Court holds that Florida condo purchaser is entitled to void contract because developer failed to establish two separate escrow accounts.
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In *Double AA International Investment Group, Inc., et. al. v. Swire Pacific Holdings, Inc., et. al.,* a federal judge of the United States District Court for the Southern District of Florida held recently that a condominium purchaser was entitled to void its contract because the developer did not establish two separate escrow accounts for the deposit, as required by § 718.202 of the Florida Statutes.

The Court held that the plain meaning of § 718.202 required the developer to have established two separate escrow accounts to hold the purchaser's deposit, since the deposit was in excess of 10% of the purchase price of the unit. In so holding, the Court commented:

> Subsection (1) states that all payments up to 10 percent of the purchase price are to paid "into an escrow account" by the developer. Subsection (2) states that all payments in excess of 10 percent of the purchase price are to be "held in a special escrow account established as provided in subsection (1) . . . ." The use of the modifier "special" in subsection (2) differentiates the account referenced in subsection (2) from the escrow account described in subsection (1), notwithstanding that the "special" account is to be established as provided in subsection (1). That language referring back to subsection (1) does not mean it is the same escrow account, merely that the second, "special" escrow account is to be established in the same manner as the escrow account described in subsection (1). Had the two accounts been referring to the same account, rather than discrete accounts, the legislature could have simply stated that payments in excess of the 10 percent are to be held "in the escrow account already established in subsection (1)."

Section § 718.202(5) of the Florida Statutes provides that

> The failure to comply with the provisions of this section renders the contract voidable by the buyer, and, if voided, all sums deposited or advanced under the contract shall be refunded with interest at the highest rate then being paid on savings accounts, excluding certificates of deposit, by savings and loan associations in the area in which the condominium property is located.

As a result, the Court held that "... given the express language of *section 718.202(5)*, Swire's failure to establish two separate escrow accounts for Plaintiffs' deposit violated the statute, and rendered the Purchase and Sale Agreement voidable by the Plaintiffs."

The Court's decision has widespread implications for Florida condominium developers that did not establish two separate escrow accounts to hold purchaser deposits that exceeded 10% of the unit's purchase price. Under the decision, purchasers would be entitled to void their contracts and seek a full refund of their deposits, plus interest as provided by the statute. For many developers that have already used a portion of purchaser deposit funds for construction purposes, this means digging into their own pockets to pay back purchasers, something that in this market may be extremely difficult.

One way to try and determine whether a condominium deposit was segregated into two separate accounts as required is to simply look at the back of the canceled checks, to see if they were endorsed with the same deposit account number. If that doesn't answer the question, or the canceled checks are no longer available, escrow agents should be able to provide this information.

*Any original italics contained in the quotes above were removed during formatting of this document.

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