Appeal No. 21-CV-0612

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

LADONNA MAY, ET AL.,

Appellant,

v.

STANTON VIEW DEVELOPMENT, LLC, *et al.*,

Appellees.

BRIEF OF APPELLEE RIVER EAST AT GRANDVIEW CONDOMINIUM UNIT OWNERS' ASSOCIATION, INC.

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1. Whether the Superior Court erred in granting Appellee River East at Grandview Condominium Unit Owners Association, Inc.'s Motion to Dismiss.

2. Whether the Superior Court erred in not allowing Appellants leave to amend their claim against Appellee River East at Grandview Condominium Unit Owners Association, Inc.

STATEMENT OF THE CASE

This case involves River East at Grandview Condominiums, located at 1262 Talbert Street, SE, Washington, DC 20020 (the "Property"). The Property was developed by Stanton View Development, LLC and RiverEast at Anacostia, LLC (collectively the "Developer"),[1] using a $6,000,000 Housing Production Trust Fund ("HPTF") loan they obtained on September 12, 2014, from the District of Columbia Department of Housing and Community Development ("DHCD").

On March 31, 2017, upon completion of the Property, the Developer established the River East at Grandview Condominium. Control of the Property subsequently shifted from the Developer to the River East at Grandview Condominium Unit Owners Association (the "Unit Owners Association"). Upon taking control, the Unit Owners Association commissioned a transition study by a

[1] Technically, RiverEast at Anacostia, LLC, was the developer/declarant, and Stanton View Development, LLC, was the general contractor. However, because Appellants refer to them collectively in their Complaint, *see* A5 at Complaint ¶ 14, they are referred to collectively herein.

professional engineering firm. The study outlined extensive structural defects in the Property, including in the Property's foundation. Based on the study, the Unit Owners Association filed a timely claim with the District of Columbia government against the structural defect warranty bond (the "warranty bond" or the "security") posted by the Developer in accordance with the provisions of the Condominium Act. The Unit Owners Association's claim was approved, and the Unit Owners Association was awarded the full amount of the security.

Between 2017 and 2019, Appellants purchased their respective units within the Property. Shortly after moving in, Appellants began noticing defects in their units, which worsened over time. Appellants filed suit against the Developer, DHCD, and the Unit Owners Association. Appellants' sole claim against the Unit Owners' Association was negligence. Appellants based this claim on the allegations that the Unit Owners Association did not properly evaluate the structural integrity of the Property before taking control of it and did not make a claim against the Developer's warranty bond as soon as one of Appellants did as to her condominium unit. The Unit Owners Association moved to dismiss on the grounds that the facts alleged against it, even if true, cannot give rise to a finding of negligence as a matter of law, because, among other reasons, the Unit Owners Association timely filed and obtained 100 percent of the structural warranty bond that Appellants claim the Unit Owners Association did not apply for soon enough. The Appellant who apparently

submitted to DHCD a structural warranty claim before the Unit Owners Association received nothing, and yet Appellants allege that the Unit Owners Association was negligent in submitting its structural warranty bond claim after one of the Appellants.

The Superior Court granted the Unit Owners Association's motion to dismiss. In this appeal, which followed, Appellants ask the Court to resolve two questions related to their negligence claim against the Unit Owners Association:

1. whether the Superior Court erred in granting the Unit Owners Association's Motion to Dismiss; and

2. whether the Superior Court erred in not allowing Appellants leave to amend their claim against the Unit Owners Association.

For the following reasons, the answer to both questions is no.

STATEMENT OF FACTS

On September 12, 2014, DHCD issued a $6,000,000 HPTF loan to the Developer for the purpose of constructing 46 affordable housing condominium units on the Property. A6; A91.[2] Upon completion of the construction, on March 31, 2017, the Developer created the River East at Grandview Condominium by recording the Declaration of Condominium and Bylaws among the land records of the District of Columbia. A298–315 (Condominium Declaration); A317–69 (Condominium

[2] "A" references cite to the Appendix to the Brief of Appellants, which was filed on June 1, 2022.

Bylaws). On July 7, 2017, the first unit was conveyed to a bona fide purchaser, non-party Patrice S. Edwards. App. 015.[3,4]

Appellants are various original condominium unit owners. They purchased their respective units directly from the Developer through public offerings in 2017 through and including 2019. A6, A16, A19, A23, A28, A31, A37, A44, & A47 at Complaint ¶¶ 21, 61, 89, 121, 158, 185, 220, 285, & 312. Shortly after moving in, Appellants began noticing defects in their units, such as cracks in the drywall and cement flooring, gaps in the framing around doors and windows, uneven flooring, defective plumbing, and poor rooftop drainage. A7–54. Appellants reported the defects to the Developer, who attempted to perform some interior unit repairs. *Id*. Because the defects were caused by problems with the building's structure and/or foundation, however, the repairs proved temporary. A7 at Complaint ¶ 20.

On July 5, 2019, within two years of the conveyance of the first unit, the Unit Owners Association timely filed a notice of warranty bond claim for the common elements with the DHCD Rental Conversion and Sales Division (the "Division"). A13 at Complaint ¶ 47. The Unit Owners Association supported its claim with a transition engineering evaluation, a/k/a transition study, performed by a qualified

[3] "App." references cite to the Appendix to the Unit Owners Association's Appellee's Brief, filed herewith.

[4] The Court may take judicial notice of the River East at Anacostia, LLC deeds because they are official public records, available at https://gov.kofiletech.us/DC-Washington/.

professional engineering firm. App. 23–79; App. 87. The transition study confirmed the Unit Owners Association's allegation that the common elements, units, roof, and building exterior of the Property were structurally defective. *Id*. The Unit Owners Association also supported its warranty bond claim with a cost estimate of $5,111,000 to repair, replace, or renovate the structurally defective building components. App. 88. On June 11, 2021, the Division found that the Unit Owners Association established a perfected claim against the Developer's warranty bond. App. 86–88. Therefore, the Division awarded the Unit Owners Association warranty security in the amount of $436,937.71, which was the entire bond the Developer had been required to post pursuant to the Condominium Act. App. 88.

On January 29, 2021, Appellants filed their Complaint in this matter, naming the Developer, DHCD, and the Unit Owners Association as defendants. A1–72. Only a single count, Count IX – Negligence, of their thirteen (13)-count Complaint was against the Unit Owners Association. A63–64. Appellants based Count IX on allegations that the Unit Owners Association did not properly evaluate the structural integrity of the Property before taking control of the Unit Owners Association and did not make a claim against the Developer's warranty bond sooner than it did related to the common elements.[5] A13 at Complaint ¶ 47; A63–64 at Complaint

[5] The most plausible reading of Count IX is that Appellant's negligence claim is based solely on the allegation that the Unit Owners Association failed to conduct a transition deficiency study before taking over management of the Property.

Count IX. On March 29, 2021, the Unit Owners Association filed a motion to dismiss on the grounds that the facts alleged against it, even if true, cannot form the basis of a finding of negligence as a matter of law. A229–34 (Motion); A287–96 (Memorandum of Law); App. 1–7 (Appellants' Opposition to Motion to Dismiss); App. 8–15 (Appellee Unit Owners Association's Reply to Appellants' Opposition to Motion to Dismiss, with Exhibit); App. 16–88 (Appellee Unit Owners Association's Supplemental Memorandum Regarding Motion to Dismiss). On August 26, 2021, the Superior Court issued an order granting the Unit Owners Association's motion. A253–59. Appellants filed a notice of appeal on September 1, 2021. A249–52.

STANDARD OF REVIEW

In *Hoff v. Wiley Rein, LLP*, this Court explained:

> We "review an order granting a motion to dismiss de novo," *Hillbroom v. PricewaterhouseCoopers LLP*, 17 A.3d 566, 573 (D.C.2011) (citing *Chamberlain v. Am. Honda Fin. Corp.*, 931 A.2d 1018, 1022 (D.C.2007)), applying the "same standard the trial court was required to apply." *Id*. We accept the "allegations in the complaint as true" and view "all facts and draw [ ] all reasonable inferences in favor of the plaintiff[ ]." *Id*. (citing *Murray v. Wells Fargo Home Mortg.*, 953 A.2d 308, 316 (D.C.2008)). All "uncertainties or ambiguities in the complaint must be resolved in favor of the pleader." *Id*.

However, for the sake of argument, the Unit Owners Association will address the only other allegation Appellants made against it in their Complaint, which is that it "submitted its warranty claim on or about July 5, 2019, two (sic) months after May's submission." A13 at Complaint ¶ 47.

(quoting *Atkins v. Indus. Telecomms. Ass'n*, 660 A.2d 885, 887 (D.C.1995)) (internal quotation marks omitted).

110 A.3d 561, 564 (D.C. 2015) (alterations in original). Nevertheless, "[d]ismissal is warranted … if 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Id.* (quoting *Owens v. Tiber Island Condominium Ass'n*, 373 A.2d 890, 893 (DC 1977)). Put another way, a Rule 12(b)(6) motion should be granted if "[t]here is simply no way, under existing law, to read the complaint as stating any basis for holding [the moving party] liable for what happened to [the plaintiff]." *Klahr v. D.C.*, 576 A.2d 718, 721 (DC 1990).

SUMMARY OF ARGUMENT

Appellants make two arguments as to why they adequately stated a claim of negligence against the Unit Owners Association. First, they assert that the Unit Owners Association breached its fiduciary duties to the unit owners by not "promptly … submitting a warranty claim[.]" *App'nts Br.* at 48–49. Second, Appellants contend that the Unit Owners Association was negligent by "fail[ing] to conduct a transition deficiency study or otherwise identify structural defects *prior to taking over management* [of the condominium]." *Id*. at 49–50 (emphasis added). Neither of these arguments raises a factual allegation sufficient to sustain a negligence cause of action against the Unit Owners Association.

The Condominium Act requires the Developer to warrant individual units and common elements against structural defects from the date the first unit is conveyed

to a purchaser until two years thereafter. It is undisputed that the Unit Owners Association submitted a warranty bond claim within this two-year period, and thus that its claim was timely. Appellants, however, argue that the Unit Owners Association's warranty bond claim was not "prompt" because it was filed a little over three (3) months after Appellant LaDonna May filed a claim against the warranty bond for her individual unit. Appellants cannot cite any legal authority supporting their argument that an otherwise timely common elements warranty claim runs afoul of an association's fiduciary duties merely because an individual unit owner filed a claim first.

Appellants other argument, that the Unit Owners Association was negligent by not commissioning a transition deficiency study prior to taking over management of the condominium, is meritless because the Condominium Act expressly provides that until the Developer transfers control to the Unit Owners Association, all tort liability rests with the Developer.

Finally, the Superior Court did not err in failing to give Appellants leave to amend their claim against the Unit Owners Association because Appellants did not request leave to do so, either in their opposition to the Unit Owners Association's motion to dismiss or by way of a motion for reconsideration of the Superior Court's order granting the motion. Nevertheless, even if Appellants had sought leave to amend their claim against the Unit Owners Association, the Superior Court would

have been required to deny the request because, for the reasons outlined in Argument Section I, below, Appellants cannot plead any set of facts to support a viable claim of negligence against the Unit Owners Association.

ARGUMENT

I. The Superior Court properly granted the Unit Owners Association's motion to dismiss because Appellants can plead no set of facts to support a claim upon which relief can be granted against the Unit Owners Association.

As indicated above, Appellants raise two arguments in their brief[6] to support their claim that the Unit Owners Association negligently carried out its fiduciary duty to address the structural defects present in the individual and common elements of the condominium building. First, they argue that the Unit Owners Association failed to "promptly … submit[ ] a warranty claim." *App'nts Br.* at 48–49. Appellants do not explain in their brief why the Unit Owners Association's warranty bond claim was (allegedly) not "prompt." However, in their opposition to the Unit Owners Association's motion to dismiss in the court below, Appellants explained that their argument is based on the fact that Appellant LaDonna May filed a warranty claim for her individual unit a little over three (3) months before the Unit Owners

[6] Indicative of the weakness of Appellants claim against the Unit Owners Association is how Appellants devote the majority of their Statement of Facts and twenty-six (26) pages of argument to their claims against DHCD, yet devote only two (2) pages of threadbare argument to their claim against the Unit Owners Association.

Association filed its claim for the common elements. App. 4. Thus, according to Appellants, the Unit Owners Association did not act with sufficient promptness. This argument is meritless.

The Condominium Act provides:

> A declarant[7] shall warrant against structural defects in each of the units for 2 years from the date each unit is first conveyed to a bona fide purchaser, and all of the common elements for 2 years. The 2 years shall begin as to any portion of the common elements whenever the portion has been completed or, if later … at the time the first unit is conveyed to a bona fide purchaser.

D.C. Code Ann. § 42-1903.16(b)(4) (footnote added). Thus, an individual unit owner may submit claims related to structural defects in her unit up to two years from the date her unit was first conveyed, and unit owners' associations may submit claims related to structural defects in the common elements up to two years from the date the first unit was conveyed to a bona fide purchaser.

In this case, the first unit was conveyed to a bona fide purchaser on July 7, 2017. The Unit Owners Association submitted its claim against the Developer's warranty bond on July 5, 2019. Being that the Unit Owners Association's warranty claim was filed within two (2) years of the conveyance of the first unit, it was timely pursuant to the Condominium Act. The timeliness of the Unit Owners Association's common elements warranty bond claim is undisputed. Nevertheless, Appellants still

[7] The terms developer and declarant refer to the same entity.

argue that the Unit Owners Association breached its fiduciary duties by not submitting its claim before Appellant LaDonna May filed hers. Appellants did not cite any legal authority to the Superior Court supporting their position that a unit owners association must file the warranty bond claim for the common elements before the first unit owner files a claim against the warranty bond for his or her individual unit. Nor do they cite any such authority to this Court on appeal. The only requirement the Unit Owners Association was required to satisfy was submission of the common elements warranty bond claim before the expiration of two years from the date the first unit was conveyed to a bona fide purchaser. It is undisputed that the Unit Owners Association satisfied this requirement. A13 at Complaint ¶ 47. Therefore, the Unit Owners Association met its fiduciary duty with respect making a claim against the Developer's warranty bond for the common elements.

The second reason Appellants cite for why they adequately pled negligence against the Unit Owners Association is that they alleged in their Complaint that the Unit Owners Association "fail[ed] to conduct a transition deficiency study or otherwise identify structural defects *prior to taking over management*." *App'nts Br.* at 49–50 (emphasis added). However, tort liability for acts or omissions related to control of the condominium before the unit owners association takes over management rests with the Developer alone. The Condominium Act provides that

the "period of declarant control" is the time, set by the condominium instruments, during which the declarant is authorized to "appoint and remove some or all of the officers of the unit owners' association or members of its executive board, or both, or to exercise powers and responsibilities otherwise assigned by the condominium instruments and by this chapter to the unit owners' association, the officers, or the executive board." D.C. Code Ann. § 42-1903.02(a). Such authorization is valid until "the time set by the condominium instruments or after units to which three-fourths of the undivided interests in the common elements appertain have been conveyed, whichever occurs first." *Id*. Pursuant to the River East at Grandview Condominium Bylaws, "until the first annual meeting of the Association, the Declarant shall have the right to appoint a majority of the Board of Directors[.]" Bylaws at § 5.2. The Bylaws further provide that, so long as the declarant is authorized to appoint a majority of the Board of Directors, "[t]he … appointees need not be Unit Owners or residents of the Condominium," and "the Declarant shall have the right in its sole discretion to replace such directors and to designate their successors if vacancies occur for any reason." *Id*. Election of unit owners as directors, which represented the transfer of control from the Developer to the Unit Owners Association, took place "at the first annual meeting of the Association," *id*., which was held "(i) within two years from the date that the first Unit [wa]s conveyed or (ii) within 90 days after

Units to which 75% of the Percentage Interests appertain [were] conveyed by the Declarant, whichever date first occur[ed.]" *Id*. at § 4.3.2.

Until the period of declarant control prescribed by Section 42-1903.02(a) of the Condominium Act expires, "the declarant shall … have the power *and the responsibility* to act in all instances where this subchapter or the condominium instruments require or permit action by the unit owners' association, its executive board, or any officer or officers." D.C. Code Ann. § 42-1903.02(c) (emphasis added). This is important because the Condominium Act specifically addresses the tort liability of the declarant versus the tort liability of the unit owners association as follows:

> ***An action for tort alleging a wrong done***: (1) by any agent or employee of the declarant or of the unit owners' association; or (2) ***in connection with the condition of any portion of the condominium which the declarant*** or the association ***has the responsibility to maintain, shall be brought against the declarant*** or the association, as the case may be.

Id. at § 42-1903.09(a) (emphasis added). Thus, because the Developer, pursuant to D.C. Code Ann. § 42-1903.02(a) & (c) and Bylaws § 5.2, had the responsibility to maintain the condominium before the Unit Owners Association took over management, any liability related to a transition deficiency study not being performed before the Unit Owners Association took over management rests with the Developer. *See* D.C. Code Ann. § 42-1903.09(a) (providing that

[a]n action for tort alleging a wrong done … in connection with the condition of any portion of the condominium which the declarant … has the responsibility to maintain, shall be brought against the declarant[.]").

Appellants' statement that the Unit Owners Association "has not provided a date certain by which it officially took over control of the Property from the declarant," *App'nts Br.* at 50, is a red herring. As indicated above, the Unit Owners Association commissioned a transition study after it took over management of the condominium. This fact is undisputed. The Unit Owners Association then filed the warranty bond claim for the common elements in a timely manner, which is to say within two years of the conveyance of the first unit to a bona fide purchaser. This fact is also undisputed. Because the Unit Owners Association satisfied these duties within the statutorily-prescribed period, the precise date on which it took over management of the condominium is irrelevant.

Lastly, the Unit Owners Association notes that, had the Superior Court not dismissed Count IX, it would have resulted in an illogical outcome and imposed an impossible duty on the Unit Owners Association. As outlined above, before control of the condominium transfers from the declarant to the unit owners' association, the declarant controls the board of directors, appoints its members (who need not be unit owners), and may replace them for any reason whatsoever. Obviously, during this period, the declarant cannot be relied upon to select and engage a reliable,

trustworthy, and independent firm to conduct a transition study. The purpose of a transition study is to conduct an unbiased, competent, and professional analysis of the structural integrity of the condominium building to determine whether a claim needs to be made against the declarant's warranty bond. The Condominium Act would not – and does not – contemplate the declarant-controlled board performing the transition study prior to the unit owners' association taking over control, as such a study would not be independent in any sense of the term. The declarant would have a financial incentive to obtain a study finding as few defects as possible. Only when the unit owners' association is controlled by the unit owners, namely *after* it assumes control of the condominium, does it have the power to select an engineering/architectural firm that will look after the best interests of the unit owners. The last thing the statute would contemplate would be a board consisting of non-unit owners, serving at the unfettered discretion of the declarant, conducting the transition study to determine the necessity of a warranty claim against the declarant himself.

II. The Superior Court did not err in failing to allow Appellants leave to amend their claim against the Unit Owners Association because Appellants did not seek leave to amend the claim, and even if they had, the Superior Court would have been required to deny the request because, as outlined above, Appellants cannot plead any set of facts to support a claim upon which relief can be granted against the Unit Owners Association.

Appellants argue that "the Superior Court erred in failing to give [them] the opportunity to replead." *App'nts Br.* at 50. In making this argument, Appellants lump their claims against DHCD together with their claim against the Unit Owners Association. Although Appellants requested leave to amend their claims against DHCD, they did not request leave to amend their claim against the Unit Owners Association. Appellants essentially concede this in their brief. *See id*. at 51 (arguing that Appellants "requested leave to file Motion to file their First Amended Complaint *in their Opposition to the DHCD's Motion* and given the breadth, scope and seriousness of the allegations, [Appellants] should be granted an opportunity to replead." (emphasis added)). Because Appellants did not seek leave to amend their claim against the Unit Owners Association, either in their opposition to the Unit Owners Association's motion to dismiss or in a motion to reconsider the Superior Court's order granting the Unit Owners Association's motion to dismiss, the Superior Court did not err in failing to give Appellants leave to replead their claim against the Unit Owners Association. *See Miller-McGee v. Washington Hosp. Ctr.*, 920 A.2d 430, 438 (D.C. 2007) (explaining that, "[a]bsent exceptional

circumstances, a [trial] court has no obligation to invite a plaintiff to amend his or her complaint when the plaintiff has not sought such amendment." (quoting *U.S. ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 242 (1st Cir. 2004)) (compiling supporting cases in footnote)). Moreover, even if Appellants had sought leave to amend their claim against the Unit Owners Association (which they did not), their request would have been futile because, for the reasons outlined above, they cannot plead any set of facts that would state a claim upon which relief can be granted against the Unit Owners Association.

CONCLUSION

The Unit Owners Association submitted a timely warranty bond claim against the Developer pertaining to the structural defects in the common elements. Appellants cite no legal authority in support of their allegation that the Unit Owners Association breached its fiduciary duties by submitting the warranty bond claim for the common elements a few months after Appellant LaDonna May filed a warranty bond claim for structural defects in her individual unit. The Unit Owners Association did not have a duty to perform a transition study prior to taking over control of the condominium. All tort liability for acts or omissions in the management of the condominium before the Unit Owners Association took control rests with the Developer. Appellants did not request leave to amend their claim against the Unit Owners Association, and even if they had, their request would have

been futile because the Unit Owners Association satisfied its fiduciary duties as a matter of law. For these reasons, the judgment of the Superior Court in favor of the Unit Owners Association must be affirmed.

Respectfully submitted,

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REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:
   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayer identification number would have been included;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

/s/ Timothy J. Dygert, Jr.
Signature

2021-CV-0612
Case Number(s)

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of July, 2022, a copy of the foregoing Brief of Appellee River East at Grandview Condominium Unit Owner's Association, Inc. was served on the following *via* the D.C. Court of Appeals' electronic e-filing system:

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