Filing # 147473503 E-Filed 04/11/2022 04:53:38 PM

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

COMPLEX BUSINESS LITIGATION DIVISION

CLASS REPRESENTATION

IN RE: CHAMPLAIN TOWERS SOUTH COLLAPSE LITIGATION.

CASE NO.: 2021-015089-CA-01

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DEFENDANT, 8701 COLLINS AVENUE CONDOMINIUM ASSOCIATION, INC.'S MOTION TO DISMISS COUNT XVII OF PLAINTIFFS' CONSOLIDATED THIRD AMENDED COMPLAINT

COMES NOW, Defendant, 8701 Collins Avenue Condominium Association, Inc. (hereinafter "the 8701 Association"), by and through its undersigned counsel, files its Motion to Dismiss Count XVII of Plaintiffs' Consolidated Third Amended Complaint, and as grounds for the foregoing states as follows:

INTRODUCTION

1. On March 9, 2021, this Court granted Plaintiffs leave to file their Consolidated Third Amended Complaint, wherein Plaintiffs named—for the first time—the 8701 Association as a defendant.

2. At all times material hereto, Eighty-Seven Park—a condominium situated at 8701 Collins Avenue—was located adjacent to Champlain Towers

South ("CTS"). A beach access walkway ran between Eighty-Seven Park and the south foundational wall of CTS. Construction of the beach access walkway was completed in early 2019. Pl. Compl. at ¶ 189.

3. According to Plaintiffs, in November of 2019 (i.e., ***after*** completion of the beach access walkway), the developers of Eighty-Seven Park submitted to the condominium in form ownership the land located at 8701 Collins Avenue. *Id.* at ¶¶ 664, 666. Included in the submission was the aforementioned beach access walkway. *Id.* at ¶ 666.

4. Plaintiffs contend that the beach access walkway was constructed defectively, causing runoff water to infiltrate CTS's south foundational wall—which had been damaged during the construction of the walkway. *Id.* at ¶¶ 193, 197, 676. Plaintiffs further allege that the infiltrating runoff water caused the collapse of CTS. *Id.* at ¶ 193.

5. On July 17, 2021, this Court cautioned Plaintiffs that it "[did] not want this case bogged down with dubious claims and Hail Marys." (Hr'g Tr., 39:1-5, July 7, 2021.) This Court instructed "the lawyers to be targeted and effective," and it stated that it did not want them "throwing desperation passes." (Hr'g Tr., 39:6-9, July 7, 2021.) Despite the foregoing admonishments, Count XVII of Plaintiffs' Consolidated Third Amended Complaint is fraught with frivolity, as it does not evidence a basis for imposing liability on the 8701 Association.

SUMMARY OF ARGUMENT

A. Plaintiffs fail to attach to their Consolidated Third Amended Complaint the documents that they rely on for the imposition of the developers' alleged liabilities on the 8701 Association.

The "General Allegations" section of the Consolidated Third Amended Complaint outlines the manner in which various defendants were reportedly negligent. The 8701 Association is not mentioned even once in this section, which spans nearly 300 paragraphs. *See* Pl. Compl. at ¶¶ 30-308. The ***sole*** basis for the 8701 Association's alleged liability is the Declaration of Condominium, which Plaintiffs fail to attach to their Consolidated Third Amended Complaint. Instead, Plaintiffs quote language from the declaration concerning the assumption of "responsibilities." Plaintiffs gratuitously claim that "responsibilities" is inclusive of "liabilities," without pleading any ultimate facts to support same or citing any language in the Declaration of Condominium.

Although the 8701 Association appreciates that this Court may only consider the four corners of the Consolidated Third Amended Complaint in ruling upon the present motion, it notes that failure to attach the Declaration of Condominium to the Consolidated Third Amended Complaint constitutes more than mere procedural non-compliance, as it precludes the 8701 Association from affirmatively showing this Court that there is no factual basis for imposing the developers' liabilities onto

the 8701 Association.[1]

B. Plaintiffs also fail to allege ultimate facts establishing a legal duty owed by the 8701 Association to Plaintiffs in view of §§ 718.301(5), (6), Fla. Stat., as they fail to allege when the developers ceased to be in control of the 8701 Association.

The Consolidated Third Amended Complaint alleges facts all of which occurred either prior to the establishment of the 8701 Association or while the 8701 Association was developer-controlled. Hence, under §§ 718.301(5), (6), Fla. Stat., liability cannot rest with the 8701 Association. Plaintiffs have failed to specify when the aforementioned alleged breaches purportedly occurred. However, a fair reading of the Consolidated Third Amended Complaint indicates that all of the aforementioned acts occurred in early 2019 or before—i.e., when the 8701 Association was under the control of the developers.

Most notably, notwithstanding that Plaintiffs have not claimed—and ***cannot*** claim—that the 8701 Association had the authority to direct the design, construction, or installation of the beach access walkway,[2] they nevertheless

[1] Had Plaintiffs attached to their Consolidated Third Amended Complaint the Declaration of Condominium—as they were required to do under Fla. R. Civ. P. 1.130—it would have been patently obvious to this Court that there is no factual basis whatsoever for Plaintiffs' contention that the 8701 Association assumed the developers' liability. The terms "liability" and "liabilities" appear collectively over fifty times in the Declaration of Condominium. Not once are these terms used to shift liability for the design, construction, or installation of the beach access walkway. Had there been such language, Plaintiffs would have quoted it in their Consolidated Third Amended Complaint.

[2] In the Consolidated Third Amended Complaint, Plaintiffs state that "***[i]n early 2019***, the Terra Defendants, JMA, NV5, and DeSimone built the beach access walkway in place of the prior 87th Terrace and against the CTS south foundation wall." Pl. Compl. at ¶ 189 (emphasis added). In

contend that the 8701 Association should have "ensured the design, construction, and installation of the beach access walkway was performed in a reasonably safe manner." They premise their argument on provisions in the Declaration of Condominium. *See id.* at ¶ 670. More specifically, Plaintiffs contend that because the Declaration of Condominium states that the 8701 Association assumed the developers' ***responsibilities*** as set forth in the Development Agreement, the 8701 Association also assumed the developers' ***liabilities*** "for the design, construction, installation, and maintenance of the 87th Terrace easement improvements, including the beach access walkway." *Id.* at ¶¶ 669-70.

ALLEGATIONS IN THE CONSOLIDATED THIRD AMENDED COMPLAINT

In their Consolidated Third Amended Complaint, Plaintiffs note that, at all times material hereto, a beach access walkway ran between CTS and Eighty-Seven Park, abutting the former's south foundation wall. Plaintiffs allege that during the construction of the walkway, developers "penetrated CTS's foundation wall, leaving gaps and holes." Pl. Compl. at ¶ 193. They further contend that the

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November of 2019 (i.e., after completion of the beach access walkway), "the Terra Defendants through, 8701 Collins Development, LLC, recorded a Declaration of Condominium for Eighty-Seven Park." *Id.* at ¶ 664 (emphasis added). The Declaration of Condominium transferred ownership of "the land located at the 8701 Collins Property, . . . including the beach access walkway," to the condominium. *Id.* at ¶ 666.

Hence, prior to November of 2019, the 8701 Association did not own the land on which the beach access walkway currently sits. Plaintiffs have failed to plead facts supporting that the 8701 Association was involved in the development or construction of the beach access walkway.

developers constructed the beach access walkway "pitched and angled toward the CTS south foundation wall." *Id.* at ¶¶ 197, 676. According to Plaintiffs, runoff water consequently infiltrated CTS's foundational structure through the aforementioned "damaged" wall, causing the garage to flood when it rained. *Id.* at ¶ 198. Said water reportedly compromised the structural foundation of CTS, resulting in the building's collapse. *Id.* at ¶ 193. All of these acts occurred while the developer was in control of the 8701 Association, as per the Consolidated Third Amended Complaint.

Notably, the "General Allegations" section of the Consolidated Third Amended Complaint outlines the manner in which various defendants were allegedly negligent. ***The 8701 Association is not mentioned even once in this section, which spans nearly 300 paragraphs***. *See id.* at ¶¶ 30-308. As a matter of fact, excluding Paragraph 26—wherein the 8701 Association is identified as a defendant—the 8701 Association is not mentioned in the Consolidated Third Amended Complaint until the final count. *See id.* at ¶¶ 659-682.

In Count XVII of the Consolidated Third Amended Complaint, Plaintiffs allege that the 8701 Association's liability in the present matter arises out of the design, construction, installation, and maintenance of the beach access walkway. *Id*. at ¶¶ 659-82. Plaintiffs contend that, at all times material hereto, the 8701 Association owed them various duties:

671. According to 8701 Association's governing documents, the 8701 Association likewise has and had a duty to ***control, manage, maintain, repair, reconstruct and operate*** condominium property and/or association property including the 87th Terrace easement area, including ***the beach access walkway***.

672. The 8701 Association owed Plaintiffs and the Classes a duty, including a nondelegable duty under its governing documents, the Miami-Dade County Code of Ordinances, and the common law, to ***maintain*** Eighty-Seven Park's common elements, including the 87th Terrace easement area and beach access walkway, in a safe condition ***and*** to ***warn of unreasonable risks of harm***.

673. This duty included ***insuring that conditions on*** its premises, including ***the beach access walkway*** on the 87th Terrace easement area, ***did not create a danger to*** the public and owners, residents, and ***inhabitants of CTS***.

674. After its incorporation, and especially throughout the time that Mr. Piazza its president, the 8701 Association had a duty, including a non-delegable duty ***to ensure the design, construction, and installation of the beach access walkway was performed in a reasonably safe manner***.

675. This duty further includes the responsibility to the Plaintiffs and Classes to ***redress any harms caused by the design, construction, or installation methods used in developing the beach access walkway***.

Id. at ¶¶ 671-75 (emphasis added).

According to Plaintiffs, the 8701 Association breached the aforementioned duties in the following manner:

a. ***improperly maintaining and operating*** the 87th Terrace easement area, including the beach access walkway, in a manner that allowed for;
b. allowing ***excavation*** dangerously close to the south foundational wall of CTS;

c. failing to comply with applicable rules, code, regulations, and safety measures governing ***excavation*** abutting adjacent structures, including but not limited to those pertaining to excavation support and protective systems;
d. failing to take proper and necessary precautions for ***excavations*** performed immediately adjacent to the CTS south foundation wall;
e. failing to prevent the ***excavation*** work from damaging the CTS foundation wall and/or failing to recognize that such damage had occurred;
f. ***constructing*** the beach access walkway on 87th Terrace so it was pitched and angled toward the CTS south foundation wall causing an unreasonable and burdensome increase in water runoff;
g. failing to prevent the ***construction work*** for the beach access walkway from damaging the CTS south foundation wall and/or failing to recognize that such damage had occurred;
h. ***allowing water runoff to infiltrate the CTS foundation wall*** and damage its structural foundation;
i. ***damaging the CTS south foundation wall*** so that water runoff was able to infiltrate the CTS foundation;
j. ***failing to maintain, repair, and remediate dangerous conditions***, including but not limited to repairing the CTS structural instability and foundation wall, repairing the beach access walkway on 87th Terrace and/or warning Plaintiffs and the Class Members of dangers posed by the forgoing actions, inactions, and omissions; and
k. ***failing to redress any harms*** caused by the design, construction, or installation methods used in developing the beach access walkway.

Id. at ¶ 676 (emphasis added).

MEMORANDUM OF LAW

A. Motion to Dismiss Standard.

When ruling upon a motion to dismiss, trial courts must "determine whether the complaint properly states a cause of action upon which relief can be granted."

Fox v. Professional Wrecker Operators of Florida, Inc., 801 So. 2d 175, 178 (Fla. 5th DCA 2005). In so doing, trial courts confine their review to the four corners of the complaint, draw all inferences in favor of the pleader, and accept as true all well-pleaded allegations. *Id.*

To state a cause of action, a complaint must comply with Fla. R. Civ. P. 1.110. *Pizzi v. Central Bank and Trust Company,* 250 So. 2d 895, 896 (Fla. 1971). Fla. R. Civ. P. 1.110(b) requires that a pleading contain the following:

> (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the ultimate facts showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which the pleader deems himself or herself entitled. Relief in the alternative or of several different types may be demanded. Every complaint shall be considered to demand general relief.

"Pleadings must contain ultimate facts supporting each element of the cause of action. Mere conclusions are insufficient." *Clark v. Boeing Company,* 395 So. 2d 1226, 1229 (Fla. 3d DCA 1981) (citations omitted); *see also Bell Atlantic Corp. v. Twombly,* 550 US 544 (2007) (noting that "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do"); *Barrett v. City of Margate*, 743 So. 2d 1160, 1162 (Fla. 4th DCA 1999) (stating that "[t]he complaint must set out the elements and the facts that support them so that the

court and the defendant can clearly determine what is being alleged").

Notably, "[w]hether a prima facie case has been pled depends on the ***sufficiency of the plaintiff's allegations of fact***, excluding the bare conclusions of the plaintiff." *Alvarez v. E & A Produce Corp.,* 708 So. 2d 997, 999-1000 (Fla. 3d DCA 1998) (emphasis added).

B. This Court must dismiss Count XVII of Plaintiffs' Consolidated Third Amended Complaint because Plaintiffs have failed to attach documents on which they premise their action.

Pursuant to Fla. R. Civ. P. 1.130(a), "[a]ll bonds, notes, bills of exchange, contracts, accounts, or documents on which action may be brought or defense made, or a copy thereof or a copy of the portions thereof material to the pleadings, ***must*** be incorporated in or attached to the pleading." As per the Florida Supreme Court, dismissal is appropriate where a plaintiff fails to attach to their complaint the contract upon which their action is based. *Conklin v. Cohen,* 287 So. 2d 56, 60 (Fla. 1973); *see also Striton Properties, Inc. v. City of Jacksonville Beach,* 533 So. 2d 1174, 1179 (Fla. 1st DCA 1988) (holding that the trial court properly ordered the plaintiff to attach to its complaint the Planning and Development Agreement where "[t]he plain language of the complaint show[ed] that the Planning and Development Agreement [was] critical to [the plaintiff's] claims that it [had] 'vested rights' that the City and Agency destroyed"); *Armstrong v. Pet Memorials, Inc.,* 301 So. 2d 150, 151 (Fla. 4th DCA 1974) (reversing summary judgment

entered against the defendant where "[t]he record [was] devoid of any proof of the provisions of the articles of incorporation of Pet Memorials," and "the articles should have been attached to the complaint as an exhibit" because the plaintiff's "cause of action [was] was based in part on those provisions"); *Winn-Dixie Stores, Inc. v. Sams,* 281 So. 2d 47, 47-48 (Fla. 3d DCA 1973) (affirming dismissal of class action where the plaintiff failed to, *inter alia*, provide the court with "documents upon which his alleged cause of action [was] based").

In the case at bar, the duties allegedly owed by the 8701 Association purportedly arise out of various provisions in its "governing documents," the Declaration of Condominium, and the Development Covenants. For instance, Plaintiffs contend that pursuant to 8701 Association's ***governing documents***, the 8701 Association had a duty to control, manage, maintain, repair, reconstruct and operate the beach access walkway. They also claim that under its ***governing documents***, the 8701 Association owed a duty to maintain the beach access walkway in a safe condition and to warn of unreasonable risks of harm thereon.

Most notably, Plaintiffs acknowledge that construction of the beach access walkway preceded submission of the land located at 8701 Collins Avenue to the condominium. Notwithstanding their complete failure to plead facts supporting that the 8701 Association was involved in the development or construction of the beach access walkway, Plaintiffs attempt to hold the 8701 Association liable for

the design, construction, and installation of the beach access walkway. They aver that because the ***Declaration of Condominium*** states that the 8701 Association assumed the developers' responsibilities as set forth in the ***Development Agreement***, the 8701 Association also assumed the developers' liabilities "for the design, construction, installation, and maintenance of the 87th Terrace easement improvements, including the beach access walkway."

Because Plaintiffs argue that the Declaration of Condominium, the Development Agreement, and various governing documents serve as the basis for the imposition of duties, Plaintiffs are required to attach these documents to their Consolidated Third Amended Complaint. Their failure to do so mandates dismissal under *Conklin*.

Although the 8701 Association appreciates that this Court may only consider the four corners of the Consolidated Third Amended Complaint in ruling upon the present motion, it notes that the Declaration of Condominium contains language which, under the principles of contract interpretation, tends to eviscerate Plaintiffs' contention that the 8701 Association assumed liability for the design, construction, and installation of the beach access walkway. Therefore, failure to attach the Declaration of Condominium to the Consolidated Third Amended Complaint constitutes more than mere procedural non-compliance, as it precludes the 8701 Association from affirmatively showing this Court that there is no factual basis for

imposing the developers' liabilities onto the 8701 Association, and that dismissal is therefore proper on said basis. The importance of the 8701 Association's position is highlighted in the case below.

In *Aleman v. Gervas,* 314 So. 3d 350, 352 (Fla. 3d DCA 2020), the parties disagreed on whether a contractual provision imposed individual liability for a debt owed to Raymond Aleman. After the parties submitted competing interpretations of said provision, the Third District held as follows:

> We note that to accept Aleman's interpretation of the contract, that the parties intended to impose individual liability on one another for the payment of funds due to Raymond, would run afoul of basic contract interpretation principles. ***The parties used different language where they specifically intended to impose individual liability, which "strongly implies that a different meaning was intended" where they omitted such language.*** Fowler, 89 So. 3d at 1048. ***The sentence in the contract immediately following the one at issue here, makes clear that the parties knew how to draft a provision imposing individual liability where they intended it.***

Id. at 353 (emphasis added).

Likewise, in the case at bar, although Plaintiffs contend that the assumption of responsibilities by the 8701 Association under Paragraph 11.1 of the Declaration of Condominium is tantamount to the assumption of liabilities, the declaration uses different language where the imposition of liability was intended. For instance, the terms "liability" and "liabilities" appear collectively over fifty times in the Declaration of Condominium, including thrice in the paragraph immediately

succeeding Paragraph 11.1. The omission of the term "liabilities" in Paragraph 11.1 strongly implies that "responsibilities" is not inclusive of "liabilities." This is bolstered by the fact "liability" and "liabilities" appear over fifty times in the declaration, thereby making it unequivocally clear that the parties knew how to draft a provision imposing liability where intended.

C. <u>This Court must dismiss Count XVII of Plaintiffs' Consolidated Third Amended Complaint because Plaintiffs have failed to adequately plead the "duty" element of their negligence claim, as the Consolidated Third Amended Complaint does not state ultimate facts regarding when the developers ceased to be in control of the association.</u>

Pursuant to § 718.104(2), Fla. Stat., "[a] condominium is created by recording a declaration in the public records of the county where the land is located, executed and acknowledged with the requirements for a deed." Pertinently, condominiums are operated by associations, "which must be a Florida corporation for profit or a Florida corporation not for profit." § 718.111(1)(a), Fla. Stat. A condominium association's membership is comprised of unit owners. *Id.* After "unit owners other than the developer elect a majority of the members of the board of administration of an association, the developer shall relinquish control of the association, and the unit owners shall accept control." § 718.303 (4), Fla. Stat.

Pursuant to § 718.301(5), Fla. Stat., prior to the transfer of a condominium association's control from developer unit owners to non-developer unit owners, ***<u>"[i]f . . . any provision of the Condominium Act or any rule promulgated</u>***

thereunder is violated by the association, the developer is responsible for such violation . . . and is liable for such violation or violations to third parties." (emphasis added.)

Moreover, under § 718.301(6), Fla. Stat., prior to turnover, "***actions taken by members of the board of administration designated by the developer are considered actions taken by the developer***, and the developer is responsible to the association and its members for all such actions." (emphasis added). Plaintiffs have failed to plead ultimate facts regarding when the developers ceased to be in control of the association. This deficiency is fatal because the Consolidated Third Amended Complaint does not provide a basis for the imposition of ***any*** of the alleged duties, and much less for recovery against the 8701 Association.

CONCLUSION

In summary, because Plaintiffs have failed to attach to their Consolidated Third Amended Complaint the documents on which—by their own concession—their action is based, this Court must dismiss Count XVII under Fla. R. Civ. P. 1.130(a). Additionally, given the applicability of §§ 718.301(5), (6), Fla. Stat., Plaintiffs' failure to allege when the developers ceased control mandates dismissal under Fla. R. Civ. P. 1.140(b)(6).

WHEREFORE, Defendant, 8701 Collins Avenue Condominium Association, Inc., respectfully requests that this Court grant its Motion to Dismiss

Count XVII of Plaintiffs' Consolidated Third Amended Complaint, and for all other relief deemed just and proper.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to all counsel of record, by e-mail, on April 11, 2022.

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