



New Jersey Condominium Associations Have Standing to Bring Common Law Fraud and Consumer Fraud Act Claims Against Third-Party Contractors

By Kimberly A. Freimuth

In recent case law handed down by the New Jersey Superior Court on June 7, 2007, in the matter of *Port Liberte Homeowners Association, Inc. v. Sordoni Construction Co.*, 924 A.2d 592 (NJ Super. 2007), the court confirmed that a condominium association is the intended beneficiary of a developer's actions. Any subcontractor entering into a contract or supplying a product for use in the construction of the common elements after the developer registers the condominium with the Department of Community Affairs is on constructive notice that representations made to, and omissions withheld from, the developer will be deemed as if they were made to, or withheld from, the association once it assumes control of the condominium.

In *Port Liberte*, the developer filed copies of the condominium association's Master Deed and Declaration of Covenants with the Department of Community Affairs and with the county clerk's office – which created the condominium association. Several years later, the developer filed for Chapter 11 bankruptcy and relinquished control of the project to the association before 75 percent of the units had been sold. After gaining control, the association discovered defects in the Exterior Insulation Finish System (EIFS) used to construct certain buildings, including common elements, that had caused significant water and structural damage to those buildings. The association brought an action against the manufacturer of the EIFS, asserting common law fraud and consumer fraud. It argued that once the developer filed for bankruptcy protection and turned over control of the condominium, the association immediately stepped "into the shoes" of the developer. The manufacturer, however, argued that the association lacked standing to bring such an action because it did not make or participate in the decision to select the EIFS product, and because the association did not exist at the time the decision was made.

The New Jersey Superior Court held that a condominium association has standing to assert claims for common law fraud and consumer fraud against third-party contractors and materialmen for defects in the construction of the common elements, regardless of whether the association formally existed at the time. The court further noted that to say the association does not have standing because the developer was the party to whom the misrepresentations were made produces an unjust result and is contrary to the legislative scheme permitting a condominium association to institute suit to recover damages to the common elements. Citing a Chancery Court case, the court compared the developer's control of an association to that of a majority shareholder's control of a corporation's board of directors; just as a majority shareholder is a fiduciary for the corporation, so is a developer, by virtue of its power to control the association's board of directors, a fiduciary for

the association. The unique relationship between a condominium association and a developer, which is created by statute, allows an association to step into the developer's shoes when control is passed to the association.

The court held that the manufacturer in this case was on notice that the project was a condominium, and that the association, as the end-users of the EIFS, would ultimately govern the common elements upon completion of construction. Any misrepresentations made to the developer were essentially made to the association. The court held that, because a condominium association is the intended beneficiary of a developer's actions, any subcontractor entering into a contract or supplying a product for use in the construction of the common elements after the developer registers the condominium with the Department of Community Affairs is on constructive notice that representations made to, and omissions withheld from, the developer will be deemed as if they were made to, or withheld from, the association once the association assumes control of the condominium. As such, condominium associations have standing to bring common law and consumer fraud claims against third-party contractors for defects in construction of the condominium's common elements.

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