NO. 90642-4

SUPREME COURT OF THE STATE OF WASHINGTON

NO. 69637-8-1
COURT OF APPEALS, DIVISION I

CINDY ALEXANDER; BLOCKER VENTURES, LLC; CHRIS CLARK; R. BRUCE EDGINGTON; KIPP JOHNSON and JENNIFER JOHNSON; GOPIKRISHNA KANURI and HIMABINDU KANURI; CHRIS KASPRZAK and ELIZABETH KASPRZAK; PAUL LARKINS and JOYCE HYOJUNG LARKINS; KRISTINE MAGNUSSEN; SCOTT McKILLOP; CAINE OTT and DANA OTT; MARA PATTON; PETER RICHARDS; DANTE SCHULTZ; WINFRED D. SMITH; ROBERT STODDARD and COLETTE STODDARD; NEIL WEST; LIANG XU and JIA LU DUAN,

Petitioners,

v.

GARY SANFORD AND JANE DOE SANFORD; PAUL BURCKHARD and MURIEL BURCKHARD; JAMES SANSBURN and JANE DOE SANSBURN; RICHARD PETER and JANE DOE PETER; SHANA HOLLEY and RICHARD HOLLEY; BRETT BACKUES and JANE DOE BACKHUES; JOSEPH CUSIMANO and JANE DOE CUSIMANO; JASON FARNSWORTH; PATRICIA HOVDA and JOHN DOE HOVDA; ALEXANDER W. PHILIP and NATALIA T. PHILIP; HUCKLEBERRY CIRCLE, LLC; LOZIER HOMES CORPORATION; DOE DECLARANT AFFILIATES 1-20; DIANE GLENN and JOHN DOE GLENN; CONSTRUCTION CONSULTANTS OF WASHINGTON, LLC,

Respondents.

PETITIONERS' ANSWER TO RESPONDENTS' JOINT PETITION FOR REVIEW

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In their "joint" motion for review, the Declarant, the Executive Defendants, and Elected board member defendants (collectively "Respondents") raise three issues for review, two of which they have never raised before. None of the issues identified by Respondents merit review by this Court.

A. Claims for Breach of Fiduciary and Board Member Duty of Care in the Governance of a Condominium Owners' Association Are Not Even Arguably "End Runs" Around Statutory Limitation Periods on Warranty and Construction Claims So As to Merit Review.

Respondents first contend that the Homeowners' claims for breach of board member duties (fiduciary and otherwise), for fraud, for misrepresentation, and negligence all amount to nothing but "end runs" around the warranty statute of limitations in the WCA (RCW 64.34.445) or the contractor's statute of repose (RCW 4.16.310).

This contention is easily debunked, and does not represent a serious question in the law. The limitations periods Respondents refer to apply, by their express terms, to warranties of quality on condominiums, and breach of contract claims premised on a failure to construct the project properly. The claims asserted in this lawsuit are different. Had a timely warranty claim been asserted by the Association under the WCA, it would certainly have included far more than is at issue here. The Association has undertaken pursuant to its multi-million dollar special assessment only a fraction of the work that it would have asserted a claim for had the limitations periods not been ignored by Respondents. Moreover, the Homeowners' claims in this matter aggregate to only a fraction (18/40ths of the units) of the full scope of liability the declarant would have faced on a timely warranty claim. Moreover, if the Executive Defendants and Lozier were not alter egos of the Declarant, they have no direct warranty liability anyway. At the same time, the burdens of proof the Homeowners face are far more demanding than

what would have been an almost strict warranty liability under a standard WCA warranty claim.

Accordingly, Respondents' suggestion that the Homeowners' claims are an "end run" around the warranty limitations period has no legal, factual or logical basis. No conflict meriting review or issue of substantial public importance is indicated in this issue.

B. The Complaint Alleges Participation by the Executive Defendants in the Concealment of Defects for the Accomplished Purpose of Avoiding Warranty Responsibility Until the Limitations Period Expired.

Respondents' second contention is that the Complaint does not allege that the Executive Defendant participated in the decision not to sue for warranty violations, and therefore could not have dominated the Board on that issue.

This is an entirely new argument by Respondents. It is also factually inaccurate.

The Complaint alleges that the Executive Defendants engaged in a pattern of concealing defects and misdirecting the Board as to the cause of leaks, for the purpose of causing the warranty period to expire without action. The Complaint alleges that Executive Defendant Sanford ***remained on the Board*** during and after the most critical event in that process occurred, to wit, the Board deciding to ignore the advice of counsel and construction professionals to take action before the warranty limitations period expired, in light of indications of serious construction defect problems. The Complaint alleges that Sanford remained on the Board falsely ascribing problems to "maintenance" during this critical period.

The issue is whether adverse members dominated the Board such that it could not be expected that the Board would reveal the facts of the Homeowners' claims. There is

no requirement that the Board be adversely dominated as to the decision of some particular issue, as defense counsel seems to think. In any case, whether the Executive Defendants directly participated in the decision not to hire counsel and proceed with a warranty claim remains at this point unclear. It can reasonably be assumed that the testimony could show that other Board members relied on the Executive Defendants' misdirection about the cause of leaks, and that the remainder of the Board would have acted differently had the Executive Defendants revealed what they knew to be the truth – that the building envelopes throughout the project were improperly constructed and severely compromised. That being the case, the Executive Defendants' continued presence with the remaining majority of adverse Board members supports the rationale for applying the doctrine.

Finally, the Executive Respondents' argument regarding their participation in the Board's failure to follow up on attorney and professional advice is unsupported by reference to conflicting authority which would justify review. RAP 13.4(b).

C. The Doctrine of Adverse Domination, If Applied Here, Should Be Measured by the Majority Test Because the Board Acted on the Basis of Majority Vote, and the Elected Board Members, or a Majority of Them, Were Themselves Corrupt.

Respondents' third contention is that adverse domination need not be adopted, but that if it is adopted it should be measured by a standard of "complete" domination.

As to Respondents' first point, the Homeowners agree that this matter could probably be decided without resort to the adverse domination doctrine. Under traditional common law rules, as explained in the briefing below, where the evidence (or in this case, governing allegations) show that an agent does not in fact convey information to a principal because he is acting in his own or someone else's interests, the defalcating

agent's knowledge should not be presumptively imputed to the principals. *Lowman v. Guie*, 130 Wash. 606, 611, 228 P. 845 (1924). On this ground alone, the trial court or the Court of Appeals should have concluded that the allegations of the Complaint preclude a finding, in the absence of evidence, that the defendant board members were acting as agents of the Homeowners. The Complaint specifically alleges that they were *not* acting as proper agents, but in their own interests. If on the presentation of evidence the trier of fact concludes that the Homeowners were not aware of facts supporting their causes of action, and were not on "inquiry notice" of those facts, then the limitations period is tolled. The Homeowners suggest that either formulation of the law leads effectively to the same place in this case.

Respondents' second claim, that "complete" domination is a better standard by which to measure adverse domination, relies on no supporting authority, and is so entirely lacking in logic that it does not merit review. Respondents' only rationale for favoring complete domination is their bare assertion that the "flow of information" from an Association Board of Directors to condominium owners is "not the same" as the flow of information in a corporation from a Board to shareholders. No explanation is offered.

The Complaint alleges that the Board became aware of multiple reasons to believe the Project had serious problems, and that this information was *never* passed on to the members at large until the eve of the special assessment. The Complaint explains that some board members did this to serve their personal interests in selling their units, or in preserving property values, and that others did it to serve the interests of their employers and thus indirectly, their own interests. Hypothetically, this Board acted on the basis of majority rule.

As long as it is shown that a majority of these Board members acted in furtherance of their own interests in concealing this information as described in the Complaint, there is every reason to presume that information would not be passed on to members by a Board comprised of a majority of corrupt members.

Finally, as with the other issues raised in their request for review, Respondents fail to identify any conflict of authority justifying review. Respondents do argue that claims of this sort are "likely to recur" and pose an "attractive opportunity" to "avoid the effect of the statute of limitation and repose." Respondents' suggestion that allowing proof of adverse domination threatens to open the "floodgates of litigation" borders on the absurd. The availability of the adverse domination presumption may be a matter of real concern to developers who conspire to conceal defects and defraud their customers by continuing to serve on condominium Boards until warranties expire, but that does not make the adoption of the doctrine in general, which is widely accepted throughout the nation, a matter of significant public interest.[1]

D. Fraud Based on Concealment of Defects By an Appointed Board Member During His Term Governing the Association Does Not Require a Written Misrepresentation By the Declarant In Order To Be Actionable.

Respondent's fourth contention is that in proving their fraud case, the Homeowner's are not permitted to demonstrate reliance on a misrepresentation or

[1] Presumably this Court is not concerned about counsel's *ex cathedra* pronouncements about what homeowners are likely to do when they are defrauded by developers and learn that they may have the legal right to sue corrupt board members that conceal their wrongdoings. As a long-time practitioner in the field, the undersigned sees no signs of homeowners beating down the doors to the courthouse to engage in years of litigation over board malfeasance issues of this kind. Any objective appraisal of the law demonstrates that the likelihood of success on these claims as a substitute for an expired warranty claim is vanishingly small. This case is also quite unique in the experience of the Association's counsel because the alleged misconduct of the Respondents was so egregious and so clearly documented; even so, the Homeowners had to search far and wide before finding an attorney willing to wade through decades of records and conclude that their case had enough merit to consider taking it on.

omission unless they can point to it in the a Public Offering Statement, or in a written statement signed by the declarant under RCW 64.34.445. This contention is either badly confused or utterly disingenuous, and in either case, it lacks even a shred of support in the law.

First, RCW 64.34.443(2) states that condominium purchasers may "rely" only on written representations on *for purposes of establishing the existence of an express warranty of quality in the sale of a condominium unit.* The statute does not purport to be a license to commit fraud or misrepresentation in the *governance* of a condominium association after sales, which is what is at issue here.

Second, Respondents make much of the fact that the Court of Appeals commented that unit sellers have a duty to disclose defects under RCW 64.06.020, and therefore board members have reason to expect that their representations will be passed on to subsequent purchasers. Respondents argue that there is no duty to disclose under is particular statute because it does not apply to condominium sales.

Respondents' argument is all much ado about nothing. At worst, RCW 64.06.020 does not apply to *original* sales by the developer, in which a Public Offering Statement must be given. See RCW 64.06.005(2)(b) and RCW 64.34.405(3). Presumably the Form 17 disclosure is required as to *subsequent sale*s of condominium units that do not require a Public Offering Statement from the declarant. What the Association in fact also argued is that subsequent buyers of condominium units have a right to a "resale certificate" which discloses the existence of known defects under RCW 64.34.425, and therefore board members can expect their misrepresentations and concealment of such defects to be passed on to the injury of subsequent unit buyers.

Third, Respondents contend that "Even during the period of declarant control, the declarant and its appointed board members had no duty under the WCA to disclose alleged construction defects [that the appointed board members knew or should have known about.]" Brief at 19-20.

Respondents cite to *Kelsey Lane HOA v. Kelsey Lane Co.*, 125 Wn.App. 227, 242, 103 P.3d 1256 (2005) for the astounding proposition that they could, with impunity, lie and conceal information central to the proper execution of their duties, as directors, to see to the maintenance and upkeep of condominium common elements. Fortunately for condominium owners everywhere, Respondents do not understand what the *Kelsey Lane* case says, or else they are deliberately misstating its holding and rationale.

Kelsey Lane was a summary judgment motion on a construction defect claim that included allegations of breach of fiduciary duty by the declarant for failure to disclose known or suspected defects in the Public Offering Statement and/or during governance of the Association. The Court of Appeals explained that the declarant in *Kelsey Lane* hired a separate general contractor to perform the construction; the declarant had no involvement in construction itself, and thus no reason to know of poor construction. 125 Wn.App. at 235. There was no evidence that the declarant-appointed board members actually knew or should have known of the defects in order to establish, for summary judgment purposes, a possible breach of fiduciary duty in failing to disclose them. *Id.* at 243.

Our case is profoundly different from *Kelsey Lane*. Here it must be taken as established fact that in the course of constructing the Huckleberry Circle project through the Respondents' own company (Lozier Homes), the declarant and Executive Defendants

actually learned of the existence of widespread defects. The Executive Defendants thus had knowledge of the defects during their tenure, and did not act reasonably on that knowledge by disclosing it and/or taking other appropriate actions such as commencing a warranty claim to ensure that the homeowners would have proper redress.

Nothing in *Kelsey Lane* says or suggests that a declarant-appointed Board member need not act on his knowledge of hidden construction defects. It stands merely for the proposition that a declarant can isolate itself from the construction process through independent contractors, and establish at summary judgment in such a case that it 071there were failures by declarant-appointed board members to reveal such defects when known, and failures to disclose strong reasons to suspect such defects – all in order to protect these board members' own financial interests. That is a breach of the statutory fiduciary obligation under the WCA to act in the Association members' best interest and see to the proper upkeep of the Project. That breach of duty led directly to the eventual "motherlode of rot" and the multi-million dollar repair assessment imposed on innocent Homeowners in this case after the breadth of the Board's incompetence or outright corruption became known.

Thus, as to this last issue, too, Respondents fail to demonstrate any conflict of authority that would justify review under RAP 13.4(b).

Accordingly, Respondents' "joint" request for review should be denied.

RESPECTFULLY SUBMITTED this 15th day of September, 2014.

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From: OFFICE RECEPTIONIST, CLERK
Sent: Monday, September 15, 2014 10:05 AM
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Cc: Daniel S. Houser; Ian McDonald; Jerry H. Stein; Justin D. Sudweeks; Ken Strauss; Leonard D. Flanagan; Jerret.Sale@Bullivant.com; tracy.horan@bullivant.com; asalter@tetonlaw.com; brian.esler@millernash.com; Gill.Fadaie@millernash.com
Subject: Alexander, et al. v. Sanford, et al.; Supreme Court cause no. 90642-4

Dear Clerk,

Attached is Petitioners' Answer to Respondents' Joint Petition for Review for filing today in the matter of Alexander, et al. v. Sanford, et al., Supreme Court cause no. 90642-4. Thank you for your assistance in filing this.

Thank you.

Mariah Lynge
Office Manager/ Paralegal

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