

The Lender as Successor Developer Revisited

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A "hot off the press" order was issued by the United States District Court for the Southern District of Florida on February 27, 2013. Although this order is not yet officially published, it serves as the most recent reminder that when condominium projects are concerned, a thoughtful and careful evaluation and assumption of developer rights and obligations continues to be critically important for foreclosing lenders and bulk investors.

The Porto Venezia Condominium Association, Inc. ("Porto"), as Plaintiff asked the District Court to reconsider a summary judgment granted in favor of Defendant WB Fort Lauderdale, LLC ("WB"). WB is the single purpose entity formed by the lender to take title to the condominium property from the defunct "creating" developer. On March 28, 2011, Porto filed a complaint against WB which, among other matters, included a count for breach of statutory implied warranties pursuant to Florida Statute §718.203 because the condominium property was allegedly not fit, merchantable, and suitable for its intended purposes. The basis for this claim was that WB had failed to construct the property pursuant to the building code and plans and had used poor design, engineering and construction. Porto included a list of claimed defects, including issues with the roof, building exterior, floor tiles, mold, seawall, and the electrical, mechanical, and plumbing systems.

In the Order the Court explicitly considered the distinction between what it called a "builder-developer" (a/k/a a "creating" developer), and a "lender-developer". The Court further examined whether WB was a "developer" for purposes Florida Statute §718.203. That statute defines "developer" as a "person who creates a condominium or offers condominium parcels for sale or lease in the ordinary course of business" § 718.103(16), Fla. Stat. Because WB had been created for the sole purpose of selling the Porto units, the Court concluded that WB was a "developer" that offered condominium parcels for sale in the ordinary course of its business. Therefore, the Court held, the builder/lender-developer distinction is irrelevant for purposes of determining a lender's (or by implication a bulk investor's) liability for statutory warranties afforded by the Condominium Act. As the Court observed, "[t]he Florida Legislature crafted a broad definition of "developer" that captures both builder-developers and lender-developers, [and] the Court should not have to cut away statutory obligations that ride along with entities meeting that definition".

So what does this mean for foreclosing lenders and distressed condominium investors? The protections of the Florida Distressed Condominium Relief Act ("Relief Act") continue to be extremely relevant. Obtaining *and maintaining* a "bulk buyer" or a "bulk assignee" classification under the Relief Act can provide significant protections to a foreclosing lender or a bulk investor, and avoid the

statutory warranties predicament faced by the lender in this instance.

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