

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, 110 SOUTH TAMARIND AVENUE, WEST PALM
BEACH FL 33401

TERRACE GALLERY, LLC,

Appellant,

v

GALLERY ONE CONDOMINIUM
ASSOCIATION, INC., AND DEJ
HOTELS, LLC,

Appellees.

Case No. - 4D2023-2682¹

L.T. No. - CACE-22-007165

**APPELLEE GALLERY ONE CONDOMINIUM ASSOCIATION, INC.'S
RESPONSE TO APPELLANT, TERRACE GALLERY, LLC'S INITIAL
BRIEF**

On appeal from the Seventeenth Judicial Circuit
in and for Broward County

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¹ Concurrent with the instant appeal, Gallery One initiated an appeal, Case No. 4D2023-2681, concerning the same underlying action.

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STATEMENT OF THE CASE AND FACTS

A. Statement of the Facts:

Gallery One Condominium Association, Inc. (“Gallery One” or “Association”) is a not-for-profit corporation and mixed-use, condominium/hotel in a single building located at 2670 East Sunrise Boulevard, Fort Lauderdale, FL 33304. Gallery One contains 257 Units, comprised of 231 Residential Units, 25 Commercial Units, and 1 Hotel Unit.

Gallery One is governed by Chapter 718, Florida Statute (the “Condominium Act” or the “Act”). Gallery One was established on December 14, 2005, and is governed by its Declaration of Condominium, which is recorded in Official Records Book 41098 at Page 194, of the Public Records of Broward County, Florida, and was recorded on December 14, 2005. (“Condominium Declaration”). See A-1, Pgs. 17 – 161.

Appellant, Terrace Gallery, LLC (“Terrace Gallery”), Plaintiff in the underlying action, is a Florida limited liability company and a Member of Appellant, Gallery One, owning residential units within the subject building.

DEJ Hotels, LLC (“DEJ”) is a Florida limited liability company, which owns the hotel component (“Hotel Unit”) located inside Gallery One. DEJ also owns all 25 Commercial Units. Pursuant to the Condominium Declaration, DEJ, as the Hotel Unit owner, DEJ also owns, manages, and

controls the "Shared Components," as defined by the Condominium Declaration in Section 2.36.

Section 2.36 of the Condominium Declaration provides as follows:

"Shared Components." Together, the improvements constituting the Common Elements, Residential Units, Commercial Units and the Hotel Unit have been, or shall be, constructed as a single structure and operated as an integrated project. Given the integration of the structure of those improvements, and notwithstanding anything to the contrary depicted on the survey/plot plan attached hereto as Exhibit "2", the following components of the improvements (the 'Shared Components') shall be deemed part of the Shared Components of the Hotel Unit whether or not graphically depicted as such on said survey/plot plan: any and all structural components of the Improvements, including, without limitation, all exterior block walls and all finishes (glass, paint stucco etc.) and balconies, terraces and/or facades attached or affixed thereto; the roof; all roof trusses, roof support elements and roofing insulation; **all utility, mechanical, electrical, telephonic, telecommunications, plumbing, telephone switchboard, Life Safety Systems and other systems, including, without limitation, all wires, conduits, pipes, ducts, transformers, cables and other apparatus used in the delivery of the utility, mechanist telephonic, telecommunications, electrical, plumbing, Life Safely Systems and/or other systems; all heating, ventilating and air conditioning systems. including, without limitation, compressors, air handlers, ducts, chillers, water towers and other apparatus used in the delivery of HVAC services; all elevator shafts, elevator cabs, elevator cables and/or systems and/or equipment used in the operation of the elevators transversing the Condominium Property; and all trash rooms and any and all trash collection and/or disposal systems.** In addition, the Shared Components include use rights in and to the Easement Parcel solely to the extent provided by and in accordance with the terms and conditions of the Easement Agreement, and the following areas and/or facilities (together with a license for

reasonable pedestrian access thereto, as determined by the Hotel Unit Owner): **the main hotel lobby; the pools and pool deck; the fitness center, if any, which may be located from time to time within the Improvements constructed upon the Hotel Unit, maid service closets, laundry chutes and preservice areas.** Notwithstanding anything herein, or in any of the exhibits hereto, contained to the contrary, the Shared Components shall be deemed part of the Hotel Unit. The Hotel Unit Owner shall have the right (but not the obligation), by Supplemental Declaration executed by the Hotel Unit Owner alone, to designate additional portions of the Hotel Unit as Shared Components hereunder. Notwithstanding the designation of the Shared Components, the Hotel Unit Owner shall have the right, from time to time, to expand, alter, relocate and or eliminate the portions of the Hotel Unit deemed Shared Components, and/or to include portions of a Commercial Unit (provided said Commercial Unit is owned by the Hotel Unit Omar) as part of the Shared Components, without requiring the consent or approval of the Association or any Owner, provided that any portions withdrawn are not in the reasonable opinion of the Hotel Unit Owner essential to the structural integrity of the Residential Units, and/or the Commercial Units, the provision of utilities and utility services to the Residential Units and/or the Commercial Units and/or the provision of pedestrian access to and from the Residential Units and/or the Commercial Units and the wing public sheet. In furtherance of the foregoing, the Hotel Unit Owner also reserves the absolute right at any time, and from time to time, to construct additional facilities within the Hotel Unit and to determine whether same shall be deemed Shared Components. It is expressly contemplated that persons other than Unit Owners shall be granted use rights in and to certain of the facilities of the Hotel Unit (such determination to be made in the sole and absolute discretion of the Hotel Unit Owner).

See Condominium Declaration, Section 2.36 (emphasis added).

Section 9.1 of the Condominium Declaration provides that the Association is not responsible for the operation and maintenance of the

Shared Components. Rather, pursuant to Section 12.1 of the Condominium Declaration, DEJ, as the Hotel Unit Owner, is responsible for the maintenance and operation of the Shared Components, which is funded through “Shared Costs.” Section 12.3 of the Condominium Declaration provides that DEJ, as the Hotel Unit Owner, has the authority to charge each owner of a Residential Unit and/or Commercial Unit whatever amount necessary to cover the full amount of the Shared Costs. Pursuant to Section 12.1 of the Condominium Declaration, DEJ, as the Hotel Unit Owner, is specifically excluded from needing to fund the Shared Costs.

B. Statement of the Case:

This case concerns the validity of Gallery One’s Governing Documents in relation to the Condominium Act. Specifically, Terrace Gallery is seeking a declaration that the following sections of the Condominium Declaration be deemed invalid and volitive of the Condominium Act: Sections 2.13, 2.14, 2.27, 2.36, 3.3, 3.4, 5.1, 7.3, 8.3, 9.1, 12.1, and 12.3.

On May 17, 2022, Terrace Gallery filed its Complaint for Declaratory Relief which contained two (2) counts for Declaratory Relief against the Association (R:26-41). On June 8, 2022, DEJ filed its Motion to Intervene, (R:187-194). On September 2, 2022, the Trial Court entered an Order granting DEJ’s Motion to Intervene and also vacated any default that may

have been entered against the Association and ordered the Association to respond to Terrace Gallery's Complaint in 20 days. (R:248-249)

On September 22, 2022, Gallery One filed its Answer and Affirmative Defenses to Terrace Gallery's Complaint which admitted each and every allegation of Terrace Gallery's Complaint, subject to the legal conclusions asserted by Terrace Gallery, which did not warrant a response. (R:274-281).

On March 31, 2023, DEJ filed its Motion for Summary Judgment as to all counts of the Complaint alleging the claims were barred by the applicable statute of limitations and statute of repose codified in §718.110(10), Fla. Stat., and §95.11(2)(b), Fla. Stat. (R:1070-1098). On July 18, 2023, Terrace Gallery filed its Response in Opposition to DEJ's Motion for Summary Judgment. (R:2458-2484). On August 4, 2023, DEJ filed its Reply to Terrace Gallery's Response in Opposition to DEJ's Motion for Summary Judgment. (R:2947-2974).

On April 11, 2023, Terrace Gallery filed its own Motion for Summary Judgment seeking Summary Judgment as to Count I of the Complaint. (R:1257-1451). In response, DEJ filed its Response in Opposition to Terrace Gallery's Motion for Summary Judgment and its Opposing Statement of Facts on July 28, 2023. (R:2643-2938). On August 10, 2023, Terrace Gallery

filed its Reply to DEJ's Response in Opposition to Terrace Gallery's Motion for Summary Judgment. (R:2975-2987).

Gallery One did not file any brief in response to either Motion for Summary Judgment filed by Terrace Gallery or DEJ.

On October 9, 2023, after significant briefing and oral arguments, the court entered a Final Order on Terrace Gallery's Motion for Summary Judgment². In its Order, the Court found that Section 2.13, which defines "common elements" of the Condominium Declaration violated the Condominium Act. However, the Trial Court found that Section 2.36, which defines "Shared Components," did not violate the Condominium Act. Additionally, in granting summary judgment, in part, the trial court also found that part of Sections 2.13, 2.14, 2.27, 2.36, 3.3, 3.4, 5.1, 7.3, 8.3, 9.1, 12.1, and 12.3 of the Condominium Declaration are not unfair, unreasonable and in violation of Fla. Stat. 718.

Based upon the reading of the Trial Court's October 9, 2023, Summary Judgment Order, it was not apparent that the Summary Judgment Order was intended to be a Final Judgment. It was anticipated that the remaining portions of Gallery One's Declaration that were found not to be in violation

² The Court also adjudicated DEJ's Motion for Summary Judgment, denying it in its entirety. This portion of the Court's Order is not being appealed.

could be adjudicated subsequently, perhaps after discovery and future motions. This could have been completed in a variety of ways, including potentially retaining an engineering expert to provide expert opinion and testimony that specific portions of the property within Section 2.36 are, “required for the furnishing of utilities and other services to more than one unit or to the common elements.”

However, on October 25, 2023, for the first time, the Trial Court advised that it was the Trial Court’s intention to fully resolve all issues in Terrace Gallery’s Complaint. See Appendix A-7. As such, until such time as the Trial Court declared that Terrace Gallery’s Complaint was resolved, it was not evident that further clarification was warranted because that clarification could have been obtained through subsequent discovery and the litigation process.

On October 25, 2023, Terrace Gallery filed its Motion for Rehearing and/or Reconsideration of Final Judgment and Incorporated Memorandum of Law. (R:3126-3144). On November 3, 2023, the Association likewise filed its Motion for Clarification and/or Reconsideration and/or Rehearing, (R:3210-3378), and, on November 12, 2023, DEJ filed its Response in Opposition thereto. (R:3442-3448). On November 20, 2023, the trial court entered an Order on Terrace Gallery’s Motion for Rehearing and/or

Reconsideration wherein it stated that the Final Order on Terrace Gallery and DEJ's competing Motions for Summary Judgment "resolved all issues presented in Terrace Gallery's Complaint for Declaratory relief" and was effectively intended as a final order on all counts of Terrace Gallery's Complaint. (R:3523-3524).

On May 2, 2024, the Association, in the capacity of plaintiff, filed a separate, 5-count complaint in Broward County Circuit Court against DEJ styled *Gallery One Condominium Ass'n, Inc. v. DEJ Hotels, LLC*, Case No. 24-006096. See Appendix A-11. On June 24, 2024, Gallery One filed a 5-count Amended Complaint, the current operative complaint, in that separate action. See Appendix A-12. The claims in the new lawsuit are as follows: Count I for damages, declaratory, equitable, and injunctive relief for violations of the Florida Condominium Act and cancellation and reformation of illegal portions of the Declaration; Count II for breach of the Declaration and for damage; Count III for breach of the implied duty of good faith and fair dealing; Count IV for unjust enrichment, pled in the alternative; and Count V for an action under §718.302 for damages, declaratory, equitable and injunctive relief and cancellation for illegal parts of the Declaration and other maintenance, management, and operation contracts.

As the new lawsuit demonstrates, the Association has taken the consistent position in both the instant case and in the new case that certain provisions of the Declaration are illegal and unenforceable. The new lawsuit, however, expands the list of illegal provisions and adds a component for damages and injunctive relief for DEJ's overcharges and unfair and unreasonable assessments, independent of the illegality of the Declaration under the Act.

SUMMARY OF THE ARGUMENT

Gallery One does not oppose the relief sought by Terrace Gallery, subject to any effort by Terrace Gallery to reverse the Trial Court's vacating the default judgment against Gallery One.

In response to Terrace Gallery's Complaint, Gallery One substantively admitted all the allegations, and raised no substantive affirmative defenses. (R:274-281).

Terrace Gallery initiated an appeal, challenging the Trial Court's Final Order, asserting that the Trial Court erred when it ruled that Section 2.13 of the Condominium Declaration violates the Condominium Act, but that Section 2.36 of the Condominium Declaration does not violate the Condominium Act. See Gallery One's Initial Brief, See Appendix A-13, p. 430-431 and 435-436.

Terrace Gallery also initiated a separate lawsuit against DEJ challenging the legality and viability of the Condominium Declaration. More specifically, Terrace Gallery asserts that the physical structure and financial structure of the mixed-use condominium association, as created by the Condominium Declaration, is improper and violates Fla. Stat. 718. See Appendix A-12 pp. 199-241.

As such, Terrace Gallery incorporates these arguments as if fully set forth herein and does not oppose the relief sought by Terrace Gallery.

CONCLUSION

Gallery One takes no position to oppose the relief sought by Terrace Gallery. Gallery One substantively admitted the factual allegations raised by Terrace Gallery in its Complaint and did not oppose its Motion for Summary Judgment. Gallery One initiated an appeal to address the limited issue created by the Trial Court finding that Section 2.13 of the Condominium Declaration violates the Condominium Act, but that Section 2.36 does not. Moreover, Gallery One initiated a separate lawsuit to challenge the physical and financial structure of Gallery One's mixed-use condominium association that vests a tremendous amount of power and authority to DEJ, at the expense of Gallery One's Board of Directors and the Gallery One Members.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of August 2024, I electronically filed the foregoing document with the Clerk of Courts by using the Court's E-Filing system, which will send a notice of electronic filing to all counsel of record, including:

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CERTIFICATE OF COMPLIANCE

Pursuant to Florida Rules of Appellate Procedure 9.045(e) and 9.210(a)(2)(B), Appellants hereby certify that the type size and style of the Initial Brief of Appellants is Arial Style 14pt and that the word count is 2252.

Respectfully submitted,

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