haynesboone

October 31, 2018

Putting the Brakes on Construction Defect Suits in Texas

By: Pierre Grosdider

In *Mosaic Residential N. Condo. Ass'n. Inc. v. 5925 Almeda N. Tower LP*, the Houston First Court of Appeals affirmed a district court's summary judgment dismissal of a suit brought by a residential condominium unit owners' association against the builders and developers of a new high-rise project.[1] The suit followed water damages to 29 of the condominium's 394 units. Assuming it is upheld, this decision is a victory for developers and builders of residential condominiums. The court's key holding, that the condominium's declaration expressly denied the association standing to sue for construction defects, is important because it might, in conjunction with the litigation-curbing measures introduced in 2015 in Texas Property Code §§ 82.119–120, help reduce the number of these lawsuits.

In practical terms, language prohibiting an association from suing for construction defects might force unit owners to personally bear the burden of litigation, even under the alleviating conditions of a contingency fee arrangement. Anecdotal evidence suggests that some of these new construction defect lawsuits involving condominium towers or complexes are filed by associations on behalf of all unit owners even when only a fraction of the unit owners have evidence of any actual damages. From the developers and the builders' perspective, a lawsuit initiated by a limited number of unit owners with specific claims might be easier to resolve amicably by, say, repairing the affected units, than one filed by an association claiming to represent the interests of all the owners and expecting a settlement payment.

Generally, residential condominium developers must file in county property records a "declaration of condominium," a document that establishes the existence and the terms of the condominium.[2] Condominium declarations, among other matters, can modify the statutory rights and responsibilities of the unit owners' association. In particular, Texas Property Code § 82.102(a)(4) grants associations the right to sue on behalf of unit owners, unless the declaration provides otherwise:

> (a) Unless otherwise provided by the declaration, the association, acting through its board, may: . . . (4) institute, defend, intervene in, settle, or compromise litigation or administrative proceedings in its own name on behalf of itself or two or more unit owners on matters affecting the condominium.

In this case, the condominium's declaration specifically denied the association the right to sue on behalf of the unit owners for construction defects. The declaration's § 19(e) provided that:

> All Owners hereby acknowledge and agree that the Association shall not be entitled to institute any legal action on behalf of any or all of the Owners which is based on any alleged defect in any Unit or the Common Elements, or any damage allegedly sustained by any Owner by reason thereof, but rather, all such actions shall be instituted by the Person(s) owning such Units or served by such Common Elements or allegedly sustaining such damage.

Condominium unit windows started to leak in 2008, within a year of project completion. More windows allegedly leaked in 2012 and 2013. The association sued the developer and the contractors on Oct. 22, 2014, alleging various tort and breach of warranty claims in relation to the window systems. By then, 29 units (7.4 percent of the total) had experienced leaks and the association had spent $27,294 fixing them. The association's alleged damages included costs of repairs, "mental anguish damages, exemplary damages, attorney's fees and costs."

J.E. Dunn, a general contractor on the project, moved for summary judgment on the basis that the association did not have standing to sue for construction defects. The trial judge agreed, granted the motion (without specifying the grounds therefor), and eventually issued a final take-nothing judgment as to all issues in the suit. The court taxed costs against the plaintiff, per Texas Rule of Civil Procedure 131.

On appeal, the association argued that it had "(1) statutory standing; (2) common law standing; and (3) associational standing to bring its claims."[3] The court of appeals disagreed and affirmed the district court's grant of summary judgment. The parties also argued the statute of limitations, but the court saw no need to reach this issue.[4]

The Association Lacked Statutory Standing

The association first invoked Texas Property Code § 82.102(a)(4) to justify its statutory standing to sue. The court held that the association's claims on behalf of the owners were all based on alleged construction defects of the condominium window units, which were expressly barred by the declaration's § 19(e). Attempting to circumvent § 19(e)'s language, the association also argued that it brought the suit on its own behalf, not just on that of its members. This argument fared no better in the court's eyes. It noted that the association's membership consisted exclusively of unit owners, and to permit the association to sue on its own behalf in light of this fact would defeat § 19(e)'s intent. Such an absurd result would be inconsistent with the basic rules of contractual interpretation, which applied equally to condominium declarations.

The court also rejected the association's public policy arguments centered around the claim that the declarant should not be allowed to circumscribe its statutory rights. The court simply noted that § 82.102 reflected the state's public policy and that the association had adduced no evidence to question the statute's plain language, which allowed a declarant to curtail the powers of a unit owners' association. The court also rejected the association's attempt to assert standing based on Texas Property Code § 202.004(b) because this section applied to lawsuits to enforce restrictive covenants, not suits for construction defects.

The Association Lacked Common Law Standing

Common law standing "requires that the plaintiff have suffered an 'injury in fact'" and that the parties' dispute can be resolved by a judicial adjudication.[5] The court rejected the association's common law standing claim because all of the allegedly defective windows were within the condominium units and not part of the common elements. Nothing in the declaration made the association responsible for damages within the units, and the fact that the association had funded certain repairs did not, in and of itself, establish standing. Additionally, no agreement could confer standing. This part of the opinion arguably left open the possibility that an association might establish common law standing to sue if the common areas are damaged, notwithstanding express contractual language to the contrary, as in the declaration's § 19(e).

The Association Lacked Associational Standing

Finally, the court rejected the association's associational standing claim because it did not satisfy one of the doctrine's three prongs. An association may claim associational standing to sue on behalf of its members if:

> (1) its members would otherwise have standing to sue, (2) the association seeks to protect interests that are germane to its purpose, and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.[6]

The parties disputed whether the association satisfied the second and third prongs, as it trivially satisfied the first (the existence of at least one association member with personal standing to sue was enough to satisfy the first prong). But, the third prong can be satisfied only if the relief sought is of a nature to satisfy all injured members collectively, such as with a declaration or an injunction. The third prong is not satisfied if the relief sought requires proof of each member's individual circumstances, such as when trying to recover money damages and each member suffered differently. Because the association sought only money damages for construction defects, the amount of which varied with each member, the third prong was not satisfied, and the associational standing doctrine did not apply. The court, therefore, saw no need to decide whether the association satisfied the doctrine's second prong.

First published by *Law360* on October 31, 2018.

[1] No. 01-16-00414-CV, 2018 WL 5070728, at *1 (Tex. App.—Houston [1st Dist.] Oct. 18, 2018, no pet. h.) (Radack, C.J.) (mem. op.).

[2] Tex. Prop. Code § 82.051(a).

[3] Mosaic, 2018 WL 5070728, at *4.

[4] It is somewhat telling that both the trial court and the court of appeals decided the case on standing grounds when, considering the facts and the briefs, they arguably might have done so on limitations grounds.

[5] Id. at *10.

[6] Id. at *12.