IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

IN RE: CHAMPLAIN TOWERS SOUTH COLLAPSE LITIGATION,

CLASS REPRESENTATION

CBL DIVISION

CASE NO: 2021-015089-CA-01

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TG AND TWI'S REPLY IN SUPPORT OF MOTION TO DISMISS CHAMPLAIN TOWER SOUTH CONDOMINIUM ASSOCIATION'S CROSSCLAIMS

Defendants Terra Group, LLC ("TG") and Terra World Investments, LLC ("TWI") file their Reply in Support of their Motion to Dismiss Champlain Tower South Condominium Association, Inc.'s Crossclaims ("Crossclaims").

INTRODUCTION

Champlain Towers South Condominium Association, Inc.'s ("Association") Memorandum of Law in Opposition to Motions to Dismiss ("Response") fails to confront one of the core challenges presented by TG and TWI's Motion to Dismiss ("Motion"), and the one challenge directed exclusively at the Association: whether the Association lacks standing to advance the individual wrongful death, personal injury, and personal property damage claims of CTS' unit owners, renters, and invitees.[1] Instead, the Response erects a strawman against which to argue: it

[1] Because the Crossclaims largely mirror the Plaintiffs' Consolidated Second Amended Class Action Complaint ("Complaint") in its pleading conventions, the Motion's challenges to the pleading of the Crossclaims largely mirror those presented by TG and TWI's Motion to Dismiss the Complaint, with the important exception of the Motion's challenges to the Association's purported standing to bring claims for wrongful death, personal injuries, and personal property damage. TG and TWI, therefore, incorporate by reference, and rest upon, TG and TWI's papers filed in connection with their Motion to Dismiss the Complaint, as well as their Motion to Dismiss the Crossclaims, in connection with the Crossclaims' pleading deficiencies, and TG and TWI maintain their objections to the pleading contained both in their Motion to Dismiss the Crossclaims and their Motion to Dismiss the Complaint.

frames the question presented by the motions to dismiss as one of the measure of recoverable damages, and it cites *Hochman v. Lazarus Homes Corp.*, 324 So. 2d 205 (Fla. 3d DCA 1975), and similar cases, for the unremarkable and inapposite proposition that the question of the measure of recoverable damages is typically not answered on a motion to dismiss.[2] That proposition is true enough – what kinds damages are recoverable on an otherwise well pleaded claim are typically not decided on motions to dismiss – but TG and TWI's Motion does not challenge the ***measure*** of recoverable damages for the claims the Association seeks to advance. To the contrary, the Motion challenges the Association's right to advance – in the very first instance – claims beyond the purview of the Association's limited statutory authority to act only "**on behalf of *all* unit owners concerning matters of common interest**." *See* § 718.111(3), Fla. Stat. (emphasis added). The kinds of damages recoverable on the Association's claims is, for the purpose of the Motion, of no moment.

With the strawman disassembled, the Court is left with the question framed by the Motion: whether a Chapter 718 condominium association, like the Association here, has standing to assert the wrongful death, personal injury, and personal property damage claims of others? The Association is a creature of limited statutory authority. It lacks authority to act as a super-plaintiff and to arrogate to itself the personal claims of each putative plaintiff in this case. If the Association is to litigate a claim in this case, it may only litigate claims "**on behalf of all unit owners concerning matters of common interest**." The Crossclaims exceed the Association's authority, as explained below.

[2] *Hochman* explains that "a motion to dismiss is not a proper method of attacking a complaint **that is insufficient only in that the elements of damage are improper or insufficiently alleged**." 324 So. 2d at 206.

1. The Motion Frames a Challenge to the Association's Standing to Sue, not a Challenge to the Measure of Recoverable Damages.

To combat the Motion's challenge to the Association's standing, the Association reframes the question to one of damages and argues that "[a] motion to dismiss is not a proper method of attacking a complaint that is insufficient only in that the elements of damage are improper or insufficiently alleged." Resp. at 4 (quoting *Hochman*, 324 So. 2d at 206). The Motion, however, challenged the Association's *right* to advance the claims of others, not the measure or amount of damages that ultimately may be recoverable on those claims. It should go without saying that dismissal is appropriate where the plaintiff lacks standing to assert its claims. *See, e.g., Liebman v. City of Miami*, 279 So. 3d 747, 751-52 (Fla. 3d DCA 2019).

Specifically, the Motion argued that the Association "may not advance individualized claims of personal injury, wrongful death, or damage to personality because all such claims are personal to the claimants and exceed the scope of the Association's narrow, legislatively circumscribed authority." Mot. at 17. And the Motion rested this proposition upon the clear terms of Section 718.111(3) of the Condominium Act, the legislation that grants condominium associations certain limited rights to act on behalf of their unit owners, but only when acting "**on behalf of *all* unit owners concerning matters of common interest**." *See* § 718.111(3), Fla. Stat. (emphasis added). To meet this challenge, the Association cites several inapposite cases holding that motions to dismiss should not be granted simply because a complaint fails to allege recoverable damages when the claim and right to recovery are otherwise well pled.[3]

[3] This argument implicitly concedes that the Association does, in fact, seek unauthorized recoveries – most obviously, wrongful death recoveries which "can only be pursued by [a] personal representative for the benefit of beneficiaries." *See Grape Leaf Capital, Inc. v. Lafontant*, 316 So. 3d 760, 761 n.1 (Fla. 3d DCA 2021).

For example, in *Willams v. Legree*, 206 So. 2d 13 (Fla. 2d DCA 1968), a mother brought a wrongful death claim for the loss of her minor daughter. *Williams*, 206 So. 2d at 14. The appellate court reversed the trial court's dismissal of the mother's complaint because the mother "[did] have a cause of action for the wrongful death of her daughter and . . . her complaint sufficiently stated such cause of action," though the court held that the mother could not recover certain *kinds* of wrongful death damages, like compensation for the loss of the deceased child's services. *Id*. at 15. Despite the unavailability of certain damages to the plaintiff mother, she still had the right to pursue a wrongful death claim. Here, in contrast, the Association has no right to pursue claims that are not common to "all unit owners" and which do not concern "matters of common interest," no matter the measure of damages.

Salcedo v. Wells Fargo Bank, N.A., 223 So. 3d 1099 (Fla. 3d DCA 2017), is similarly inapposite. In *Salcedo*, the plaintiff sued a bank for negligently permitting the contents of a safe deposit box subject to garnishment to be removed from the safe deposit box, thus depriving the plaintiff of the ability to seize and realize the value of the box's contents. *Salcedo*, 223 So. 3d at 1104. The bank moved to dismiss for several reasons including the plaintiff's inability to prove the contents of the box and thus the plaintiff's damages — *i.e.*, the value the plaintiff was allegedly deprived of because of the bank's negligence. The court conceded that "proof of damages may be daunting," but reversed the dismissal of the complaint because "the **amount of damages** is not at issue at the motion to dismiss stage of the proceedings." *Id.* at 1105 (emphasis added). Here, again, TG and TWI's Motion does not rest upon, or even address, the *kinds* of recoverable damages on the Association's claims. Rather, it challenges the Association's *right* to bring any wrongful death, personal injury, or personal property claims in the first instance.

Hutchison v. Tompkins, 259 So. 2d 129 (Fla. 1972), is similarly inapposite in that the court, there, determined that the plaintiff "alleged a contract creating a legal right in the petitioners to receive the contract price," such that it had the right to sue for breach of contract and thus should have been permitted to seek to prove and recover general damages for the alleged breach. *Hutchison*, 259 So. 2d at 132. That is, the existence of the plaintiff's legal right to enforce a contract was sufficient for the case to proceed, with the question of recoverable damages to be litigated in the future. Again, here, TG and TWI's Motion challenges the Association's "legal right" to vindicate the rights of others, in the first instance, not the measure of the damages that may ultimately be recoverable for the purported violation of the otherwise recognized "legal right" to seek damages.[4]

The authorities cited in the Association's Response, therefore, fail to address the threshold question of whether the Association has standing to pursue the individual claims of others. Section 718.111(3), Fla. Stat. plainly limits the Association's authority to litigate only claims "**on behalf of all unit owners concerning matters of common interest**," and the Association's conduct must be limited to that limited authority. See § 718.111(3), Fla. Stat. (emphasis added).

2. Chapter 718.111(3) Only Authorizes the Association to Litigate Claims "On Behalf of All Unit Owners Concerning Matters of Common Interest."

The Response next argues that *Seawatch at Marathon Condo. Ass'n, Inc. v. Charley Toppino & Sons, Inc.*, 610 So. 2d 470 (Fla. 3d DCA 1992), supports the Association's right to sue

[4] *Shands Teaching Hospital & Clinics, Inc. v. Beech Street Corp.*, 899 So. 2d 1222 (Fla. 1st DCA 2005), merely cites *Hutchison* for the proposition that "the measure or amount of damages is not at issue [on a motion to dismiss]."

to recover damages for the loss of personalty.[5] *Seawatch* does not justify the Association's pursuit of such claims.

First, *Seawatch* involved a class action brought by a condominium association for defects to the structural reinforcing system of the condominium, plainly a "matter of common interest" to "all unit owners." *Id.* at 471. Some of the resulting damage from the defects in this condominium-wide structural reinforcing system manifested itself within the individual units in the form of "cracking of the concrete surfaces, cracking of ceramic tiles and the seepage of rust-stained water." *Id.* There is no mention in the *Seawatch* opinion, however, of damage to non-typical personalty (unlike damage to common, developer-provided finishes and fixtures that were damaged by the condominium-wide defects), nor is there any mention of personal injuries, or of wrongful death claims, the kinds of claims challenged by the Motion. *Id*. Moreover, the property that was allegedly defective was the "concrete" and "metal decking system," which the Third District appropriately described as "common elements." *Id*. at 471-72. In reaching its decision, the Third District reasoned: "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." *Id.* at 472 (emphasis added). Thus, it was the defective common elements which drove the court's decision to recognize the association's standing in *Seawatch*.

Moreover, *Seawatch* merely held that "the common interest provision of [Rule 1.221] has been interpreted **to permit a class action by the association for a construction defect located**

[5] The Response is silent about the wrongful death and personal injury claims, seemingly conceding that the pursuit of those claims facially exceeds the Association's "on behalf of all unit owners concerning matters of common interest" authority.

physically within a unit, rather than in the common elements, **if the defect is prevalent throughout the building**."[6] *Id.* at 473. Thus, an association may sue for a construction defect outside the common elements if, and only if, "the defect is prevalent throughout the building," such that the Association is acting consistently with its authority under Section 718.111(3), *i.e.*, "**on behalf of all unit owners concerning matters of common interest**." See § 718.111(3), Fla. Stat. (emphasis added). *Seawatch*, therefore, recognizes the two elements to a condominium association's Section 718.111(3) standing: (1) an action on behalf of "all unit owners" and (2) an action that "concerns matters of common interest." The Association here satisfies neither element in connection with its wrongful death, personal injury, and personal property damage claims.

For example, here, unlike *Seawatch*, the Association does not advance claims each unit owner shares as a "matter of common interest" with each other owner. Instead, the Crossclaims seek to advance claims for the recovery of "resultant deaths, injuries, and losses," including, presumably, recoveries on the claims of parties outside the class of the Association's unit owners, *i.e.*, the claims of renters, invitees, and guests. *See* Cross-cl. ¶ 290 ("Defendants . . . are responsible . . . for the CTS Building's collapse and resultant deaths, injuries, and losses, for which recovery is sought herein.").

Moreover, even if the Association's claims were limited strictly to those of the Association's unit owners, the Association would still lack "on behalf of all unit owners concerning matters of common interest" standing because "all unit owners" did not perish in the collapse, "all unit owners" did not suffer personal injuries and "all unit owners" did not lose the same personalty. The Association, therefore, cannot satisfy the "all unit owner" condition of its

[6] The only authority the *Seawatch* court could muster for this proposition is a continuing legal education publication.

standing under Section 718.111(3). Finally, the same logic applies to the "common interest" condition to the Association's standing given that unit owners with a diversity of property and personal injuries do not share the same "common interest" in each other's personal property or personal injury interests and claims.[7] *See Bonavista Condo. Ass'n., Inc. v. Bystrom*, 520 So. 2d 84 (Fla. 3d DCA 1988) ("The individual tax assessments on 150 condominium units separately sold, owned, occupied, and taxed do not present a matter of common interest."). The wrongful death, personal injury, and personal property damage claims of individuals are not, by definition, matters of common interest to all unit owners because the Association's unit owners do not have the same undivided property interests in each other's personal property, as they do in the property owned in a common interest community form of ownership.

3. The Association Acknowledges It May Not Pursue Wrongful Death Claims.

Finally, the Response does not attempt to defend the Association's effort to advance its putative wrongful death claims, seemingly acknowledging through its silence the insurmountable obstacle to the Association's ability to bring those claims: "By statute, **the personal representative is the only party with standing to bring a wrongful death action** to recover damages for the benefit of the decedent's survivors and the estate." *Roughton v. R.J. Reynolds Tobacco Co.*, 129 So. 3d 1145, 1150 (Fla. 1st DCA 2013) (citing *Wagner, Vaughan, McLaughlin & Brennan, P.A. v. Kennedy Law Grp.*, 64 So. 3d 1187, 1191 (Fla. 2011)). *See also Grape Leaf Capital, Inc. v. Lafontant*, 316 So. 3d 760, 761 n.1 (Fla. 3d DCA 2021)("A wrongful death case can only be pursued by the personal representative for the benefit of the beneficiaries"); *Kadlecik v. Haim,* 79 So. 3d 892, 893 (Fla. 5th DCA 2012)(same). And the Association, "a not-for profit

[7] For example, unlike each unit owner's common undivided interest in the defect free operation of an HVAC system, each unit owner does not share a common undivided interest in another unit owner's television or art work. Losses to those items are personal to their owners.

corporation" organized "in accordance with Florida Statute Chapter 718," Cross-cl. ¶¶ 7, 25, may not act as a personal representative. *See In re Estate of Montanez*, 687 So. 2d 943, 946 (Fla. 3d DCA 1997)("Section 733.305, Florida Statutes (1993), only allows corporations to serve as personal representatives of an estate when they are trust companies, banking corporations, savings associations, and savings and loan associations."). The Crossclaims must be repled as a result.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished, either via transmission of Notices of Service of Court Document generated by the E-Portal or in some other authorized manner for those counsel or parties who are excused from e-mail service on this 3rd day of March, 2022.

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