NJ's Appellate Division Affirms Significant Consumer Fraud Act Judgment Against Builder, Subs and Principal, in Condo Dispute, Making Clear That Statements of Capabilities in Offering Statements Will Be Closely Scrutinized in Defect Litigation

By Kevin J. O'Connor*

In Belmont Condominium Association, Inc. v. Geibel, 2013 WL 3387636 (App. Div. July 9, 2013), New Jersey's Appellate Division affirmed in large part a substantial judgment against the sponsor, developer and general contractor of Belmont, a seven-story, thirty-four unit condominium building in Hoboken, under New Jersey's Consumer Fraud Act, N.J.S.A. § 56:8-1 et seq. ("CFA"). The Belmont case highlights the significant dangers to sponsors, developers and their principal officers in marketing and building condominiums in New Jersey.

The CFA was originally enacted by the New Jersey Legislature over 50 years ago to respond to the public harm resulting from "the deception, misrepresentation and unconscionable practices engaged in by professional sellers seeking mass distribution of many types of consumer goods." Since its enactment over 50 years ago, the Legislature and the courts have greatly expanded the scope of the CFA to apply in the broad sense to all sorts of circumstances in the construction field.

In addition to fraudulent misrepresentations and omissions of material fact, in the field of residential construction, the CFA and implementing regulations can result in liability for myriad statutory violations that have the practical result of imposing strict liability on companies and their individual owners, officers, managers and/or employees. Allen v. V & A Bros., Inc., 414 N.J. Super. 152 (App. Div. 2010).

In Belmont, the jury awarded the condo association $1,749,340 in damages for defective work done by the builder/sponsor and purported misrepresentations about its work and overall capabilities, which damages were then trebled under the CFA for a total award (including pre-judgment interest and attorneys' fees) of $7,236,677.28.

On appeal, the defendants raised several arguments which were addressed by the Appellate Division and will be important clarification for sponsors/builders. First is the question of whether the claimed misrepresentations were sufficient to permit an award under the CFA. The principal owner and general manager of the builder/sponsor had never built a building before, yet the marketing materials included general claims that potential buyers "would be getting a 'Proven Developer and Construction Management Team which has overseen the building and renovation of Over 400 Single Family & Condominium Homes, and over 1,000,000 Sq. Ft. Of Office/Commercial/Retail Development."

Perhaps more significantly, the trial court below had permitted the jury to consider a CFA award premised on a single line in the public offering statement ("POS") to the effect that "[t]here are no known defects in the building (a part of which) you are purchasing, nor in the common area and facilities, that you could not determine by a

reasonable inspection." Notably, the POS was circulated before the building was even constructed, and this statement was used as a basis for CFA liability when it turned out at the builder had used shoddy construction techniques to seal the outside walls, leading to significant infiltration and mold problems.

The Appellate Division also addressed several other challenges by the defendants to the condo association's standing to pursue damages for prior owners of the condos, or for areas that were not considered part of the common elements. The Court ruled that the condo association could pursue claims on behalf of original owners who were no longer owners as the association was generally seeking redress for damage to the common areas. The Court did vacate that portion of the award which was intended to cover the cost of replacement windows, deeming them to be outside the common elements.

This recent opinion provides further proof that construction firms performing services in the residential context must take care to ensure strict compliance with the statutes and regulations application in residential construction. Marketing materials and offering statements given to potential purchasers must be carefully scrutinized and in all instances must be accurate. The recent case law has developed to, in essence, substantially lessen the burden of proof on the plaintiff seeking to impose personal liability, thereby rendering the corporate shield of questionable utility to shield owners/officers/employees from personal liability. Construction firms are well advised to closely evaluate the manner in which they perform contracts and take action to ensure uniform procedures which strictly adhere to applicable regulations.

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