

Real Estate Title Insurance & Construction Law

Avoiding Double Damages and Attorney Fees Under PREDFDA

The Planned Real Estate Development Full Disclosure Act allows these remedies for individual unit owners, not associations

By Patrick J. Perrone and Loly G. Tor

According to the Foundation for Community Association Research, as of 2012, there were approximately 6,400 community associations in New Jersey (ranking 16th in the United States), and the popularity of common-interest ownership, through condominiums, cooperatives and planned real estate developments continues to grow. The condominium market in New Jersey is showing signs of bouncing back after the recession, with developers reviving projects and buyers showing increased interest. But, with every new condominium or community, it seems that litigation is inevitable.

In every planned development, the

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developer, or sponsor, of the development maintains control of the association until 75 percent of the units are sold. Once the 75 percent threshold is met, control of the association then transitions to the unit owners. Transition, rather than just the transfer of control, has become a time of negotiation between the association and the developer about possible construction defects in the common elements and other issues that may affect the association. When negotiations fail, litigation often follows. In addition to contract, warranty and tort claims, associations assert claims against developers (and others) for violation of the Planned Real Estate Development Full Disclosure Act (PREDFDA). The associations use the threat of double damages and attorney fees available under PREDFDA as a negotiation tool, but they fail to recognize that only the individual unit owners — and not associations — can recover such damages under PREDFDA.

PREDFDA regulates developments where unit owners share common elements or facilities. This includes condominiums and cooperative developments, as well as other developments consisting of 100 or more units. It requires a developer to file an application for registration with the Department of Community Affairs (DCA). With the application, a developer must provide a copy of the proposed public offering statement (POS), which allows a buyer to make an informed decision about his or her purchase. The POS, which must be provided to each purchaser, must “disclose fully and accurately the characteristics of the development and the lots, parcels, units, or interests therein offered, and shall make known to prospective purchasers all unusual or material circumstances or features affecting the development.” N.J.S.A. 45:22A-28.

PREDFDA claims are often premised on allegations that the developer misrepresented the nature of the development in the POS by, for example, failing to disclose construction defects. Misrepresentations in the POS can subject a developer to liability. A developer selling property subject to PREDFDA that makes “an untrue statement of material fact or omits a material fact from any application for registration, or amendment thereto, or from any public offering statement, or who makes a misleading statement with regard to such disposi-

tion” is subject to liability under the statute and “shall be liable to the purchaser for double damages suffered, and court costs expended, including reasonable attorney’s fees.” N.J.S.A. 45:22A-37a.

The key point that condominium owners and homeowners associations overlook when asserting PREDFDA claims is that a developer that violates the provisions of PREDFDA “shall be liable to the purchaser” for double damages and attorney fees. An association, by definition, is not a “purchaser.” PREDFDA defines “purchaser” as “any person or persons who acquires a legal or equitable interest in a unit, lot, or parcel in a planned real estate development, and shall be deemed to include a prospective purchaser or owner.” N.J.S.A. 45:22A-23(d). However, PREDFDA defines “association” separately as “an association for the management of common elements and facilities, organized pursuant to section 1 of P.L.1993, c.30 (C.45:22A-43).” N.J.S.A. 45:22A-23(n). The legislature also used the term “association” in several places throughout PREDFDA but excluded it in the one section that creates a cause of action: N.J.S.A. 45:22A-37.

The 1993 amendments to PREDFDA also support this reading of the statute. The legislature amended PREDFDA in 1993

to acknowledge that an association has the authority to assert tort claims on behalf of unit owners with respect to common elements by adding the following language to the statute: “The association may assert tort claims concerning the common elements and facilities of the development as if the claims were asserted directly by the unit owners individually.” N.J.S.A. 45:22A-44(d). The amendment also added the definition of “association” to the statute. N.J.S.A. 45:22A-23(n). Obviously, the legislature was aware that if it intended for a condominium association to have the ability to sue, it needed to explicitly provide for the right to sue by statute. If it intended for an association to have the right to assert PREDFDA claims pursuant to N.J.S.A. 45:22A-37a and recover double damages and attorney fees, the legislature would have included such language in the statute. It did not do so. (An association’s ability to assert claims for PREDFDA violations under different sections of the statute, which do not permit the recovery of double damages or attorney fees, is not addressed in this article.)

Although there are no published cases making this point, the Appellate Division in *Coastal Group v. Planned Real Estate Development Section, Department of Community Affairs*, 267 N.J. Super. 49, 57

(App. Div. 1993), recognized that N.J.S.A. 45:22A-37 “deals with a purchaser’s private remedy against a developer.” There are also unpublished New Jersey trial court rulings addressing the issue. For example, Judge Hector Velazquez, of the New Jersey Superior Court, Hudson County, considered this issue in *South Constitution Condominium Owners’ Association v. South Constitution Associates*, Docket No. HUD-L-2719-08, and held that the plaintiff condominium association did not have standing to assert PREDFDA claims against the developer. Judge Velazquez reasoned that the “plain and clear language” of PREDFDA permits only the unit owners to assert claims. Judge Velazquez further held that reading PREDFDA to allow a condominium association to assert claims “would render inoperable the canon of statutory construction that requires the statute to be interpreted only according to the plain meaning of its clear and unambiguous language without resort to extrinsic aid.”

It is unlikely that associations will stop asserting claims for violations of PREDFDA with the goal of seeking double damages and recouping their attorney fees. However, developers can take the wind out of the associations’ sails by moving to dismiss the claims. ■