IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA COMPLEX BUSINESS LITIGATION DIVISION

CASE NO. 2021-015089 CA 01
SECTION: CA43
JUDGE: Michael Hanzman

IN RE: CHAMPLAIN TOWERS SOUTH COLLAPSE LITIGATION
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DEFENDANT JOHN MORIARTY & ASSOCIATES OF FLORIDA, INC.'S MOTION TO DISMISS AND/OR STRIKE PORTIONS OF CHAMPLAIN TOWERS SOUTH CONDOMINIUM ASSOCIATION'S AMENDED CROSSCLAIM

Defendant, JOHN MORIARTY & ASSOCIATES OF FLORIDA, INC. ("JMAF"), by and through its undersigned counsel, and pursuant to Florida Rules of Civil Procedure 1.140(b)(6) and (f), hereby files this Motion to Dismiss and/or Strike portions of the Amended Crossclaim filed by Defendant Champlain Towers South Condominium Association, Inc. (the "Association").

I. INTRODUCTION

1. On March 10, 2022, Plaintiffs filed their Consolidated Third Amended Class Action Complaint (the "Third Amended Complaint"), contending, *inter alia*, that the construction of Eighty Seven Park ("87 Park"), which began in 2016 and was completed in 2020, contributed to and caused the tragic partial collapse of Champlain Towers South ("CTS"). Plaintiffs are the unit owners, residents, occupants, and guests at CTS at the time of the collapse on June 24, 2021.

2. On March 29, 2022, the Association filed an Answer and Affirmative Defenses to Plaintiffs' Third Amended Complaint, and also asserted an Amended Crossclaim (the "Amended Crossclaim") against JMAF and the other Defendants. The Amended Crossclaim, like the original Crossclaim the Association filed in connection with its Answer and Affirmative Defenses to Plaintiffs' Second Amended Complaint, again attempts to assert the same two causes of action (Count X – negligence – and Count XI -strict liability) that Plaintiffs asserted against JMAF in

their Third Amended Complaint. Because the Association's Amended Crossclaim (like its original Crossclaim) is largely a "cut and paste" of Plaintiffs' allegations, the Amended Crossclaim suffers from the same fundamental deficiencies identified in JMAF's December 30, 2021 Motion to Dismiss and/or Strike Plaintiffs' Consolidated Second Amended Complaint ("JMAF's MTD SAC"), JMAF's January 19, 2022 Motion to Dismiss and/or Strike Champlain Towers South Condominium Associations' Crossclaims ("JMAF's MTD Crossclaims"), JMAF's February 3, 2022 Reply to Plaintiffs' Omnibus Response to Defendants' Motions to Dismiss ("JMAF's MTD SAC Reply"), and JMAF's March 2, 2022 Reply to Defendant Champlain Towers South Condominium Association's Omnibus Response to Motions to Dismiss/Strike Crossclaims ("JMAF's MTD Crossclaims Reply"), all of which are hereby incorporated by reference. Further, as detailed below (and in JMAF's MTD Crossclaims and JMAF's MTD Crossclaims Reply), the Association lacks standing to bring wrongful death, personal injury, and certain property loss claims that belong to the individual Plaintiffs, and not to the Association.

3. Thus, the Court should dismiss or, alternatively, strike portions of the Association's Amended Crossclaim for all of the reasons set forth below and in JMAF's MTD SAC, JMAF's MTD SAC Reply, JMAF's MTD Crossclaims, and JMAF's MTD Crossclaims Reply.

II. LEGAL STANDARDS

Under the time-honored standard for evaluating a motion to dismiss for failure to state a cause of action per Florida Rule of Civil Procedure 1.140(b)(6), the court must accept all of the allegations in a complaint as true. *Locker v. United Pharmaceutical Group*, 46 So. 3d 1126, 1128 (Fla. 1st DCA 2010). Whether a complaint is sufficient to state a cause of action is an issue of law for the Court. *Id.*; *Brewer v. Clerk of Circuit Court, Gadsden County*, 720 So. 2d 620, 623 (Fla. 1st DCA 1998).

Pursuant to Florida Rule of Civil Procedure 1.140(f), "[a] party may move to strike or the court may strike redundant, immaterial, impertinent, or scandalous matter from any pleading at any time." A common usage of a motion to strike is to remove improper or irrelevant allegations from a pleading. *Parrish & Yarnell, P.A. v. Spruce River Ventures*, 180 So. 3d 1198, 1200 (Fla. 2d DCA 2015). A motion to strike tests the legal sufficiency of a claim. *Id*.; *Wilson v. Clark*, 414 So, 2d 526, 528 (Fla. 1st DCA 1982) (motion to strike the allegations of undue influence in complaint was available remedy).

III. ARGUMENT

JMAF maintains that the Amended Crossclaim suffers from the same deficiencies and problems identified in JMAF's previous filings (JMAF's MTD SAC, JMAF's MTD SAC Reply, JMAF's MTD Crossclaims, and JMAF's MTD Crossclaims Reply). JMAF recognizes, however, that the Court's Omnibus Order on Motions to Dismiss, entered on February 3, 2022, denied all of the Defendants' motions to dismiss, and thus effectively rejected the non-standing arguments contained in JMAF's prior motions and replies. Whereas JMAF continues to assert that all of the previous arguments raised in opposition to both the Association's original Crossclaim and Plaintiffs' Second Amended Complaint require dismissal of the Association's Amended Crossclaim, JMAF's focus in this Motion is the Association's lack of standing (which the Court has not yet considered or ruled upon).[1]

I. The Association Lacks Standing to Sue for Unit Owners' Personal Injury, Wrongful Death, and Particular Property Damage Claims

JMAF joins and adopts the standing arguments raised in Defendant 8701 Collins Development, LLC's April 8, 2022 Motion to Dismiss CTS' Crossclaims. Chapter 718, Florida's

[1] Although JMAF does not reargue the pleading deficiencies effectively ruled upon in the Court's February 3, 2022 Omnibus Order in this Motion, JMAF will assert its position in its affirmative defenses to the Association's Amended Crossclaim (as it has done in response to Plaintiffs' Third Amended Complaint).

Condominium Act, legislatively authorizes the condominium form of property ownership and grants condominium associations certain limited rights to act on behalf of their members, including the right to sue and be sued in a representative capacity, but only when the Association is acting "*on behalf of all unit owners concerning matters of common interest*." *See* § 718.111(3), Fla. Stat. (emphasis added); *see also* Fla. R. Civ. P. 1.221 (a condominium association may "institute maintain, settle, or appeal actions or hearings in its name on behalf of all association members concerning matters of common interest, including, but not limited to: (1) the common property, area, or elements; (2) the roof or structural components of a building, or other improvements…").

Significantly, the Association appears to be holding open the possibility of pursuing claims in this action for the wrongful deaths and/or personal injuries of its members. For instance, the Association alleges in paragraph 296 of the Amended Crossclaim that "Defendants, individually and collectively are responsible in whole or in part, for the CTS Building's collapse and *resultant deaths, injuries, and losses for which recovery is sought herein*." (emphasis added). In addition, instead of acknowledging in its February 16, 2022 Memorandum of Law in Opposition to Motions to Dismiss Crossclaims (the "Association's Response") that it lacks standing to pursue such claims, the Association stated that:

> The Association has standing to pursue claims common to all unit owners that suffered damages as the result of the catastrophic collapse of their condominium building. *Whether each unit owner's damages are limited to property damage or include personal injury or wrongful death is an issue for another day*.

Association's Response, p. 7 (emphasis added).

But, in fact, the issue of whether the Association can pursue claims for personal injury or wrongful death in this case is not for "another day," but rather can and should be decided now. The Association clearly lacks standing to maintain any claim for wrongful death or personal injury on behalf of its members because such claims are indisputably personal and belong to the

individual Association members who died or suffered personal injuries as a result of the collapse. Because damages for wrongful death and personal injuries unequivocally do not concern "matters of common interest," the Association simply cannot purport to assert claims for same.

Whether the Association possesses standing to assert claims for each individual unit owner's property, as distinguished from injury or death claims, will now turn on whether those property claims have been assigned to the Association. Like claims for personal injury and wrongful death, claims for the loss of the personal property that was inside each condominium unit are personal to each individual property owner and not common to all other unit owners. Similarly, claims for loss of the value of each individual condominium unit itself are also personal to each unit owner. For this reason, the Association ordinarily would not possess standing to assert claims for each individual unit owner's personalty or for the value of each unit owner's condominium unit. However, JMAF acknowledges that the Court recently approved an Allocation Settlement Agreement (the "Agreement") between CTS unit owners and wrongful death claimants that potentially modifies the Association's right to pursue certain property claims. Pursuant to the Agreement, "participating unit owners" will assign all of their property claims, including, without limitation, claims for personal property loss and loss of their condominium units, to the Association. Nevertheless, CTS condominium unit owners are also permitted to opt-out of the Agreement and, if they elect to do so, will not assign their property claims to the Association. As of the date of this Motion, it is unknown how many unit owners, if any, will elect to opt-out of the Agreement because the Court-ordered opt-out period has not yet expired. Although the Association might possess standing to assert property claims assigned to the Association by

participating unit owners under the Agreement, the Association would continue to lack standing to assert the property claims of "opt-out" unit owners.[2]

In sum, the Association cannot pursue individualized claims for wrongful death, personal injury, or unassigned property damages because such claims are personal to individual Association members and exceed the scope of the Association's narrow, legislatively circumscribed authority. *See, e.g. Avila South Condominium Ass'n, Inc. v. Kappa Corp.*, 347 So. 2d 599 (Fla. 1977); *Akoya Condominium Ass'n, Inc. v. 3M Co.*, 2015 WL 12724122 (Fla. Cir. Ct. Aug. 3, 2015), *aff'd per curiam*, 199 So. 3d 527; *2711 Hollywood Beach Condo Ass'n v. TRG Holiday, Ltd.*, 2018 WL 3371781 (Fla. Cir. Ct. 2018).

Finally, even if the Association could establish standing under Section 718.111(3) (which it cannot), it still could not maintain any action for wrongful death. Only a decedent's personal representative has standing to advance such a claim. *See Roughton v. R.J. Reynolds Tobacco Co.*, 129 So. 3d 1145, 1150 (Fla. 1st DCA 2013). "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." *Id*. (citing *Wagner, Vaughan, McLaughlin & Brennan, P.A. v. Kennedy Law Group*, 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) ("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). Indeed, the Association did not dispute in its Response that only personal representatives of decedents are authorized to bring actions to recover damages under Florida's Wrongful Death Act. *See* § 768.20, Fla. Stat.

[2] Moreover, at a minimum, the Association would need to amend its Amended Crossclaim to include allegations relating to any assignment of unit owner property claims to the Association. The Amended Crossclaim is devoid of any such allegations (for the obvious reason that no assignment of property claims has occurred yet) and, thus, the Amended Crossclaim fails to allege a basis for standing to recover damages for any assigned property loss claims.

II. The Association's Previous Arguments in Support of Standing Fail

The Association's Response attempted to refute the standing arguments contained in JMAF's MTD Crossclaim on two grounds. First, the Association sought to ignore its lack of standing by asserting that a motion to dismiss is not a proper method of attacking a complaint if its only defect is improper or insufficiently alleged damages. *See* Association's Response, p. 4. Second, although the Association did not expressly dispute that it is precluded from bringing claims for the benefit of its members for personal injury and/or wrongful death, it argued that it can maintain claims for loss of personal property within a unit under certain circumstances. *Id*. at pp. 5-7. Both arguments are without merit.

Contrary to the Association's prior contentions, JMAF's standing arguments are well-founded and firmly rooted in Fla. Stat. Section 718.111(3) and Fla. R. Civ. P. 1.221. These provisions establish the rules of standing for a condominium association, and standing questions can be properly resolved via a motion to dismiss and/or to strike. Moreover, to the extent that the Association is still attempting to claim Florida law permits a condominium association to bring claims for personal injury and wrongful death, none of the cases previously cited by the Association supports its position. The Association's cases concern only claims for loss of property within specific units under particular circumstances, and do not address personal injury or wrongful death claims.

A. The Court Can Dismiss or Strike Association Damages Claims

Any continued argument by the Association that a motion to dismiss is not properly brought in this instance is simply incorrect. In one sparse paragraph, the Association previously asserted in conclusory fashion that its crossclaims are not rendered vulnerable to a motion to dismiss because JMAF attacks the element of damages. *See* Association's Response, p. 4. The

Association, however, did not address the fundamental issue of standing, and simply ignored the gatekeeper role that it represents.

"Standing to bring [a claim] or participate in a particular legal proceeding often depends on the nature of the interest asserted." *Hayes v. Guardianship of Thompson*, 952 So. 2d 498, 505 (Fla. 2006). In deciding when a condominium association has standing, or the right to sue and be sued, in its name on behalf of all unit owners, the Florida Legislature determined that standing would exist only for "matters of common interest to most or all unit owners, including, but not limited to, the common elements; the roof and structural components of a building or other improvements; mechanical, electrical, and plumbing elements serving an improvement or a building; and representations of the developer pertaining to any existing or proposed commonly used facilities." *See* § 718.111(3), Fla. Stat.

Florida Rule of Civil Procedure 1.221 similarly defines when an association can maintain a claim in its name on behalf of all of the unit owners. "Rules of Civil Procedure 1.221 and 1.222 granting condominium and mobile home owners' associations standing to bring suit on behalf of their members were adopted in response to extensive legislation setting forth the framework for and the powers and duties of condominium and mobile home owners' associations." *Palm Point Property Owners' Ass'n of Charlotte County, Inc. v. Pisarski*, 626 So. 2d 195 (Fla. 1993). Thus, the rights of an association to purse a legal claim in its name have been carefully and narrowly circumscribed.

Standing arguments, including those against a condominium association, are routinely brought via motions to dismiss at the onset of a case. *See, e.g.*, *Avila South Condo Ass'n, Inc. v. Kappa Ass'n, Inc.*, 347 So. 2d 599 (Fla. 1977) (affirming dismissal for association's lack of standing); *Reibel v. Rolling Green Condo A, Inc.*, 311 So. 2d 156 (Fla. 3d DCA 1975) (reversing

trial court's denial of motion to dismiss association's claim because it lacked standing); *Palm Point Property Owners' Ass'n*, 626 So. 2d at 196-97 (affirming dismissal as association lacked standing to pursue the action). Accordingly, any continued contention by the Association that lack of standing cannot properly be decided at this stage of the case is wrong.

B. The Association Misapplied Florida Case Law in Their Previous Attempt to Claim Condominium Associations Can Bring Claims for the Benefit of its Members for Loss of Personal Property within a Unit.

The Association also argued in its previously filed response that it can assert claims and obtain damages for individual members' loss of property within the units at CTS, because the entire building was destroyed and all unit owners suffered some loss. This argument ignores well-established Florida law that the Association's claim must involve common elements or property owned by the Association before the required "common interest" exists for a claim on behalf of its members.

In its Response, the Association relied on *Allied Tube and Conduit Corp. v. Latitude on to River Condo Assn., Inc.*, 306 So. 3d 312 (Fla. 3d DCA 2020), to support its argument. That case, however, actually confirms that an association can only initiate actions for defects to property in which the unit owners have a shared interest. In *Allied Tube*, the defendants appealed a non-final order certifying a class permitting a condominium association to bring claims on behalf of unit owners for a defective fire sprinkler system. *Id.* at 313. The Third District ruled that the trial court did not abuse its discretion in concluding that replacement of the fire sprinkler system throughout the building was a matter of common interest, even though some of the defects were located within individual units. *Id*. at 314. There, each unit owner had a shared interest in the fire sprinkler system because it served the entire building.

By contrast, in the case at bar, the Association is apparently attempting to pursue damages for each individual unit owner's property losses, which naturally differ in type, size, scope, and

value. Individual ownership of various electronics, jewelry, art, furniture, and fixtures cannot be the subject of an action brought by the Association because such loss is unique to each individual unit owner.[3] Only to the extent that any property claims are ultimately assigned to the Association pursuant to the Agreement would the Association possess standing to pursue such claims. However, for the reasons detailed above, the Association would not have standing to pursue unassigned property claims.

The Association also cited to *Seawatch at Marathon Condo. Ass'n. Inc. v. Charlie Toppino & Sons, Inc.*, 610 So. 2d 470 (Fla. 3d DCA 1992), in its response for the proposition that a class action by an association can be maintained for a construction defect "located physically within a unit, rather than in the common elements, if the defect is prevalent throughout the building." Association's Response, p. 5. In *Seawatch*, a condominium association initiated a class action for defects to the structural reinforcing system of the condominium building. Some of the resulting damage from this condominium-wide system (similar to the fire sprinkler system in *Allied Tube*) occurred within the individual units. *Id*. at 471. However, the specific property that was allegedly defective was the concrete and metal decking system, which the Third District described as a matter of common interest. *Id*. at 473.

Again, contrary to the Association's argument, the decision in *Seawatch* is consistent with JMAF's position, because the Association here is seeking recovery not merely for damages to a common element or common property, but rather for property that is highly personal and specific to each individual owner (to the extent again that such claims are not assigned to the Association pursuant to the Agreement). The Association's contention that its claims for the property loss

[3] Moreover, unlike the condominium association in *Allied Tube*, the Association here has made claims for personal injury and wrongful death, which by their nature are unique to every individual and, indeed, not every unit owner died or incurred personal injuries.

incurred by each unit owner are matters of common interest must be rejected, at least for all unassigned property claims.

CONCLUSION

For all of the foregoing reasons, the Court should dismiss or strike all claims for wrongful death, personal injury, and unassigned property claims contained in the Amended Crossclaim because the Association lacks standing to maintain such claims, and the Court should grant such other and further relief as it deems just and proper.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 14, 2022, a true and correct copy of the foregoing *Answer and Affirmative Defenses to Champlain Tower South Condominium Association, Inc.'s Crossclaim* was filed with the Court via the Florida Court's E-Filing Portal, which will provide electronic service of the filing to all counsel of record.

/s/ Seth M. Schimmel
Attorney