

Real Estate Title Insurance & *Construction Law*

Internal Affairs of N.J. Condo Associations Are Free From Outside Challenges

The fox is locked out of the henhouse: Developers and contractors may not intrude

By John Randy Sawyer and
Gene Markin

In a decision that has renewed the faith of condominium law practitioners in our state's judicial system, the New Jersey Appellate Division recently issued a strongly worded opinion in *Port Liberté II Condo. Ass'n v. New Liberty Residential Urban Renewal Co.*, 2014 N.J. Super. LEXIS 19 (App. Div. Jan. 21, 2014) (approved for publication on Jan. 31, 2014). That decision has prevented a grave injustice and disallowed defendants in a multi-million dollar construction defect lawsuit to use the plaintiff-association's bylaws as a weapon to defeat liability.

Sawyer is a shareholder with Stark & Stark in Lawrenceville, and a member of the firm's construction litigation group. Markin is an associate at the firm and also a member of the construction litigation group.

In what has been exclaimed as a "big win" for condominium associations and unit owners, the Appellate Division has determined that a condominium board's decision to file suit against those responsible for construction defects cannot be assailed by third parties based on a prelitigation voting requirement in the association's bylaws. Designed to protect the financial interests of the unit owners, the bylaws cannot be used by defendant developers and contractors to suppress those very same interests. Non-homeowners, therefore, do not have standing to challenge unauthorized or procedurally defunct decisions of the board of trustees.

Faced with widespread construction defects in the common elements of its 225-unit community, with a price tag in excess of \$30 million for repairs, the Port Liberté II Condominium Association filed suit in 2008 against those responsible, the

developer and the contractors that built the development. Several years into the lawsuit, the defendants sought dismissal of the entire action because the association had not obtained a community vote to approve the filing of the suit, as required by a provision of the bylaws drafted by the developer. To rectify that oversight, the association held two separate votes to ratify the original filing of the suit, the first in October of 2009, which was approved by the community 72 votes to 3, and a second in October of 2011, which was approved by a vote of 65 to 1. Armed with these two examples of overwhelming support in the community for the lawsuit, the association opposed the defendants' motions to dismiss the case arguing that the defendants, as outsiders who owned no units in the community, had no standing to enforce the bylaws, and, even if they had such standing, the original filing of the suit was overwhelmingly ratified by the unit owners.

With an opinion that barely filled a single page and was devoid of any legal precedent or coherent reasoning, Judge Mark Baber allowed the defendants to use the association's bylaws, designed to protect the unit owners, as a weapon against them and dismissed the association's entire case, and, with it, the unit owners' hopes for fixing their community.

The Appellate Division, however, reversed Judge Baber's decision. Specifically, the appellate court found that

the “trial court misconstrued the bylaws—and disserved the unit owners’ interests—in holding that the owners could not ratify the association’s action after the lawsuit was filed.” Additionally, the court held that the defendants had no standing to enforce the voting provision of the bylaws.

Interpreting the Condominium Act and the spirit and purpose of the community’s bylaws, the court found that the voting provision of the bylaws was intended to protect the unit owners’ financial interests by requiring their approval of possibly expensive litigation. The court, however, then noted that the unit owners in the Port Liberte II community also had “an equally great—if not greater—financial interest in recovering damages to repair the common areas, because otherwise they will have to pay for the repairs themselves through assessments.” The court then concluded that it would:

not enforce a statute or regulation in a manner that would produce an absurd result, contrary to its purpose. Here, it would be absurd to construe [the bylaws] in a way that would strip the owners of a cause of action designed to recoup payment for construction defects, if they are willing to authorize the litigation after it was filed.

While provisions of the bylaws may provide a process by which a board obtains authorization to file suit, i.e., an affirmative vote of the membership, unauthorized actions of the board may be cured through ratification, such as a subsequent vote, and are not deemed null and void. This means that prelitigation voting requirements cleverly weaved into the bylaws by the developer cannot preclude an informed

board from filing suit when time is of the essence and a community vote is impractical. A later vote of the membership ratifying the decision of the board will suffice. And while not technically a “prelitigation” vote, it will nevertheless, according to the Appellate Division, comply with the spirit and intent of the bylaws and the Condominium Act.

The court went a step further and found that the defendants, strangers to the relationship between the unit owners and the association, lacked standing to enforce the voting provision in the bylaws. To that end, the court observed that “because [the] defendants’ interests were adverse to the unit owners, letting them enforce the unit owners’ interests would be akin to letting the proverbial fox protect the interests of the chickens.”

Turning its attention to the cases improvidently cited by Judge Baber in support of his decision to dismiss, the court had no trouble distinguishing them as lacking any relevance and legal significance. Ascribing error to Judge Baber’s decision to dismiss the association’s entire case on a curable procedural hypertechnicality, the Appellate Division reversed and revived the original complaint to proceed on the merits. A second issue addressed by the Appellate Division was the trial court’s decision to deny the association the opportunity to amend its complaint to further delineate its structural damage claims. In its first amended complaint, not only did the association allege property damage resulting from the deficiently installed building envelopes (cladding, windows and doors, roofs, etc.), but it also alleged cracks in the “slab floors” and “garage leaks” caused by defects in the “Foundation Walls and Slabs.” Suspecting structural damage, the association hired a structural engineer to perform investigations and to offer an opinion. Due

to weather restrictions and other delays, the board did not learn of the existence of serious structural issues until it was ready to file its fourth amended complaint.

In its proposed fourth amended complaint, the association sought to more specifically identify the structural claims being alleged. Judge Baber, however, viewed the structural allegations as a “new claim,” distinct and unrelated to the “building envelope” claims he interpreted the whole case to be about. Denying the association’s application to amend its complaint forced the association to file a new complaint asserting only the structural claims against many of the same parties that were defendants in the already filed case. As a result, the association’s structural claims could not relate back to the original date the main case was filed, and therefore became in danger of being time-barred by the statute of limitations and/or the statute of repose.

On appeal, the issue was far from a close call and warranted “little discussion.” Based on the exact reasons and arguments submitted to Judge Baber in the association’s motion papers, the appellate court reversed, concluding that the proposed structural allegations did not constitute a “new claim,” but were rather “a more specific description of the factual bases for allegations that were already set forth in earlier versions of the complaint.”

Following Judge Baber’s dismissal of the Port Liberte II Condominium Association’s suit, word spread quickly through the defense bar about a new avenue to avoid liability for construction defects. The Appellate Division has now spread a new word: Developers and contractors cannot intrude into the affairs of a condominium association and its unit-owner members by forcing strict compliance with unamendable, onerous prelitigation voting requirements in the bylaws. ■