

**IN THE COURT OF APPEALS
STATE OF GEORGIA**

**THUNDERBOLT HARBOUR
PHASE II CONDOMINIUM
ASSOCIATION, INC.,**

Appellant,

v.

MICHAEL F. RYAN,

Appellee.

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Court of Appeals

Case No. A13A1827

BRIEF ON APPEAL

**THUNDERBOLT HARBOUR PHASE II CONDOMINIUM ASSO-
CIATION, INC.** appeals from the State Court of Chatham County's February 25,
2013 Order, which granted summary judgment to the defendant/appellee
MICHAEL F. RYAN [R.950].

This case presents an issue of first impression in this State's appellate courts: whether Georgia law recognizes a condominium homeowners association's breach of fiduciary duty claim against a developer/declarant. For the reasons that follow, this Court should find that such a claim exists under Georgia law and reverse the trial court's grant of summary judgment.

PART I - STATEMENT OF FACTS AND PROCEEDINGS BELOW

This construction defect case arises out of the original construction of Thunderbolt Harbour Condominium Phase II (“Phase II”), a building comprised of seven adjoining residential units at a waterfront condominium in Thunderbolt, Georgia. [R.354, Affidavit of Ryan, ¶ 4] Plaintiff/appellant Thunderbolt Harbour Phase II Condominium Association, Inc. (Phase II HOA) is the condominium association for Phase II. [R.356, Affidavit of Ryan, ¶ 9]

The Declaration for Thunderbolt Harbour Condominium was executed on February 28, 2000, and filed of record in Chatham County, Georgia on March 6, 2000, by the original developer and declarant Brunson & Bonner, LLC. [R.361-383] The Declaration contemplated the construction of 36 units in 4 buildings. [R.361] The Declaration expressly reserved the option to expand the condominium by adding up to 7 units (“Expansion Units”) on a portion of the subject property (“Expansion Property”). [R.361; 375] The Declaration further provided that the condominium would be administered by the Thunderbolt Harbour Condominium Association, Inc. (“Phase I HOA”). [R.362] After the original 36-units (“Existing Units”) were at or near completion, the original declarant elected to exercise its right to expand the condominium by executing its First Expansion Supplement to

the Declaration. [R.385-386]

On May 14, 2001, the declarant transferred its interest in the Expansion Property to Ryan Builders, along with its right to build the Expansion Units now known as Phase II. [R.388-390; R.356, Affidavit of Ryan, ¶ 7]. Ryan Builders subsequently undertook to develop Phase II, and by fall 2003, the construction of all seven Expansion Units was drawing to a close. [R.356; Affidavit of Ryan, ¶ 8].

On September 10, 2003, Ryan Builders caused the Phase II HOA to be formed by filing Articles of Incorporation pursuant to the Georgia Nonprofit Corporations Code with the Georgia Secretary of State. [R.392-396; R.356, Affidavit of Ryan, ¶ 9].

Ryan Builders served as the developer/general contractor for Phase II, which was constructed in the 2001 to 2003 time frame. [R.355; Affidavit of Ryan, ¶ 5]. On September 13, 2003, the last Certificate of Occupancy for the Expansion Units was issued by the City of Thunderbolt signifying the substantial completion of the construction of Phase II. [R.397-404]

On December 5, 2003, the Declaration was amended to provide, inter alia, that the Phase II HOA would administer the Expansion Units, while the Phase I HOA would administer the Existing Units. [R.405-433] That same day, on

December 5, 2003, Ryan Builders, as successor declarant and developer, conveyed the common areas of Phase II to the Phase II HOA. [R.356, Affidavit of Ryan ¶ 10], but Ryan remained sole officer and director of Phase II HoA. Ryan, served as the sole officer and director for the Phase II HOA while Ryan Builders had control [R.357, Affidavit of Ryan, ¶ 13], until July 11, 2006.

After construction was completed in 2003, Ryan as the sole officer and director controlled the Phase II HOA from its inception at incorporation on September 9, 2003, until it was turned over to the Phase II HOA at a meeting held on July 11, 2006. During that period, Ryan Builders through Ryan marketed and sold the units, and Ryan was responsible for managing the affairs of the Phase II HOA as the sole director in accordance with the condominium instruments and Georgia law until the turnover, which took place July 11, 2006. [See R.755-757, Depo. of Ryan, pp.35-43]

After July 2006, there was no further communication between Ryan, Builders/Michael Ryan and the Phase II HOA until March 26, 2010, when counsel for the homeowners association delivered a certified letter to Ryan Builders and Ryan alleging construction deficiencies at Phase II. [R.359, Affidavit of Ryan, ¶ 23] A meeting was held with Phase II HOA counsel on April

14, 2010, to discuss the alleged deficiencies, but the matters were not resolved. [R.30, Complaint, ¶ 24].

This lawsuit was filed shortly thereafter on June 10, 2010, by the Phase II HOA pursuant to its statutory authority to maintain an action for damage to the common areas of Phase II (the “Common Areas”) [R.29, Complaint, ¶ 13], which included the building’s roof and hard coat stucco exterior cladding. [R.356, Affidavit of Ryan ¶ 10] The plaintiff HOA alleged water intrusion in the building envelope and other improper construction of the Common Areas. [R.30-36] The complaint named Ryan Builders, Ryan, and several other defendants. As to Ryan Builders and Ryan, the complaint alleged negligent design and construction, breach of implied warranties, breach of fiduciary duty, and nuisance. The defendants answered and discovery ensued.

Ryan Builders and Ryan together moved for summary judgment. [R.332] All defendants, including Ryan Builders, were then dismissed from the law suit, leaving only Ryan as a party defendant. [R.26; 941, 946, 948]] The Phase II HOA also settled all of the individual causes of action against Ryan individually, except for the claim for breach of fiduciary duty against Ryan, individually, in his capacities of officer, director, and/or sole board member of the homeowner’s

association for failure to inspect, maintain, repair, and sue the subcontractors, among other things [R.948; R.40-41, Complaint ¶¶ 59-62].

In ruling on the motion for summary judgment, the trial court held that the HOA itself had standing to sue the defendants and that a factual issue existed precluding summary judgment on the issue of whether the statute of limitations barred the plaintiff's claims, but the court found that the only viable claim remaining against Ryan individually was the plaintiff's claim for breach of fiduciary duty. The trial court held that Georgia law does not recognize a cause of action by a condominium association against a developer and accordingly granted summary judgment to Ryan [R.950] on this issue as a matter of law. [R.950-954] This appeal followed.¹

¹Appellant Phase II HOA also filed a motion for reconsideration [R.955], which the trial court denied [R.960] prior to expiration of the time for filing the notice of appeal.

PART II – ENUMERATION OF ERROR

- I. The trial court erred in granting summary judgment on the ground that Georgia law does not recognize a HOA's breach of fiduciary duty claim against a developer/declarant.**

- II. The trial court erred as a matter of law in ruling that Georgia law does not recognize a HOA's breach of fiduciary duty claim against a developer/declarant when he has also served as the sole officer and director of the HOA.**

JURISDICTION AND PRESERVATION OF ERROR FOR APPEAL

This Court has jurisdiction because the subject matter is not exclusively reserved to the Supreme Court under Ga. Const. of 1983, Art. VI, § VI, Par. II or III. Phase II HOA has a right of direct appeal from the February 25, 2013 Order under OCGA § 5-6-34 (a), and OCGA § 9-11-56 (h), because it is an order granting summary judgment. The errors presented in this appeal were preserved by arguments raised in the parties' briefs and the trial court's rulings thereon and the trial court's issuance of the February 25, 2013 Order and the rulings contained therein.

STANDARD OF REVIEW

To prevail on a motion for summary judgment, “the moving party must demonstrate that there is no genuine issue of material fact,” *Montgomery v. Barrow*, 286 Ga. 896, 898 (692 SE2d 351) (2010) (citation omitted), so that the party “is entitled to judgment as a matter of law.” *Kaplan v. City of Sandy Springs*, 286 Ga. 559, 560 (690 SE2d 395) (2010). A de novo standard of review applies, and the evidence, and all reasonable conclusions and inferences drawn from it are viewed in the light most favorable to the nonmovant. *Arko v. Cirou*, 305 Ga. App. 790, 791 (700 SE2d 604) (2010); *Strength v. Lovett*, 311 Ga. App. 35, 36 (714 SE2d 723) (2011).

PART III – ARGUMENT AND CITATION OF AUTHORITIES

I. The trial court erred in granting summary judgment on the ground that Georgia law does not recognize a HOA’s breach of fiduciary duty claim against a developer/declarant.

The Phase II HOA complaint alleges in Count 9 that Ryan et al. owed a fiduciary duty to the plaintiff HOA while exercising control over the Common Areas. [R.40] Specifically, the complaint alleges that Ryan and the other defendants breached their fiduciary duty, *inter alia*:

- (a) In failing to adequately inspect and repair the Project.
- (b) In failing to hold the developers, contractors, designers, and suppliers liable for improper construction of the Project.
- (c) In failing to maintain adequate and proper insurance coverage.
- (d) In failing to adequately maintain the building.
- (e) In failing to properly form Thunderbolt Phase II Condominium Association.
- (f) In failing to provide adequate funds to repair and maintain the Project.

The plaintiff further alleged that as a direct and proximate result of the breach of their fiduciary duty, plaintiff suffered damages. [R.41]

In response to Ryan's motion for summary judgment, the HOA argued that the defendants had a fiduciary duty to the condominium association to turn over the common areas in good repair. [R.668-672] But in the reply brief in support of summary judgment on this issue [R.935-940], Ryan pointed out that the United States District Court for the Northern District of Georgia had rejected a similar argument recently in the unreported, unpublished decision of *St. Claire Townhome Association, Inc. v. D.R. Horton, Inc.*, Case No.1:07-cv-2712 (Decided April 15, 2009) [See R.832-849 for copy of opinion]. In that case, the

plaintiff condominium association had urged the district the court to adopt the South Carolina holding of *Concerned Dunes West Residents v. Georgia-Pacific Corp.*, 349 S.C. 251 (562 SE2d 633) (2002), which recognized such a fiduciary duty on the part of the developer to the condominium association. That case also discusses other states which recognize such a cause of action. But the district court had refused to follow that case on the grounds that there was no Georgia authority permitting such a claim. [See R.842-843] The trial court in this case accepted this argument and granted summary judgment to Ryan individually on this ground. But the court erred in doing so.

While the federal district court may have been limited in its ability to judicially extend Georgia law to recognize such a cause of action, this Georgia state appellate court is not, and it is certainly not bound by an unreported, unpublished opinion of the federal district court.

In the *Concerned Dunes* case, the South Carolina Supreme Court discussed the policy issues behind recognizing a cause of action by a condominium association against a developer for breach of fiduciary duty:

In the case of *Duncan v. Brookview House, Inc.*, 262 S.C. 449 (205 SE2d 707) (1974), our Supreme Court held that the promoters of a corporation are fiduciaries to each other and to the corporation they are creating. *Id.* at 456,

205 SE2d at 710. Here, we think there is a corollary between the promoters of a corporation and the developers of a PUD. Both are entrusted by interested investors to bring about a viable organization to serve a specific function. Both should be expected to use good judgment and act in utmost good faith to complete the formation of their organizations.

Concerned Dunes, supra, at 257. The South Carolina court also noted that other states such as Illinois recognizes that a condominium developer stands in a fiduciary relationship to the owners' association. *Id.* at 258. Florida and California also recognize a homeowners association's right to maintain a cause of action against the developer for defects in the construction of common areas. *Id.* at 258-259; 260. The South Carolina court ruled that, likewise in that state, a developer has a fiduciary duty to the owners association to transfer common areas in good repair. *Concerned Dunes*, 349 S.C. at 260.

Appellant encourages this Court to follow South Carolina's and other states' lead in recognizing a cause of action against a developer for breach of his fiduciary duty to the homeowners' association and to accordingly reverse the trial court's summary judgment on this issue.

II. The trial court erred as a matter of law in ruling that Georgia law does not recognize a HOA’s breach of fiduciary duty claim against a developer/declarant when he has also served as the sole officer and director of the HOA.

Assuming *arguendo* that Georgia would not recognize a cause of action by a condominium association against the developer as such under the *St. Claire* reasoning, Georgia clearly recognizes claims – including claims for breach of fiduciary duty – against the developer in his capacity as an officer and director of a condominium homeowners association organized under the Georgia Nonprofit Corporation Code [see R.712, Art. II]. *Dunn v. Ceccarelli*, 227 Ga. App. 505, 508 (489 SE2d 563) (1997) (physical precedent only, but frequently cited with approval).

A corporate officer or director owes to a non-profit corporation and its members a fiduciary or quasi-fiduciary duty, which requires that he act in utmost good faith. *Enchanted Valley RV Park Resort v. Weese*, 241 Ga. App. 415, 423 (5) (526 SE2d 124) (1999). In the management and use of corporate property, directors and officers of non-profits act as fiduciaries and are charged with serving the interests of the corporation as well as the members. See *id.* “When such duties

are violated, resulting in waste to the corporate assets or injury to such property, the directors and managers are liable to account.” *Id.*

While these claims must ordinarily be brought derivatively, where as here, the defendant does not assert that the claim was derivative, the court may treat the action as properly brought. *Dunn v. Ceccarelli*, 227 Ga. App. at 509, n.4. Here, the action was brought directly, not derivatively, but the issue was not raised. Thus, the trial court should have treated the claim as properly brought.

Because appellant Phase II HOA has demonstrated that Georgia law does in fact recognize a homeowners association’s breach of fiduciary duty claim against a developer/declarant when he has also served as the sole officer and director of the association organized under Georgia’s Nonprofit Corporations Code, this Court should reverse the trial court’s grant of summary judgment on this ground.

CONCLUSION

For the foregoing reasons, Thunderbolt respectfully requests that this Court reverse the trial court’s grant of summary judgment to Ryan.

Respectfully submitted this 29th day of May, 2013.

DURANT LAW LLC

/s/ M. Katherine Durant

M. KATHERINE DURANT

Attorney for Appellant

Georgia Bar No. 234881

4426 Hugh Howell Rd. Suite B-336

Tucker, GA 30084

(404) 841-8412

katherine@durantlawllc.com

FRIEDMAN, MARTIN & STEVENS, LLP

/s/ Brad Stevens

BRAD STEVENS

Attorney for Appellant

Georgia Bar No. 680787

114 Barnard Street, Suite 2A

Savannah, GA 31401

(912) 232-8500

bstevens@friedmanmartin.com

LASKY LAW GROUP

/s/ W. Brian Cornwell

W. BRIAN CORNWELL

Attorney for Appellant

Georgia Bar No. 459090

120 West Liberty Street

Savannah, Georgia 31401

(912) 232-6423

bcornwell@laskylaw.com

CERTIFICATE OF SERVICE

This is to certify that I have this day served opposing counsel in the foregoing matter with a copy of **BRIEF OF APPELLANT** by U.S. Mail in a properly addressed envelope with adequate postage affixed thereon to ensure delivery and addressed to:

Peter D. Muller, Esq.
Goodman McGuffey Lindsey & Johnson, LLP
530 Stephenson Avenue, Suite 300
Savannah, GA 31405-5987

This 29th day of May, 2013.

DURANT LAW LLC

/s/ M. Katherine Durant

M. KATHERINE DURANT

Attorney for Appellant

State Bar No. 234881

4426 Hugh Howell Rd. Suite B-336
Tucker, GA 30084
(404) 841-8412
katherine@durantlawllc.com