6 April 2017

Practice Group:

Construction and Engineering

Insurance Policy Did Not Prevent Association Recovery from Subcontractors for Defective Work

By Justin L. Weisberg

On February 17, the First District Appellate Court issued an opinion regarding the Implied Warranty of Habitability in the case of *Sienna Court Condominium Association v. Champion Aluminum Court et al.* The opinion involved three separate appeals: the first relating to claims by Sienna Court Condominium Association ("Sienna") against an insolvent developer and an insolvent general contractor; the second involving the dismissal of Sienna's claims against the architect, the engineers, and suppliers; and the third involving the dismissal of the general contractor's claims against its subcontractors.

In the first appeal, the subcontractors were unsuccessful in attempting to dismiss Sienna's claims against them, but were able to get the court to certify for appeal the questions presented in their motions to dismiss. Pursuant to the prior decision of *Minton v. Richards Group,* a condominium association could sue subcontractors directly under the implied warranty of habitability, even though the condominium association had no direct contract with the subcontractors, if the condominium association had no recourse against the developer and general contractor. As discussed by the appellate courts in *Minton v. Richards Group* and subsequent cases, such as *Pratt v. Platt,* if a developer and general contractor were dissolved and insolvent, there was no recourse. In *Sienna Court v. Champion,* the developer and general contractor were dissolved and liquidated in a bankruptcy proceeding, but the subcontractors argued that since there was liability insurance, there was recourse, and Sienna should not have a claim against the subcontractors. The appellate court consistently determined that the key factor was insolvency and further noted that the existence of insurance did not defeat Sienna's claims where the developer and general contractor were insolvent.

The appellate court did determine, however, that a condominium association could not bring claims for breach of the implied warranty of habitability against the architects and engineers following its reasoning in an earlier case, *Board of Managers v. Park Point Condominium Association.* The appellate court also determined that an implied warranty claim could not be brought against suppliers. The appellate court did not address arguments relative to the implied warranty of merchantability and whether the Condominium Property Act tolling provision[1] apples to implied warranty of merchantability claims. Given the court's ruling relative to suppliers, developers might consider requiring warranties to run from the suppliers to the condominium association to preserve rights under the implied warranty of merchantability and to avoid any inconsistent limitations issues.

Finally, the court determined that a dissolved contractor had no capacity to sue its subcontractors and also found that the dismissal of all of the contractor's claims against the counter-defendants was warranted due to its lack of legal capacity. Consequently, the insurance carriers of the general contractor did not have the ability to rely upon the rights of

[1] 765 ILCS 605/18.2(f)

their insured to seek recovery from the contractor's subcontractors and suppliers, based upon the appellate court's determination that the dissolved contractor lacked the legal capacity to sue.

Authors:

Justin L. Weisberg
justin.weisberg@klgates.com
+1.312.807.4253