

Florida Court holds that condominium association is successor to developer and can recover for construction defects from performance bond surety.

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On October 30, 2009, Florida's First District Court of Appeals held, in *Marseilles Condominium Owners Association, Inc. v. Travelers Casualty and Surety Company of America*, that a condominium association can sue and recover from a performance bond surety for construction defects arising out of construction of the condominium. In that case, the condominium's developer was the named owner/obligee under performance bonds issued by the surety for the project. Ultimately, the contractor failed to perform and the developer hired another contractor to complete the condominium. During construction, while disputes were ongoing between the developer and the original contractor, the association was formed. After turnover of the condominium, the developer settled pending litigation with the contractor and the surety, wherein the developer agreed to cancellation of the bonds. The developer was already on notice that the association was claiming construction defects relating to the condominium. The settlement was entered into without the association's knowledge.

Subsequently, the association filed suit against both the developer and the surety, claiming that the condominium suffered from both incomplete and defective construction. As to the surety, the association sought recovery under the bonds. The surety moved for (and was granted) summary judgment in its favor, claiming that the language of the bonds precluded a claim by anyone other than the developer or its successor. The association appealed.

In reversing the lower Court, the First District held that the association was a successor to the developer under the language of the bonds, and accordingly, had standing to bring an action against the surety under the bonds. Although the bonds did not define the term "successor," the First District pointed out that "[w]hile the Developer controlled the Association at the time of filing the declaration of condominium and amended declaration of condominium, the Association succeeded to control of the condominium pursuant to section 718.301(4), Florida Statutes." The Court also stated that:

The end users of the condominium project are the individual unit owners who own their respective units and share ownership in the common elements of the project. ... The Association is the legal entity responsible for operating and maintaining the common elements owned by the collective unit owners. ... The face of the bonds indicates that they were issued for a condominium project. Thus, when Travelers issued the bonds, it knew that control over and operation and maintenance of the common elements would be vested in the Association.

To make matters worse for the surety, the performance bond, by its terms, expressly incorporated the construction contract between the developer and the contractor. As stated by the Court, this was significant

because the construction contract expressly provides that the warranties in the contract “shall be for the benefit of the Owner, and all unit owners and any owner's association.” Thus, because paragraph 1 of the bonds obligate the surety “for the performance of the Construction Contract” and paragraph 6.1 obligates the surety “for correction of defective work and completion of the Construction Contract,” the surety's obligations included the correction of all breaches of warranties for the benefit of the Association.

The Court further stated that

By virtue of the terms of the construction contract and the nature of a condominium development, Travelers had to know that the Developer would not be the owner when the construction was completed and that the condominium would be transferred to the unit owners and the Association.

In holding that the association here was the successor to the developer, the Court rejected the notion that the term “successor” should always be limited to corporate entities “that have become vested with the rights and duties of another entity through amalgamation, consolidation, or other assumption of interest.”

It is important to note the importance of the Court's ruling in light of the 1985 decision by Florida's Fourth District Court of Appeals in *Beach Point Condominium Ass'n., Inc. v. Beach Point Corp.*, wherein the Fourth District held that a condominium association was not a third-party beneficiary of a payment and performance bond secured by the contractor in favor of the original developer of the condominium. Here, however, the Court disposed of any such apparent conflict by simply stating that “[b]ecause we hold that, under the facts and circumstances of this case, the Association is a successor and may sue on the bonds, it is not necessary to reach the third-party beneficiary issue.”

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