

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF FLORIDA  
TALLAHASSEE DIVISION**

In re:

Emerald Shores Owners' Association, Inc.

CASE NO.: 08-50039-LMK

Debtor.

CHAPTER: 7

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Bart Kennedy, Patrick Kennedy, Ronnie Waters,  
Judith Waters, Terry McGill, Jean McGill,  
Don Perrin, & Harry Brazell,

Plaintiffs,

v.

ADV. PRO. NO.: 08-05009-LMK

Sherry Chancellor,

Defendant / Third-Party Plaintiff,

v.

Frank Baker,

Third-Party Defendant.  
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**ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

THIS MATTER came before the Court for hearing on August 29, 2008, on the Plaintiffs' Motion for Summary Judgment. The Plaintiffs, individual unit owners of the Emerald Shores Condominium ("Condominium"), seek a determination that approximately \$9,020.00 previously held by the Emerald Shores Condominium Association ("Owners Association") for payment of common expenses, and now in the possession of the Chapter 7 Trustee ("Trustee"), belong to the Plaintiffs and other individual unit owners of the Condominium as "common surplus" funds as that term is defined in the Florida Statutes and the Emerald Shores Condominium Declaration ("Condominium Declaration"). The Trustee asserts that the funds are property of the bankruptcy estate, because state court litigation based upon causes of action for breach of the Owners Asso-

ciation's duties to maintain the common elements constitutes a charge against the Owners Association's common expense funds, such that no common surplus exists. I find as a matter of law that these funds are not common surplus for the reasons explained more fully herein, and accordingly the Plaintiffs Motion for Summary Judgment is denied. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1334 and 157(b)(2)(A).

### **BACKGROUND**

On June 3<sup>rd</sup>, 2005, Michael Sokoloff and Evan B. Sokoloff, unit owners in Emerald Shores Condominium, sued the Owners Association in the Circuit Court for the Fourteenth Judicial Circuit in and for Bay County, Florida. This litigation ("Sokoloff Litigation") involved claims for injunctive relief and compensatory damages for harm caused to real and personal property, and for damages for personal injuries and loss of consortium, in an amount in excess of \$220,000.00. These claims resulted when the roof of the Condominium leaked and water infused the Sokoloff's real and personal property. The personal injuries resulted from the mold and mildew infestation related to moisture in the unit. The Sokoloff Litigation was stayed by the Owners Association's filing its petition for relief under Chapter 7 of the Bankruptcy Code on February 1, 2008.

On June 16, 2008, the Plaintiffs filed this complaint for declaratory judgment (the "Complaint") seeking a determination as to the status of approximately \$9,020.00, currently held by the Trustee. The Plaintiffs assert that these funds are "common surplus" of the Owners Association, which are, by Florida law, owned by the Plaintiffs and the remaining owners of the units in the Condominium in proportion to their undivided interest in the common elements. The Trustee asserts that there are no common surplus funds because the Sokoloff Litigation represents a claim, and therefore a debt, owed by the Owners Association at the time of filing for bankruptcy that exceeds the funds being held by the Trustee. The Plaintiffs Motion for Summary Judgment asserts that the monies held by the Trustee are owned, as a matter of law, by the Plaintiffs, and

other unit owners of the Condominium, because the Owners Association did not determine the Sokoloff's claim to be payable as a common expense.

A hearing to consider the Motion for Summary Judgment was held in Panama City, Florida, on August 29, 2008, and briefs were directed to be filed on the legal issue of whether, under Florida law, the Sokoloff claim would constitute a charge against the Owners Association's funds such that payment of such claim must be made from the Homeowners Association as a common expense. The Plaintiffs filed a Memorandum of Law with their Motion for Summary Judgment on July 17, 2008, and a Supplemental Memorandum of Law on September 23, 2008. The Creditor, as amicus, filed a Memorandum of Law on September 23, 2008, which the Trustee adopted and incorporated by reference. The Trustee filed a separate Memorandum of Law on September 23, 2008.

#### **DISCUSSION**

Summary judgment is appropriate if the pleadings, depositions, and affidavits show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed R. Bankr. P. 7056, incorporating Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Both parties have stipulated that the material facts and applicable law are not in dispute. The question presented is whether, as a matter of law, the Sokoloff's claim is payable as a common expense. If it is not, the funds received and held by the Owners Association for common expenses belong to the Plaintiffs and other unit owners of the Emerald Shores condominium as common surplus funds.

In Florida, every condominium is strictly a creature of statute, and therefore provisions of the declaration under which the condominium is created must confirm to the statutory requirements; to the extent that they conflict therewith, the statute must prevail. *Winlekman v. Toll*, 661 So.3d 102, 105 (Fla. App. 4 Dist. 1995). Any ambiguity in declaration of condominium is to be construed against the author of the declaration. *Kaufman v. Shere*, 347 So.2d 627, 628 (Fla. App. 3

Dist. 1977); *Santa Rose BBFH, Inc. v. Island Echos Condominium Assoc.*, 421 So.2d 534 (Fla. App. 1 Dist. 1982).

Both parties agree that funds determined to be common surplus funds are owned by the unit owners under both the Florida Statutes and the Condominium Declaration. Florida Statutes § 718.115(3) (2007) provides, “common surplus is owned by unit owners in the same shares as their ownership interest in the common elements.” Similarly, Article V of the Condominium declaration notes, “...common surplus shall be owned by the owners of all apartments in the same proportion that the undivided interest in the common elements appurtenant to each owner’s apartment bears to the total of all undivided interest...”

The parties do not agree, however, as to whether the funds at issue satisfy the definition of common surplus. Florida Statutes § 718.103(10) (2007) provides, “‘common surplus’ means the amount of all receipts or revenues, including assessments, rents, or profits, collected by a condominium association which exceeds common expenses.” Similarly, article I, paragraph 10 of the Emerald Shores Condominium Declaration defines “common surplus” as, “the excess of all the receipts of the association, including, but not limited to, assessments, rents, profits, and revenues over the amount of the common expense.” Thus, this dispute centers on whether the funds at issue are **in excess of, or over the amount of**, the common expense.

Florida Statutes § 718.103(9) (2007) provides, “‘common expense’ means all expenses properly incurred by the association in the performance of its duties, including expenses specified in [F.S.A. §] 718.115 [Common Expenses and Common Surplus].” Florida Statutes § 718.115(1)(A) provides, inter alia:

common expenses include the expenses of the **operation, maintenance, repair, replacement, or protection** of the common elements and the association property, **costs of carrying out the powers and duties** of the association, **and any other expense**, whether or not included in the foregoing, **designated as a common**

**expense by this chapter**, the declaration, the documents creating the association, or the bylaws

Fla. Stat. § 718.115(1)(A)(emphasis added). A condominium association has the power to make and collect assessments, and to lease, maintain, repair, and replace the common elements or association property. Fla Stat. § 718.111(4). The condominium association may “contract, sue, or be sued with respect to the exercise or non-exercise of its powers,” and, “[f]or these purposes, the powers of the association include, but are not limited to, the maintenance, management, and operation of the condominium property.” Fla. Stat. § 718.111(3). Thus, the Condominium Association’s obligation to maintain, repair, or replace the common elements is payable as a common expense, and it follows that liability for a breach of the duty to maintain, repair, or replace the common elements also gives rise to a common expense.

To say a charge arising from a breach of statutory duty is not payable as a common expense would place the condominium form of ownership at great risk. As recognized in *Ocean Trail Unit Owner’s Association, Inc., v. Mead*, 650 So.2d 4, 7 (Fla. 1995), protection of the condominium elements is vital in the condominium form of ownership, and execution and levy may cause the condominium association to be destroyed, to the detriment of all owners. In our case, the Condominium Declaration appears to have recognized this potential harm and instead of limiting the term common expenses to recurring expenses, provided that “common expenses include but shall not be limited to, the maintenance, operation and repair or replacement of the common elements and any valid charge against the condominium as a whole.”<sup>1</sup>

The fact that this claim was not reduced to judgment at the time this bankruptcy case commenced should have little bearing on whether or not the claim is payable as a charge against the Owners Association. A “claim” is defined by the bankruptcy code as: 1) “right to payment,

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<sup>1</sup> Article 1, paragraph 9 of the Emerald Shores Condominium declaration defines “common expense” to mean, “... the expenses for which the apartment owners are liable to the association shall include, but not be limited to, expenses of administration of EMERALD SHORES, expenses of maintenance, operation and repair or replacement of the common elements; any valid charge against the condominium as a whole; taxes imposed upon the common elements by governmental bodies having jurisdiction over EMERALD SHORES, and expenses declared to be common expenses by the provisions of the condominium documents ...”

whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured;” or 2) a “right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, secured, or unsecured.” 11 U.S.C. §§ 101(5)(A)-(B).

The Sokoloff complaint included claims against the Owners Association for injunctive relief to require the Debtor to comply with their duties and to maintain, repair, and replace the common elements of the Condominium, for compensatory damages for damages to real and personal property, and for personal injury and loss of consortium. Outside of bankruptcy, a judgment in favor of the Sokoloffs for a breach of duty would have been payable from the common expenses of the Owners Association. Commencement of this bankruptcy case may have stayed the Sokoloffs from enforcing its state law remedies against the Owners Association, but it did not halt the Sokoloff claim from being payable as a common expense.

This conclusion is consistent with Florida Case law. The court in *Coronado Condominium Association, Inc. v. Scher*, 533 So.2d 295 (Fla. 3d DCA 1988), held, under circumstances similar to those in this case, that a condominium association can be held liable for the damages to an individual unit and personal injuries to the unit owners. In *Ocean Trail Unit Owners Association, Inc. v. Mead*, 650 So.2d 4 (Fla. 1995), the court, in evaluating the validity of a special assessment to pay a judgment against the association held *inter alia*, that “the judgment were a common expense for which the association had the authority to impose an assessment.” *Id* at \*6. In this case, the Debtor had an interest in the funds obtained by the Trustee at the time of filing for bankruptcy because, under the Florida Statutes and the Condominium Declaration, common expense funds may be used to pay liability that arises from a breach of the duty to maintain, repair, or replace the common elements. The bankruptcy estate and not the individual unit owners now have an interest in this property. Accordingly, it is hereby

ORDERED and ADJUDGED that the Plaintiffs' Motion for Summary Judgment (Doc. 13) is DENIED.

DONE and ORDERED in Tallahassee, Florida this 14th day of November, 2008.

A handwritten signature in black ink, appearing to read "L. M. Killian, Jr.", written in a cursive style.

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LEWIS M. KILLIAN, JR.  
United States Bankruptcy Judge