CARLTON FIELDS

Florida Supreme Court: Separate Escrow Accounts Not Required for Condominium Deposits

January 24, 2014

The Florida Supreme Court today issued its opinion in *North Carillon, LLC v. CRC 603, LLC*, No. SC12-75 (January 23, 2014), reversing the Third DCA decision in the case (*CRC 603, LLC v. North Carillon, LLC*, 77 So.3d 655 (Fla. 3d DCA 2011)) and negating the effect of *Double AA Int'l Inv. Grp. V. Swire Pac. Holdings, Inc.*, 674 F.Supp. 2d 1344 (S.D. Fla. 2009). As a result, the Supreme Court decision eliminates a claim for consumer rescission of a condominium unit purchase contract. This opinion is a significant victory for developers that contracted before July 1, 2010, to receive a deposit of more than 10% of the unit's purchase price and planned to use the excess in the construction costs of the project. The Florida Condominium Act (Chapter 718, F.S.) provides that all consumer deposits for the purchase of a condominium unit that has not been substantially completed must be placed into an escrow account (§718.202). The Southern District decision held that, as the statute was then written, deposits up to 10% of the purchase price must be held in one escrow account, to be held until closing or termination of the contract (§718.202(1)), and that deposits in excess of 10% for use by the developer in construction of the project must be held in a completely separate escrow account (§718.202(2)). Failure to create two separate accounts made the contract voidable by the purchaser (§718.202(5)) and imposed criminal liability on the developer (§718.202(7)). Since many developers had not understood this separation of the escrows to be required, there followed a rash of rescission claims by purchasers with buyer's remorse. The Florida legislature remedied this problem by amending the Condominium Act in 2010 to allow "one or more escrow accounts." It also made the amendment retroactive. Third DCA, reversing the trial court, held that separate escrow accounts were required when the case arose in 2006, and that the 2010 amendment could not be applied to existing contracts because that would impair the vested rights of the purchasers. In reversing the Third DCA, the Florida Supreme Court determined that the 2006 version of §718.202 was inherently ambiguous. It concluded that, since the provision imposed criminal liability, the "rule of lenity" mandates that the ambiguity be resolved in favor of the developer. The "rule of lenity" states that a statute providing the basis for a criminal prosecution cannot legitimately be "susceptible of differing constructions." The Court applied the rule even though this was a civil, not a

criminal case, because the issue arises from a single statute with both civil and criminal liability. Since the Court decided that the 2006 version of §718.202 was not violated when the developer placed all deposits into a single escrow account, it did not need to decide officially whether the 2010 amendment could be given retroactive effect. However, the Court clearly indicated that, had that been an issue, the third DCA decision voiding retroactivity would have been correct, dealing one more blow to the Legislature's occasional attempt to change a statute's effect by calling its amendment a "clarification" of existing law.

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