to termination carries its own risks. Will municipalities and counties be asked to step in, as the Town of Longboat Key was with The Colony, to condemn buildings to get associations out of the repair dilemma while termination is attempted? Will more developers and speculators purchase units in bulk in older condominiums sitting on valuable property and follow Unicorp Colony Unit, LLC's lead in seeking involuntary termination in order to gain ultimate ownership of the underlying property? It should prove to be an interesting ride.

The Pros and Cons of Casting a Wide Net in Construction Defect Litigation

By: Kellie Caggiano, Esq. and Hannah Tyson, Esq., Moyer Law Group, St. Petersburg, FL

Over the past decade in Florida, construction defect litigation has seemingly become a free-for-all, with every entity that touched the project being "invited" to the litigation party. Timing often plays a large part in the plaintiff's decision on whether to sue *only* the developer, general contractor, and/or design team versus filing claims against the general contractor, developer, design team *and* the subcontractors/suppliers who participated in construction. If defects become obvious and the owner or controlling association hires an attorney soon after the project is completed, the prospective plaintiff will have plenty of time to analyze who it should sue directly. However, given the nature of construction where work by one subcontractor may wholly cover another subcontractor's work (e.g. stucco over block), construction defects do not always become obvious until well after a construction project is finished. If defects remain hidden until many years after a project's completion, anyone who worked on or supplied materials to that project will likely get sued to prevent statute of repose arguments as Florida has a 10-year statute of repose.[1] In these "eleventh hour" lawsuits, the plaintiff will probably sue everyone involved with the project and plan to "figure out" who truly caused the defects during the litigation.

Further, who the plaintiff directly sues will likely determine against whom and under what theories the general contractor/developer files its crossclaims and third-party claims. If the plaintiff sues everyone involved with the project, the general contractor/developer can just add on additional causes of action as crossclaims. However, if the plaintiff only sues the general contractor/developer, then the general contractor/developer must decide which subcontractors and suppliers to bring in as third-party defendants. This decision necessarily requires a strategy call on whether to "cast a wide net" by suing all of a project's subcontractors or to only sue those who are definitively implicated by the plaintiff's expert reports.[2]

One of the biggest pros of casting a wide net is that all parties are involved early on, reducing the chance of success for defense arguments related to the statute of repose and statute of limitations. Further, if the plaintiff or third-party plaintiff bring all parties into the lawsuit at the beginning, then there may potentially be a more thorough investigation into each alleged project defect early on. This decreases the likelihood of surprise defects being discovered later and reduces the risk of ligation delays, such as reopening discovery or extending deadlines, which often occur when new parties are added in a piecemeal fashion instead of at the start of litigation.

Another benefit of suing a large number of subcontractors or suppliers at the

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[1] *See* Fla. Stat. § 95.11(3)(c).

[2] Recent amendments to Florida Statutes § 95.11(3)(c) provides an extra year from the date of service of plaintiff's complaint for a defendant, such as a general contractor, to assert counterclaims, crossclaims, and third-party claims arising out of the subject of plaintiff's complaint, even if such claims would otherwise be time-barred. It remains to be seen whether this extra year to assert counterclaims, crossclaims, and third-party claims may help limit the shotgun approach of suing everyone involved in a construction project versus suing only those who are truly implicated in plaintiff's allegations.

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beginning of litigation is the potential for generating more insurance coverage and thus more money to potentially settle a case. Over the past decade, this seems to have emerged as the main reason behind plaintiffs taking the "wide net" approach. Plaintiffs are looking for the largest amount of settlement money possible, whether through insurance or direct from a defendant, and want to ensure there are no coverage issues precluding a global settlement such as improper notice of a claim.

However, there are also numerous cons to suing everyone involved in the project. The most glaring con is that the cost of litigation grows exponentially with every party who is added to the lawsuit. The plaintiff or third-party plaintiff will have to issue and respond to much more discovery, address significantly more motions and depose many more party representatives and experts. Further, the plaintiff's or third-party plaintiff's expert(s) costs will also increase as the expert(s) will have more areas on which to opine and investigate. For instance, if only the general contractor files third-party claims against subcontractors, it is the general contractor's responsibility to prove the case against the subcontractors, *not* the Association's. The Association's only burden in this scenario would be to prove its case against the general contractor, leaving the heavy lifting of proving up every single subcontractor's scope of work and alleged deficiencies to the third-party plaintiff general contractor.

Another downside of casting a wide net of defendants is the potential for sanctions motions brought by opposing counsel premised upon Florida Statutes § 57.105 if there are not actual defects related to each and every subcontractor or supplier. Such motions would require the plaintiff or third-party plaintiff to either reveal their evidence of a specific defect related to the subcontractor's/supplier's work, or dismiss the subcontractor/supplier. This type of motion practice will delay the litigation and require the plaintiff or third-party plaintiff to focus on avoiding sanctions instead of moving the case forward.

Finally, the biggest con of suing all the subcontractors and suppliers in a construction case is the potential fallout that filing unsubstantiated claims can have on an attorney's image and a plaintiff's claim. Filing a lawsuit before a claim is verified can damage the attorney's reputation with other counsel and cause others to take the plaintiff's claims less seriously. Specifically, there is a risk that other attorneys and claims professionals will pay less attention to significant and costly defects if every portion of the project is labeled as a defect. This can hamper resolution of the immediate case as well the attorney's future cases.

As with most decisions litigants must make, the choice of who to sue in a construction defect case is not one to be made lightly. When determining whether to only sue those subcontractors currently implicated in an expert report or casting a wider net by suing all subcontractors/suppliers who worked on the project, attorneys and their clients should weigh the pros and cons of each approach before proceeding. Further, it is important to recognize that the ultimate decision is often driven by numerous factors including: the subcontractors' available insurance coverage; additional insured obligations; contractual indemnification obligations; whether the project has a wrap policy such as an OCIP, CCIP, or other excess policy; and what business relationships still exist between the potential parties. Because the decision of who to sue will impact the entire case from beginning to end, litigants should ensure they thoughtfully weigh all these factors before taking action.

Case Law Update

By: Natalie Yello, Esq.
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***Grace & Naeem Uddin, Inc. v. Singer Architects, Inc.*, 278 So. 3d 89, 90 (Fla. 4th DCA 2019)**

The County entered into a contract with Architect and separate contract with Contractor. The County-Architect contract named Architect as Consultant and included responsibilities such as (1) recommend rejection of nonconforming work; (2) coordinate with County regarding change orders; (3) conduct site observations; (4) prepare punch list and confirm Contractor's completion of the work. Near end of project, County terminated Contractor. Record evidence indicated Architect recommended terminating the Contractor. Contractor filed suit against County for breach of contract and professional negligence against Architect. Trial court granted summary judgment to Architect, holding Architect did not owe Contractor a duty of care as the County's consultant.

The Appellate court reversed summary judgment to the Architect, because, although the County-Architect contract provided the County had ultimate decision making authority for stopping the work, the Architect was given near absolute authority to "control[ ]the project and the contractor's fate" and otherwise supervise the job. The Architect also contended that the Contractor was barred from recovering tort damages from it when the Contractor was seeking contractual economic damages from the County, claiming such a determination would result in the County recovering the same damages from both parties. The court rejected the argument as premature, noting "[w]hile a party may not collect the same damages twice, when the judgment is undetermined, overlapping damages claims are a "post-judgment issue."

***Miami-Dade County v. Morejon*, 44 Fla. L. Weekly D2904 (Fla. 3d DCA Dec. 4, 2019)**

Plaintiff, the estate of decedent who was killed when he fell through the skylight of Defendant's building, sued Building Owner for failure to obtain permits that created a dangerous condition that led to decedent's death. Building Owner listed the County's Building Official as an expert witness and Plaintiff sought to depose him. The County, a nonparty, filed a protective order and contended the Building Official was neither an expert witness or proper fact witness. Trial court denied the protective order. The appellate court noted the Miami Code of Ordinances does not permit a county official to testify as an expert without county authorization and further reiterated the rule that an expert witness who has not been retained and doesn't have personal knowledge of the facts would not be permitted to testify as an expert, therefore, the Building Official could not testify as an expert. The court also rejected Plaintiff's argument that the Building Official could testify as a fact witness with specialized knowledge pertaining to county procedure. Because the Building Official did not have personal knowledge of the facts he could not testify as a fact witness. Appellate court determined trial court department from the essential requirements of the law by denying the County's motion for protective order.

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Case Law Update

(Continued from page 8, By Natalie Yello)

***Harrell v. Ryland Group*, 277 So. 3d 292 (Fla. 1st DCA 2019)**

Original Owners contracted with Contractor to construct a residential home. Original Owners took possession of the home on May 7, 2004. Plaintiff purchased the home from Original Owners. Plaintiff was injured when he was climbing the attic ladder to repair a leak and the attic ladder collapsed below him. Plaintiff sued Contractor for negligence claiming the Contractor failed to ensure the attic ladder was installed in a secure manner and failed to verify the ladder was secure. Contractor moved for summary judgment claiming the action was time barred by Section 95.11(3)(c). Plaintiff argued Section 95.11(3)(c) would not apply because the attic ladder didn't constitute an improvement to real property. The trial court granted Contractor's motion for summary judgment and held the installation of the attic ladder constituted an improvement to real property, therefore, Section 95.11(3)(c) would control the statute of repose analysis. The trial court reasoned that because the owner took possession on May 7, 2004, the statute of repose expired on May 7, 2014, therefore, the claim was time barred. After engaging in a detailed analysis of what constitutes an improvement to real property, the appellate court affirmed the trial court's determination that the installation of the ladder was an improvement to real property, therefore, Section 95.11(3)(c) would apply.

***Prime Investors & Developers, LLC and Homestead Holdings II, LLC v. The Meridian Companies*, 45 Fla. L. Weekly D155a, (Fla. 4th DCA 2020)**

Contractor sued cabinetry subcontractor for breach of subcontract for project delays and defective cabinetry and countertops on Miami-Dade County hotel project. The subcontract contained a venue selection clause in Broward County. Subcontractor filed counterclaim against contractor for non-payment and a third-party claim for lien foreclosure. The trial court found to have improperly granted summary judgment in favor of subcontractor because: (1) contractor's affidavit raised disputed issue of material fact regarding quality of materials supplied and installed, project delays; and (2) subcontractor failed to negate developer's affirmative defense that it failed to comply with notice and timing requirement sunder Ch. 713.

Finally, the appellate court recognized, despite not having been raised by either party at the trial level, that trial court lacked subject matter jurisdiction over subcontractor's lien foreclosure claim (location of the *rem* was Miami-Dade County, not Broward County).

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By: Brett Henson, Esq.

Shumaker, Loop & Kendrick, LLP

Sarasota, FL

Case Law Update

(Continued from page 9, By Brett Henson)

***Hillcrest Country Club Limited Partnership v. Zyscovich, Inc.*, 45 Fla. L. Weekly D175a, (Fla. 4th DCA 2020)**

Golf course owner hired architect to obtain development entitlements for conversion of golf course to residences. "Bonus Provision" in owner-architect "upon receipt by the Owner of all approvals and permits necessary to develop the property in conformance with the Master Plan developed by Architect for the Project." The Court held bonus provision was ambiguous such that parol evidence was admissible and summary judgment should have been denied.

***William Weiner and Elizabeth S. Weiner v. Taylor Morrison Services, Inc.*, 44 Fla. L. Weekly D3012f (Fla. 1st DCA 2019)**

Homeowners sued homebuilder for Violation of Florida Building Code due to defective stucco installation. Homebuilder enforced arbitration provision contained within 10-Year Major Structural Defect Warranty, covering actual physical damage to load bearing elements of the home. Warranty expressly excluded coverage for stucco, and further, did not include stucco within the definition of load-bearing element. The trial court erred in finding warranty covered claims, therefore case not subject to arbitration. Further, issue of "arbitrability" is to be decided by Court, unless parties "clearly and unmistakably" decide otherwise.

Construction Law Committee Meetings

Join us for our upcoming Construction Law Committee meetings. Benefits of the meetings include 1 hour of CLE each meeting, a timely update on developing case law, statutes and administrative rulings, and informative reports from our subcommittees.

The CLC meetings occur the second Monday of every month beginning promptly at 11:30 a.m. EST. To join, call: (888) 376-5050. Enter PIN number 3532412014# when prompted. **Please note the new Pin Number**.

SUBMISSIONS

Do you have an article, case update, or topic you would like to see in CONSTRUCTive Talk? Submit your article, note, or idea to:
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Info & Upcoming Events

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It's as easy as 1, 2, 3:

1. Become a member of the Florida Bar.

2. Join the Real Property Probate and Trust Law Section.

3. Email Reese Henderson at reese.henderson@gray-robinson.com advising you would like to join the CLC and provide your contact information.

Subcommittee Practice-Get On Board

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