



Appellate Ruling Reversing Discharge of Contractor's Liens Protects Lienors



By Michael J. Kurzman

A recent construction lien claim and appeal that we handled on behalf of Miami-based CDC Builders, Inc. against developers Riviera Almeria LLC, Riviera Biltmore LLC and Riviera Sevilla LLC led to a reversal of the lower court's decision that would have discharged CDC's construction liens over two stalled Coral Gables custom home projects. The appellate court's ruling in the case overruled the trial court's interpretation and application of Chapter 713 of the Florida Statutes wherein the trial court incorrectly discharged and invalidated CDC's construction liens against the developers due to the trial court's finding that the contractor's interim payment requests were inaccurate.

The appellate ruling, which has significant implications for many other contractor lawsuits and construction liens, was the subject of a report in the Thursday, December 9, edition of the Daily Business Review. The article quoted 3rd District Court of Appeal Chief Judge Juan Ramirez who wrote that the Miami-Dade Circuit Court's ruling in this case would have "a deleterious impact . . . on

the construction industry as a whole. If we agree with the trial court, the purpose of liens would be undercut. Liens could be subject to attack for inaccuracies or simple mathematical errors. That was not what the Florida Legislature intended when it enacted the construction lien law."



The article further explains: "Miami-Dade Circuit Judge Gill Freeman granted the developer's motion for partial summary judgment and discharged the lien, ruling that CDC had wrongly filed false interim payment applications because it had withheld subcontractor money.

The 3rd DCA panel ruled that Freeman should

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CONSTRUCTION LAW

The construction law attorneys of Siegfried, Rivera, Lerner, De La Torre & Sobel, P.A., are nationally recognized as some of the leading providers of legal counsel and representation in the construction industry. We represent a diverse client base at all levels of the construction process, including owners and developers, design professionals, general contractors, construction managers, specialty trade contractors and material suppliers.

The firm's construction dispute lawyers bring years of experience to every type of project, both private and governmental, from the smallest residential or retail renovation to the largest mega-project, including airports, courthouses, stadiums, theme parks and urban high rises.

Our lawyers focusing on construction matters provide strategic legal counsel on matters involving project development and execution as well as dispute avoidance and resolution, including representation from bidding, contract negotiation, insurance claims, project support and claim presentation, through trial, arbitration or appeal.

Appellate Court Rules Lenders Are Required to Notify Contractor of Decision to Terminate Future Payments

By B. Michael Clark, Jr.



A recent decision by the First District Court of Appeals represents a potentially significant boon for the scores of contractors and other lienors that turn to the courts to seek payment for their work under the terms of a construction contract. In the case of *Whitehead v. Tyndall Federal Credit Union* the appellate court reversed the lower court's decision and found that Florida law required the credit union to notify the contractor of its decision to stop advancing funds while the contractor continued work on a construction project.

In *Whitehead*, the contractor (*Whitehead*) entered into a contract with a developer for the construction of a home. Disputes arose between the contractor and the developer. Consequently, the developer advised the contractor that no further draws would be disbursed to the contractor. However, having not been formally terminated, the contractor continued to work.

The contractor was terminated approximately one month after being advised by the developer that it would not receive further disbursement. It was not compensated for the work it performed between informal and formal termination, and the bank did not disburse any money for its benefit. Approximately one month after termination, the developer hired a completion contractor. Upon the completion contractor completing its work, the bank disbursed the remaining construction loan funds to the completion contractor.

In *Whitehead's* lawsuit seeking payment for its work on the project, it named the credit union as a party defendant, alleging violation of Fla. Stat. 713.3471 based upon the lender's failure to notify the company of its decision to

cease disbursing funds. In the case, the lower court entered final summary judgment in favor of the lender, finding that the credit union had not decided to discontinue disbursement of the construction loan, as it eventually disbursed the entire



construction loan when it issued payments to the contractor that was hired to complete the project. The appellate court reversed the ruling and stated in its judgment that Florida statutes required that once a construction lender "knows that it will stop advancing funds to a contractor or any other lienor, the lender has a duty to notify the contractor of its decision." In reaching its decision, the court concluded that "the obvious purpose of [Fla. Stat. 713.3471] is to prevent exactly what occurred here: the unjust termination of payments to a contractor who continues work, without any notice from the lender that payments will be terminated."

The construction law attorneys at our firm and throughout the state will certainly reference this decision in other cases involving lenders which terminated payments to contractors and other lienors without advance notice. We will continue to write about court decisions such as this that have important implications for the construction industry in Florida, and we encourage industry members to subscribe to our blog at www.floridaconstruction-lawyerblog.com in order to automatically receive all of our future posts. ■

Recent Court Decision Makes Developers Accountable for Construction Defects with Roadways, Drainage, Pipes

By Nicholas D. Siegfried



A recent decision by a Florida appellate court in the case of Lakeview Reserve Homeowners v. Maronda Homes, Inc. has far-reaching implications for homeowners associations in construction defect disputes with developers. The Fifth District Court of Appeal has broadened the implied warranty of fitness and merchantability granted to purchasers of new homes to include structures in common areas of a subdivision that immediately support the residence in the form of essential services. This case will further enable community association and construction defect lawyers in Florida to protect consumers who rely on the expertise of the developer for the proper construction of their new home.

The court found that a homeowners association does have a claim for breach of common law implied warranties of fitness and merchantability, which is also often referred to as a warranty of habitability, against a builder/developer for defects in roadways, drainage systems, retention ponds, and underground pipes. The court ruled that the unit owners in the community are entitled to consumer protections under the law. It wrote in its ruling that the defects in the case involve "... complex site improvements, some of which are underground. These improvements were put in so that the builder/developer could market move-in ready homes in a completed subdivision. The planning, permitting, site work and construction required to build these improvements requires expertise far beyond the expertise of the average homebuyer," who must therefore rely on expertise of

the builder/developer. The ruling also notes that: "The builder/developer is in a superior position to ferret out and discover defects in the construction of the improvements and to have the defects timely cured during construction. Upon completion of the construction, the defects are not readily discernable to the average homebuyer, even with diligent inspection."

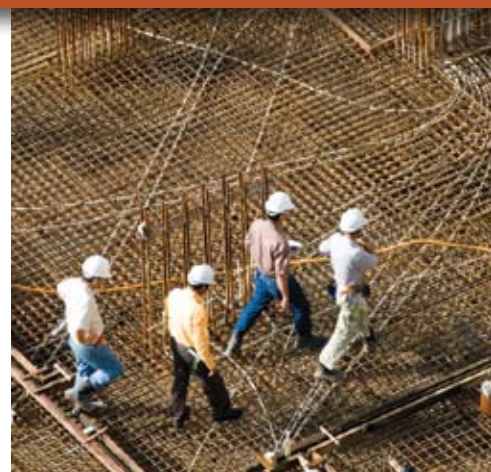
In its conclusion, the court disagreed with the Fourth District Court of Appeal's ruling in Port Sewall Harbor & Tennis Club Owners Association, Inc. v. First Federal Savings and Loan Association of Martin County, which held that the homeowners association could not recover under a theory of breach of implied warranties of fitness and mer-



chantability for defects in the construction of certain roads and drainage areas in the community. Accordingly, until the Florida Supreme Court resolves the conflict or the Florida Legislature grants warranties from the developer to purchasers of new homes, the extent of the implied warranty of habitability will depend on where the residence is located in Florida.

This is a very important ruling for homebuyers

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CONSTRUCTION LAW

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Basic Services

The corporate and construction law practice groups at Siegfried, Rivera, Lerner, De La Torre & Sobel, P.A., provide a full range of construction related services. Our construction attorneys are led by Fellows in the American College of Construction Lawyers, and we routinely offer counsel and representation involving:

- Preparation of Challenge of Public Bids Negotiation and Drafting of Construction Contracts and Related Bonds
- Project Support including Contract and Statutory Compliance Claim Recognition, Preparation, Presentation and Defense (Defect, Delay, Equitable Adjustment)
- Construction Lien and Bond Claim Perfection, Foreclosure and Defense
- Alternative Dispute Resolution
- Litigation, Arbitration and Appeal in all Tribunals

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Appellate Ruling Reversing Discharge

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not have discharged the lien because CDC was adhering to its contract with Riviera.

'Not only was CDC Builders allowed to withhold a retainage, it was contractually required to do so,' Ramirez wrote.

The opinion also pointed to state law, which 'does not prevent any person from withholding any payment, or any part of a payment . . . if there is a bona fide dispute regarding the amount due.'

The court added that 'to agree with the trial court's application of the statute would mean that otherwise valid liens would violate the lien law.'

We were very pleased to have helped our client prevail in this appeal, and we believe the reversal of the trial court's decision in this case is going to have a positive impact for many of the contractors which have filed construction lien claims in the state. ■

Developers Accountable

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and homeowners associations in Florida, as the lower court's decision in the case could have impeded many lawsuits by associations and unit owners against developers and builders involving these hidden and latent defects in the common areas of a community. To subscribe to our blog in order to receive information from us on important cases and decisions for the construction industry, visit www.floridaconstructionlawyerblog.com. ■

Firm News

Firm Secures \$9 Million Settlement in Condominium Construction Defect Lawsuit

Construction defect lawsuits against developers and their contractors can become very complicated and prolonged, and our recent \$9 million settlement on behalf of the condominium association for the Continuum on South Beach illustrates the complex nature of this litigation for attorneys who focus on construction law.

The Continuum settlement came after more than six years of litigation, and the case had grown so large and complex that if first caught the attention of the editors of the **dbr** Daily Business Review when they covered it in lengthy report entitled "South Florida Cases Show How Defect Lawsuits Multiply" in April of 2009.

The case took another 18 months to reach its conclusion, and when it did the Daily Business Review decided to share the details with its readers in a report on Tuesday, Nov. 30, which read:

"A messy, 6-year-old battle over construc-

tion defects at a Miami Beach condo tower is drawing to a pricey conclusion.

The insurer for the developer and contractors of the Continuum on South Beach and the condo association of the 314-unit South Tower have reached a \$9 million settlement. The deal is to be submitted to Miami-Dade Circuit Judge Gill Freeman by Wednesday. Once she signs off on the settlement, the costly repairs can begin, ending the dispute that dates to 2004.

The Continuum on South Beach and the South Tower Condominium Association sued developer South Beach Ocean Parcel, managed by Ian Bruce Eichner; the architecture firm Fullerton Diaz Architects; and several subcontractors.

The suit claimed design and construction defects led to leaky windows that damaged stucco, drywall and flooring in portions of the 40-story tower. The condo association also accused Eichner and the developer of misrepresenting the project's amenities, a violation of the state Deceptive and Unfair

Trade Practices Act.

The trial was scheduled to begin on Nov. 8, but a tentative settlement in September put that on hold."

This settlement could not have been achieved without the efforts of the firm's Joseph A. Miles and Steven M. Siegfried as well as the contributions of co-counsel David B. Haber.

Because these types of cases become very complex and time consuming as developers file their own subsequent lawsuits against subcontractors, it is imperative to work exclusively with lawyers who focus on construction defect lawsuits. We have represented hundreds of property owners and community associations in construction defect claims since our inception in 1977, and our experience and capabilities enables us to achieve favorable outcomes. ■



Joseph A. Miles



Steven M. Siegfried