



CONSTRUCTive Talk

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CONSTRUCTION LAW COMMITTEE NEWSLETTER, A COMMITTEE OF THE
FLORIDA BAR REAL PROPERTY, PROBATE & TRUST LAW SECTION



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CONNECTED TOWNHOMES ADMINISTERED BY FLORIDA HOMEOWNERS' ASSOCIATIONS

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For decades after condominiums were first developed in Florida in the 1960s, developers desiring to build and sell connected townhomes (duplexes, triplexes, quadruplexes, etc.) declared the buildings to condominium. Under the condominium regime, typically components of connected townhomes serving more than one unit (structural elements, walls, windows, roofs, and mechanical, electrical, and plumbing elements) were declared as common elements subject to the condominium asso-

ciation's maintenance and repair responsibility.



Condominium development in Florida, of course, carries with it some detriments for developers.

First, broad non-waivable warranties of construction quality ben-

efitting unit purchasers are imposed. Second, condominium developers must jump through substantial hoops in getting documentation approved by the State. Third, condominium association operation during the period of developer control is highly regulated, and the regulations are enforced by a state agency with jurisdiction over condominium developers and developer-controlled condominium associations. Fourth, statutes of limitation on claims do not begin to run until the transition of the condominium association to unit owner control.

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Articles and Submissions:

Here at CONSTRUCTive Talk, we are always looking for timely articles, news and announcements relevant to Construction Law and the Construction Law Committee. If you have an article, an idea for an article, news or other information that you think would be of interest to Construction Law Committee members, please contact: Peter J. Kapsales, Esq. at pkapsales@milnelawgroup.com.



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Deed-restricted Homeowners' Association ("HOA") communities in Florida, on the other hand, are not subject to The Florida Condominium Act. There are no statutory warranties imposed on developers. There is no requirement to submit documentation to the State. There are only limited statutory requirements for HOA operation during developer control, and there is no regulating state agency. Finally, there is no statutory provision extending the accrual of statutes of limitation until turnover of an HOA to lot owner control.

Knowing the complexities and risks of developing condominiums in Florida, a couple of decades back some ingenious developer came up with the idea of developing connected townhomes under an HOA regime. Since then, many communities around Florida have been developed as deed-restricted HOAs containing solely connected townhomes or connected townhomes as part of a mixed single-family home/connected townhome community.

CONNECTED TOWNHOMES UNDER AN HOA SCHEME - THE MAINTENANCE AND REPAIR DILEMMA

With a condominium, common elements are owned by all of the unit owners as joint tenants, with the common elements maintained and repaired by the condominium association. A fellow owner far afield from your building owns as much of the roof on your building as you do. In an HOA with connected townhomes, no portion of the connected townhomes is jointly owned. Each townhome owner owns their townhome in fee simple. Consequently, with a fourplex, even though the townhomes are physically connected, there are only four owners each owning solely their townhome, which includes interior and exterior components (structural elements, walls, windows, roofs, and mechanical, electrical, and plumbing elements). The owner of a townhome across the street from you owns no part of your connected townhome.

The recorded Covenants, Conditions, and Restrictions ("CCRs") of an HOA community *may* provide the HOA some degree of maintenance and repair responsibility over its connected townhomes. There is no statutory requirement, however, that the CCRs for an HOA community require the HOA to have any maintenance and repair responsibility for the connected townhomes. What has occurred as a result is that developer lawyers have drafted HOA documents that are across the board as far as HOA maintenance and repair responsibility over connected townhomes, from no responsibility, to some responsibility, to extensive responsibility.

Where the CCRs provide little or no, or simply incomplete, HOA maintenance and repair responsibility for the common elements of connected townhomes, the connected owners are left to fend for themselves. When one side of a duplex is settling because of a foundation deficiency or sinkhole, which may impact both units, there is no mechanism for sharing the repair decisions or expense, other than seeking court relief, if the duplex owners cannot agree. What if second floor or roof framing deficiencies in a fourplex are causing roof issues or exterior stucco cracking. You likely will not be able to fix the problem with each owner addressing just the framing of their particular townhome. How are they

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even going to agree on how the cost of having an engineer analyze the problem is to be split? What if there is disagreement on how to repair a problem that affects more than one townhome?

INVESTIGATING DEFECTS AND DEFICIENCIES

Under HOA CCRs, HOAs are restricted to spending HOA funds strictly on Association responsibilities. If an HOA's maintenance and repair responsibility per the CCRs is limited to the painting of the exterior walls of connected townhomes, and the stucco is cracking, arguably the stucco cracking is not within the HOA's maintenance and repair purview, and thus HOA funds are not appropriately spent on investigating the stucco cracking. The same limitation would apply to foundation and framing deficiencies, common piping and mechanical component deficiencies, termite infestation, and any manner of serious construction and design defects that could affect connected townhomes.

With the HOA being restricted in its ability to investigate common defects and deficiencies, the owners of the connected townhomes are again left to fend for themselves as far as investigating the cause of the building issues, a situation ripe for confusion and conflict.

PURSUING RESPONSIBLE PARTIES FOR DEFECTS AND DEFICIENCIES

HOA standing to pursue responsible parties for defects and deficiencies in connected townhomes is governed by the following rule of procedure adopted by The Florida Supreme Court:

Rule 1.221 - HOMEOWNERS' ASSOCIATIONS AND CONDOMINIUM ASSOCIATIONS

A homeowners' . . . association, after control of such association, is obtained by homeowners. . . other than the developer, may institute, maintain, settle, or appeal actions or hearings in its name on behalf of all association members concerning matters of common interest to the members, including, but not limited to :

. . . **(2)** the roof or structural components of a building, or other improvements (in the case of homeowners' associations, *being specifically limited to those improvements for which the association is responsible*); **(3)** mechanical, electrical, or plumbing elements serving a property or an improvement or building (in the case of homeowners' associations, *being specifically limited to those elements for which the association is responsible*) . . .

Simply put, if the CCRs don't provide for HOA responsibility for maintaining a component of connected townhomes, the HOA cannot pursue responsible parties for the cost of correcting the defects and deficiencies in such component.

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The stucco can be cracking on the second floor of all the connected townhomes in the community caused by framing deficiencies, but unless the HOA has repair responsibility for the framing and stucco, it lacks standing to pursue responsible parties for the cost of repair.

Without HOA standing to pursue responsible parties, townhome owners are again left to fend for themselves. Could six owners of a six-plex townhome building join together in a suit to tackle common defects in their connected townhomes? Possibly, but how would they agree on sharing the cost of pursuit? Then, if a recovery is realized, how would they agree on undertaking necessary repairs, especially if the cost of the repair was greater than the net recovery?

ECONOMY OF SCALE IN UNDERTAKING MAINTENANCE AND REPAIRS

Our firm represented a duplex community with identical shingle roofs. In the first decent windstorm after construction was completed, several shingles were dislodged or blew off across the community. Under the CCRs, the HOA had no maintenance and repair responsibility for the roofs. The Board resisted the idea of proposing an amendment to the CCRs to provide HOA responsibility for duplex roof repairs or replacement.

Without the amendment of the CCRs, each pair of duplex owners was on their own as far as contracting with roofers to replace their defective roofs. It is no mystery within the roofing field that if a roofing contractor bids on the replacement of a single duplex roof in a community that the cost of those reroofs would be significantly greater per duplex than if the same roofing contractor was asked to bid the reroof of 150 duplexes.

An HOA has significantly greater buying power than owners operating alone. Furthermore, the HOA, with professional management, supported by an engineer and construction lawyer, is in a much better position to assure that the work is done correctly and on time, with manufacturer's warranties being delivered at the end of the job.

PROTECTING THE AESTHETICS OF THE COMMUNITY

With the HOA administering repairs to the exterior of connected townhomes, the HOA is in the position to protect the aesthetics of the community as originally conceived. Retaining one repair contractor to conduct repairs on connected townhomes across the community allows for aesthetics to be preserved. With owners hiring their own contractors to undertake stucco repairs, window replacement, roof repairs and replacement, etc., it would be very difficult over the long term to preserve the aesthetics of the community, with no doubt a concomitant negative impact on townhome values.

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SAFETY CONCERNS

With contractors hired by the HOA to undertake exterior repairs and maintenance on connected townhomes, there is a much better opportunity to protect persons and property from damage resulting from repair efforts than if individual townhome owners are inviting contractors to the community on a piecemeal basis. This is especially true where the setback between sets of connected townhomes is very tight.

THE SOLUTION

Amend the CCRs in your connected townhome community to expand the HOA's maintenance and repair responsibility to cover all of the townhome exteriors, and the common structural, mechanical, plumbing, and electrical elements of the connected townhomes. That will cure the maintenance and repair dilemma, provide economy of scale in undertaking investigation and repair, allow for the efficient and effective pursuit of responsible parties, preserve the aesthetics of the community, protect property values, and reduce risk.

What if only a portion of the community is comprised of connected townhomes? Wouldn't the amendment unfairly burden the owners of single-family homes? The solution is to amend the documents so that only the owners of the connected townhomes are burdened by the assessments necessary to repair and maintain the townhomes and to pursue relief for any defects and deficiencies therein. But what if the HOA already had maintenance and repair obligations for the roofs? Should only the expansion of the maintenance and repair responsibility be borne by the townhome owners, or all of it?

The insurance requirements in the CCRs would likely also need to be amended so that common components of the connected townhomes are insured under the Association's property and liability coverages.

What about the expansion of an HOA's maintenance and repair responsibility to cover the exterior walls, roofs, and structural components of the single-family homes in the community? If the homes are identical in configuration and construction, this could make sense for all the reasons expressed in this article. If there is a common defect and deficiency affecting all the homes, amending the documents to expand HOA maintenance and repair responsibility could make for efficient claim pursuit.

CONCLUSION

There were problems easily anticipatable in Florida when developers chose for their convenience to develop connected townhomes and make them all or part of a deed-restricted HOA community rather than a condominium. There has been no statutory solution proposed to correct the anomalies created. Document amendment, however, can overcome the bulk of the ills. This could even be considered for single-family homes where the homes are consistent in configuration and construction. Consult your general counsel to get the amendments customized properly for your community. Beware of time constraints for claim pursuit which may dictate expedited action on amendment passage.



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Case Law Update

JD's Asphalt Eng'g Corp. v. Arch Ins. Co., 2021 WL 4558327, at *1 (Fla. 3d DCA Oct. 6, 2021)

Arch Insurance Company ("Arch") issued payment and performance bond to general contractor for Miami Dade School District project. JD's Asphalt ("JD") entered into a subcontract with the general contractor and performed work on the project. JD claimed it was owed \$11,606.63 in unpaid retainage and \$19,890.00 in unpaid change orders. The subcontract provided all change orders had to be in writing and signed. The trial court granted summary judgment in Arch's favor on the change order claim because the purported change orders were not signed. The trial court conducted a two day bench trial on the retainage claim and determined the claim was barred by the one (1) year statute of limitation contained in Section 255.05(10), Florida Statutes. The appellate court affirmed summary judgment to Arch. on the change order claim and noted the change orders that JD was asserting it was entitled to payment on were unsigned and unauthorized. The appellate court also affirmed the trial court's decision that the retainage claim was barred by the statute of limitations because the findings of fact were supported by competent substantial evidence. At the bench trial, the court determined (1) JD's Asphalt completed performance on August 11, 2015; (2) the architect certified the project to be substantially complete on August 22, 2015; and (3) JD's Asphalt filed its lawsuit on July 19, 2017. The appellate court echoed the trial court's determination that "if JD's Asphalt performed any labor during a July-October 2016 time period, it was "de minimus" punch list work and not the type of labor that would extend the one-year limitations period."

Cano, Inc. v. Judet, 4D20-1509, 2021 WL 4301625, at *1 (Fla. 4th DCA Sept. 22, 2021)

Judet ("Owner") hired Cano Inc. ("Contractor") to perform home repairs for a fixed price of \$300,000.00. The Contractor started work and was paid approximately one third (1/3) of the amount due. The Owner terminated Contractor after it determined Contractor did not obtain required building permits. The Contractor recorded a lien, filed suit to foreclose the lien, and asserted claims for breach of contract and unjust enrichment. The Owner filed a counterclaim for breach of contract and sought to recover the money he paid to Contractor in excess of the value of the work performed. The Parties stipulated that no permits were obtained for plumbing or electrical work. The Parties' experts opined on the reasonable value of the services Contractor already performed. The Trial judge determined the claim of lien was invalid and found in favor of Owner. The Trial judge also determined Owner's expert was more knowledgeable. The trial court entered judgment for Owner to place him in the position immediately prior to the contract by returning the payments he made to Contractor less the quantum meruit value of Contractor's work. On appeal, Contractor contended the court used the wrong measure of damages. The appellate court recognized: (1) where there is a total breach of the contract, an injured party may elect to treat the contract as void and seek damages that will restore him to the position that he was in prior to entering into the contract; or (2) affirm the contract and seek benefit of the bargain damages, or damages that would place the party in the position which it would have been in had the contract been completely performed, i.e. the reasonable cost of completion. The appellate court determined the trial court did not err in its measure of damages because the Owner terminated and therefore treated the Contractor's breach as a total breach and correctly sought the difference between the reasonable value of the work and the amount already paid.



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Case Law Update

Sg 2901, LLC v. Complimenti, Inc., 2021 WL 2672295 (Fla. 3d DCA June 30, 2021)

Held the interior designer who provided owner's representative services, to include "gathering" of several licensed professionals (i.e., General Contractor, Architect, HVAC contractor) for the benefit of the owner did not engage in unlicensed contracting. While the owner directed these professions to deal directly with the interior designer during the project, owner "hired" these entities, had "last word" with regard to their scope, and provided authorization to the interior designer for "everything" at the project. The interior designer's contract and lien therefore were enforceable.

Jeremy Stewart Constr., Inc. v. Matthews, 2021 WL 2978919 (Fla. 1st DCA July 15, 2021)

Homeowner called expert at trial to testify as to the amount of damages associated with water intrusion and moisture accumulation associated with builder breach of contract and warranty. The expert testified that "at the time of breach" the home could have been repaired by one (1) of two (2) methods, but failed to testify as to the amount for either method. The expert was then shown photos of the condition of the home at trial, and testified the home could no longer be repaired, and needed to be rebuilt. The trial court awarded damages based on the cost to rebuild. The First District Court of Appeal reversed and remanded on appeal, finding "damages are assessed at the time of breach, rather than the time of trial. (citing Grossman Holdings, Ltd. v. Hourihan, 414 So. 2d 1037, 1040 (Fla. 1982)).

Leder v. Imburgia Constr. Servs., Inc., 2021 WL 3177338 (Fla. 3d DCA July 28, 2021)

Held Contractor who failed to invoke pre-suit dispute resolution procedures in agreement with Owner waived its right to arbitrate. The Owner-Contractor Agreement required claims be submitted to an initial decision maker, followed by mandatory mediation, and then to binding arbitration. The Owner disputed Contractor's proposed change order and contractor allegedly abandoned the project without availing itself of the pre-suit claims procedure. The Owner filed suit and Contractor moved to dismiss based upon the parties' agreement to arbitrate. The Court recognized that a waiver "may be predicated on both pre and post-suit actions." The Court also indicated the filing of suit, pleading affirmative defenses without raising the right to arbitrate, or moving for summary judgment can result in a waiver. The Court found the Contractor's pre-suit conduct, i.e., failing to comply with the parties' contractual pre-suit resolution procedure, constituted a waiver of its right to arbitrate.

SUBMISSIONS

Do you have an article, case update, or topic you would like to see in **CONSTRUCTiveTalk**? Submit your article, note, or idea to:

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Editor's Corner:



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Construction Law Committee Meetings

Join us for our upcoming Construction Law Committee meetings. Benefits of the meetings include one (1) hour of CLE each meeting, a timely update on developing case law, statutes and administrative rulings, and informative reports from our subcommittees.

The CLC meetings occur the second Monday of every month beginning promptly at 11:30 a.m. EST. **The meetings are conducted via Zoom, which is now our standard meeting format. If you wish to attend by Zoom video, the link, meeting ID and password are below. If you do not, there is a toll-free conference call number below the link. You may call that number to hear the audio only. We will not be using the traditional conference call-in number.**

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<https://carltonfields.zoom.us/j/94765808241?pwd=Nnp6UTBxMnE0L2RMU1dXbWlxVjFRUT09>

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Password: RPPTLCLC

Toll Free:

888 788 0099 US Toll-free

877 853 5247 US Toll-free

Meeting ID: 947 6580 8241

Password: 79471039

Info & Upcoming Events

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It's as easy as 1, 2, 3:

1. Become a member of the Florida Bar.

2. Join the Real Property Probate and Trust Law Section.

3. Email Reese Henderson at reese.henderson@gray-robinson.com advising you would like to join the CLC and provide your contact information.

Subcommittee Practice-Get On Board

Interested in getting involved? Contact one of the persons listed below.

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