IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT IN AND FOR SARASOTA COUNTY, FLORIDA

BELLA COSTA, INC., etc.,

Plaintiff,

vs.

R.S. HAMILTON, INC., etc., et al.,

Defendants.

CASE NO:83-1207-CA-01

Question 7(d) re C.P.E.

FINAL JUDGMENT

THIS CAUSE having come to be considered by the Court after Trial, the Court enters the following Final Judgment. The Court has applied the procedural-substitutive analysis in balancing the factors concerning unconscionability, and finds the following to be true:

1. The purchasers during the period from 1971 to 1978 were not told the true nature of the escalation clause. Rather, when asked, it was the practice of the developer to tell them the lease amounts would probably not increase, and if they did, they would not increase by more than a few dollars. This misrepresentation was aggravated by the fact that in a substantial number of cases the misrepresentation came from the mouth of the developer himself or from his son. This finding of deceitful sales practice is considered by the Court to have substantial significance in the balance of matters, since it went to the very heart of the consequences of the leases.

2. While the Plaintiff failed to establish that purchasers did not receive condominium documents at the time they entered the contract or when the document receipt was signed, cf., Chalfonte Development Corp. vs Rosewin Coats Inc., 374 So 2d 618 (4th D.C.A.Fla.1979), the Court finds that the escalator clause was well-buried. Within the documents received by purchasers the lease comes after the exhibits of maps and plats, the fifteen-page declaration of condominium and warranty deed (see, for example, exhibit LL). The clause itself is found deep within the lease virtually at the end of the document. In addition, neither the sales brochure nor, later, the offering circular made specific reference to the escalator clauses.

3. This de-emphasis on the clause, when combined with misrepresentations concerning the true effect of the escalator clause was calculated to and in fact did mislead prospective purchasers as to their true position. In effect, the key provision of the lease was hidden in a maze of fine print and minimized by deceptive sales practice

See Kohl v Bay Colony Club Condominium Inc., 398 So 2d 865, 868, (4th D.C.A. 1981). Thus it is relatively insignificant that purchasers did receive their documents or that they were not discouraged from seeking advice of counsel.

4. The lease was prepared and "accepted" by the Association at a time when the Association consisted of the developer's attorney and the attorney's secretary and associate. The Association at the time the lease was entered into was a mere shell, without any real, substantive purpose apart from the developer's wishes. Early "negotiation" then was no more than self-dealing.

5. The unit owners were required to become assignees of the Defendants' tenancy, and their meaningful choice as to whether to accept its terms was nonexistant. This factor is particularly onerous in view of the fact the leases cover only the parking areas.

6. The negotiations which occurred in 1978-79, leading to the amendments to the leases, did not effect the unconscionability of the leases for the following reasons:

a. The leases were already established and in effect, leaving the now-legitimate Association with no bargaining power.

b. Because of this the Association was faced with accepting whatever "concessions" the developer was willing to offer or live with substantially higher rental rates in accordance with the original terms of the leases. This fact was well-known by the developer. See especially letter of October 12, 1978, exhibit R-3.

c. The fifteen percent reduction in the escalation rate was insignificant especially since it may be reasonably inferred that it was done more to avoid the consequences of section 718.401(8)(a), Florida Statutes, which declares void escalation clauses which increase at the same rate as the consumer price index.

7. Unlike Seminole-on-the-Green v Kelly, 445 So 2d 1071 (2nd D.C.A. 1984), the base rate here is forty dollars, and rent will never fall below that level. Such a base is relatively high, since the lease does not cover any of the amenities found in the usual recreation leases.

8. The developer is under no obligation whatsoever. The Association must pay real estate taxes, insurance, costs and all

maintenance expenses and obligations with respect to the leased land.

9. Most significantly, the leased land is only for parking areas. Parking is both mandatory under the Venice building code and a practical necessity in our mobile society. While it is true that parking needn't be provided for free, it is equally doubtful that any developer would build into his sales price per unit the amount of $47,520.00.[1]

10. Finally, in comparison to the substantial benefits reaped by the developer, the economic value on the open market to the Association and unit owners is nil. And, consistant with Steinhardt v Rudolph, 422 So 2d 884, 894, (3rd Dist.1982), the saleability of the individual units is considerably reduced because of the leases (although even if this factor is discounted, the unconscionable nature of the leases does not alter).

Upon the foregoing findings the Court declares that the subject leases as presently in effect are unconscionable as a matter of law, and it would not be in keeping with the administration of justice to enforce the escalator provisions of the leases.

It is, thereupon, ORDERED AND ADJUDGED as follows:

a. As an application of equitable principals, the rental amounts are hereby fixed at $58.00 per month per unit commencing from the inception of the suit and for the remainder of the leases terms. The Court hereby declares as void and unenforceable paragraphs 23 of each of the subject leases, as amended, and as said paragraphs deal with escalation of the rental amounts. In all other respects the leases remain undisturbed and in full force and effect.

b. It is the intention of the Court to divide the current escrow fund in such a way as to reimburse the Defendants at the rate of $58.00 per month per unit together with legal rate of interest from the date of inception of the suit, subject to the provisions set forth hereafter. Likewise, the balance, subject to further provision, should be returned to the unit owners.

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[1] The base cost per unit over the term of the lease. Thus if the developer never escalated the rent, he and his assignees would receive a total of $7,508,160.00. This is a high price for parking in a residential setting, even without escalation.

c. The Court reserves jurisdiction to consider the amount of taxable costs and attorneys fees, both as to the issues of entitlement and amounts. The Court will determine those amounts and award the proper parties the appropriate amount from the escrow account. The remainder will then be disbursed as set out aforesaid.

d. The Defendants in this cause and their assigns are hereby forever enjoined from enforcing the provisions of paragraph 23 of the leases, as amended, except as herein provided.

DONE AND ORDERED this 28 day of March, 1986

Alan R. Dakan
Acting Circuit Judge.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to E.G. BOONE, ESQUIRE, ROBERT T.KLINGBEIL, JR. 1001 Avenida del Circo P.O. Box 1596, Venice, Florida 34284. MICHAEL J. KEANE, ESQUIRE, P.O. Box 15339, ST. Petersburg,FL 33711.

Secretary to Judge A.R.Dakan