Realty Law Digest

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Condominiums—Construction Defects—Suit Against Sponsor, Board and Manager —Alteration Agreements—Res Judicata

A DEFENDANT CONDOMINIUM board of managers (board), individual board members and a defendant management company (manager), moved to dismiss a complaint pursuant to CPLR 3211(a)(1); (5) and (7). The board and individual board member defendants also sought costs, sanctions and attorney fees. The plaintiff opposed the motions and cross-moved for sanctions against the defendants and their counsel and for attorney fees.

This action is "the latest in a dispute between the parties over alleged structural defects in the concrete substrate slab beneath the floor" of the plaintiff's condominium unit. The complaint alleged that the plaintiff and her husband purchased the unit from the sponsor for $3,075,000 in 2005. "They received property tax exemptions under the City of New York's 421-a tax exemption program…." The plaintiff asserted that the parties' relationship deteriorated after she had rejected a request "to pay a portion of the property tax abatement for the benefit of other unit owners." The plaintiff further alleged that the defendants had "ignored repeated requests to repair and maintain" the cracked slab. The plaintiff also alleged that she and her husband had "been barred" from living in their unit for approximately seven years, "while continuing to pay millions of dollars for the unit."

The plaintiff and her husband had commenced an action in 2007 against the board defendants over "construction defects in the floor of the…unit." The plaintiffs had claimed in that action, that the slab had not been "properly leveled and flattened, resulting in numerous loose floorboards and warping in some areas…." The sponsor defendants had allegedly acknowledged that the floors in the unit had been "improperly installed" and "undertook to replace the floors."

The plaintiff had further alleged that after unsuccessful attempts by the sponsor to correct the problem, the plaintiffs undertook to make the repairs themselves. The plaintiff asserted that the board defendants had demanded that the plaintiff sign "a standard alteration/installation agreement before commencing work…." The plaintiffs had proposed changes to the agreement, allegedly to reflect, inter alia, "that the proposed work was not alterations but the

completion of flooring in accordance with the original plan…." The plaintiffs also alleged that the board defendants had demanded that the plaintiffs pay an "unreasonable amount to retain counsel to review the plaintiffs' proposed changes to the standard agreement." The plaintiff's complaint asserted claims for "breach of contract, fraud, breach of warranty, breach of implied warranty, violation of General Business Law §§349 and 350, negligence, breach of fiduciary duty, and declaratory judgment."

A prior trial court had, inter alia, denied the defendants' motion for summary judgment dismissing the plaintiffs' claims for breach of fiduciary duty and granted the plaintiffs' cross-motion for leave add the condominium as a defendant and to add a claim for a declaratory judgment as to which party is responsible for repairing the defective floor. However, the Appellate Division (court) had reversed. The court granted the defendants' motion for summary judgment and denied the plaintiffs' cross-motion for leave to amend. It observed that the plaintiffs had taken over installation of the floors and held that the board could condition its approval for structural repairs upon the plaintiffs' "compliance with the same requirements that apply to unit alterations."

The plaintiffs contended that the board had refused to either make the necessary repairs or permit them to do so. The plaintiffs cited, inter alia, the board president's alleged statement that "the board was not going to involve itself in plaintiffs' dispute with the sponsors…."

The court had opined that "it was not unreasonable for the board to require plaintiffs to adhere to the same rules that apply to all other unit owners wishing to make structural repairs" and that the plaintiffs' "opposition was insufficient to raise a question of fact as to the board's good faith or whether it was acting within the scope of its authority, and in furtherance of a legitimate purpose…." The court concluded that the defendants' motion for summary judgment "should have been granted as against the board." The court also held that the plaintiffs' cross-motion to amend its complaint to add the condominium as a party and to assert a claim for a declaratory judgment, should have been denied since the pertinent condominium offering plan (plan) language was "clear and unambiguous…."

In December 2008, the NYC Department of Buildings (DOB) issued a violation against the board defendants for "failing to maintain the concrete substrate…, finding cracks throughout the…slab, and ordering the condominium board defendants to make all necessary repairs…." In April 2009, the NYC Environmental Control board (ECB) issued a violation against the board defendants for, inter alia, "failing to repair cracks found throughout the…slab" and "ordered defendants to repair or replace the concrete substrate…." The ECB thereafter determined that "the…board defendants failed to maintain and repair the cracked concrete substrate…."

The plaintiff thereafter attempted to repair the floor. Her engineer had reported that "the…slab was deteriorating rapidly, and needed to be repaired."

The plaintiff then commenced the subject action, seeking damages based on "the defendants' failure to maintain and repair the…slab." The plaintiff alleged that "the…board defendants breached the terms of the…plan, declaration, and bylaws by failing to maintain and repair the…slab." The plaintiff further alleged that the sponsor and the manager "breached the management agreements by failing to maintain and repair the…slab." The plaintiff also claimed that the board defendants breached their fiduciary duty "by failing to undertake the necessary repairs to the…slab." Additionally, the plaintiff alleged that the sponsor and manager "aided

and abetted the breach of fiduciary duty by failing to maintain and repair the…slab." The defendants had moved to dismiss the complaint and the plaintiff cross-moved for sanctions.

The defendants argued that the complaint should be dismissed based on "the doctrine of res judicata, since the allegations in [it] essentially mirror those alleged by the plaintiffs" in the prior litigation. The plaintiff countered that the prior action involved only claims against the sponsor for "defective design and construction, whereas this action concerns claims against the…board defendants and [manager] regarding the…slab, including defendants' failure to properly install and maintain the flooring."

The court explained that "the doctrine of res judicata bars a party from litigating a claim where a judgment on the merits exists from a prior action between the same parties involving the same subject matter…." Here, the court was "not persuaded by plaintiff's assertion that the two actions are entirely different and unrelated." The court found that there was an "undeniable identity of the parties and allegations in this action and the prior action commenced by plaintiff and her husband."

The prior action had been commenced by the plaintiff and her husband, "as owners of the subject unit." There was no apparent reason or explanation "offered for the commencement of this action by plaintiff alone." "[B]oth actions involve claims against the condominium, the board, the individual defendants, the sponsor, and [manager]." Although the manager had not been named in the prior action, "the issue of whether the board or sponsor, from which liability on the part of [manager] would flow, was before the court." Additionally, the two lawsuits "involve the same subject matter," i.e., "defects in the…slab beneath the floor…."

The court rejected the plaintiff's "efforts to distinguish between the specific complaints regarding the slab in the two actions…." The court found that the plaintiff's argument that "the prior action alleged construction defects, and…complaints about cracks in the slab" and that "the failure to maintain could not have been adjudicated in the prior action because they did not exist," was contradicted by "statements in the DOB and ECB violations."

In sum, the court believed that the plaintiff "had ample opportunity to adjudicate the claims asserted in this action." The court noted that the plaintiff's engineer had advised them of the condition of the slab and the plaintiffs had proposed "numerous changes to the alteration agreement in order to fix the flooring." The court reasoned that "[c]oncerns for judicial economy and efficiency should serve to disallow plaintiff from advancing different theories based on the same factual allegations in different judicial proceedings, and warrant dismissal of this action in favor of the prior action." The court denied the request for sanctions and granted the defendants' motion to dismiss as against the board of Managers and individual board members. The action was severed and continued against the remaining defendants.

Comment: Adam Leitman Bailey, counsel for the board of managers and individual board members and the manager, emphasized, inter alia, the plaintiff and her husband had "insisted on major revisions" to the condominium's "standard alteration agreement," to which the board did not agree.

Steven D. Sladkus and Ethan A. Kobre, of Schwartz, Sladkus Reich Greenberg Atlas, attorneys for the plaintiff asserted, inter alia, that "the conditions addressed in this litigation could not have been litigated in the prior action because they arose nearly 18 months after that

action had been commenced" and their client's motion to amend her complaint in that case was denied.

The trial court and the defendants believed that the plaintiffs had sufficient knowledge, based on the DOB and ECB violations and their experts' inspections, to have raised the "failure to maintain" claims, in the prior action. Plaintiffs' counsel advises that their client is appealing.

Condominium purchasers will sometimes be dissatisfied with their sponsor's or board's efforts to remediate a construction or equipment defect. Some cases involve sponsors and boards that refuse to accept any such responsibility. The outcome in most of these cases will depend upon the precise language of the offering plan and other organizational documents, including the plans and specifications referenced therein, as well as applicable governmental building codes.

Lawyers are often asked the question, if the board hires a contractor to effect repairs and that contractor has repeatedly failed to resolve the problem, when may the purchaser assume responsibility for the work and retain their own contractor? The answer will almost always depend upon the specific facts of each case. In most cases, the sponsors and boards are entitled to make "reasonable" efforts to remediate a problem. If repeated efforts to fix a problem fail, most responsible sponsors and boards will consider retaining a different expert. Sometimes, the sponsors and boards and unit owners will agree that their respective engineers or architects should identify a mutually acceptable neutral engineer or contractor and that neutral engineer or contractor will be hired.

Construction defect litigation will often arise after the first independent board assumes control from the sponsor. A new board will often assert that the prior board failed to properly assert defect claims against the sponsor.

If defect claims are asserted several years after the units have been sold, defendants may claim, inter alia, that they have no liability because notice of the defects was given after the required notice period under the plan, the board failed to timely assert claims under warranties that had been assigned to the condominium by the sponsor or the damage is attributable to failure to properly maintain the property after the sponsor transferred control to the independent board. Defendants may also claim that the statute of limitations has expired. Sometimes they will note that hurricanes or "super-storms" have occurred during the intern period and/or cite a plaintiff's failure to follow required maintenance guidelines with respect to equipment.

Counsel for plaintiffs will often counter that the alleged defects were "latent" and could not have been discovered through reasonable diligence during the "notice period," or that the defects had been deliberately concealed.

These litigations usually involve conflicting expert reports. Defendants' experts often opine that a defect may be repaired. Plaintiffs' experts often assert that a replacement is necessary. Some defendants would rather settle these cases by doing the remedial work, because they can get the work done at a low cost, since they are "in the business." Other defendants would rather pay a sum of money and have no further continuing dealings with unit owners.

Defendants are often concerned about getting timely access to individual apartments and

about claims that their repair teams caused damage to unit owners' furniture, carpet, art work, etc.

Generally, courts understand that the parties may have different strategies for addressing problems and urge the parties to try to agree on mutually acceptable resolutions.

The courts do not "welcome" piecemeal litigation. Judicial decisions involving the doctrine of res judicata make clear that the doctrine will apply not only to claims that could have been litigated in a prior action In the subject case, there is a disagreement as to whether the claims in the second case could have been litigated in the first case.

Lorne v. 50 Madison Avenue Condominium**, Sup. Ct., N.Y. Co., Index No. 653136/15, decided April 17, 2017, Coin, J.**

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