

Appellate court to decide if condo deposits can go in one account

Paola Iuspa-Abbott

2011-02-07 12:00:00 AM

For nearly a year, developers enjoyed a victory that gave them an edge in litigation after Florida legislators tweaked a law to make it more difficult for would-be-buyers to get their condo deposits back.

But their success may be short-lived.

The 3rd District Court of Appeal is being asked to decide whether developers across the state must return millions of dollars in deposits over a technical violation of state condo law. Miami-Dade Circuit Judge Victoria Sigler recently sided with buyers and ordered developer BCRE Brickell to return a deposit because it failed to split the money in half and hold it in two separate escrow accounts as required by Florida law.

During the housing boom, buyers typically made a deposit of 10 percent of the purchase price to secure a unit and made a second deposit for the same amount when construction of the building started. Sigler decided BCRE should have kept both deposits in two separate escrow accounts.

BCRE appealed to the 3rd DCA on Jan. 31.

If the 3rd DCA agrees with Sigler, the ruling would be a big blow for developers.

"If the judge is right, the technical violation will result in all the buyers being allowed to get their money back," said Miami attorney Brian Goodkind, who represents BCRE. "It would be devastating, not just for my client, but for the entire industry."

Housing Collapse

Many contract holders gave 20 percent deposits to developers to buy new condos between 2004 and 2007. But when the housing market collapsed in 2007, many didn't close. Many are raising the escrow account claim in an effort to get their whole deposit back.

Condo recovery lawsuits blossomed in the last three years, as many new projects were completed and buyers were summoned to the closing table. In many cases, buyers and developers settled, with the developers returning portions of the deposits. But some aren't willing to settle and buyer attorneys have kept coming up with new legal strategies.

In the latest tactic in the fight over condo deposits, the 3rd DCA is being asked to interpret Statute 718.202, which

dailybusinessreview.com/PubArticleFrie...

is supposed to establish how developers must keep deposits on pre-construction projects. Developers claim the law allows them to put the entire 20 percent deposit in one account as long as they keep separate accounting records for the first 10 percent deposit and for the second 10 percent deposit.

Developers typically invested part of the deposits into their projects.

Lawyers representing buyers insist two separate escrow accounts are required by law.

In a preemptive move, developers in May sent their lobbyists to Tallahassee to amend 718.202 to echo their interpretation of the law. The legislators adopted the change and made it retroactive to affect pending suits.

Their victory didn't make buyers like Scott Saltzman drop his escrow account claim from their suits. He pushed forward. He and his lawyer, solo practitioner Joseph Altschul, successfully argued before Sigler that the 2010 amendment wasn't just a clarification but a "substantive" change in the law that if made retroactive "would impair the purchasers' vested rights."

Sigler agreed. She said a "simple reading of the plain language" of the statute shows that two escrow accounts are required. So in December, she ordered BCRE to return the deposit for violating the law.

Saltzman's legal battle started in 2009, when he sued the developer to recoup \$55,500 in deposits he made in 2004 and 2005 to buy a unit at Axis condominium in the Miami's Brickell area. The condo was priced at \$370,000, and he made two deposits totaling \$74,000. Eventually, BCRE returned 5 percent of the purchase price, or \$18,500, said Saltzman, who planned to buy the unit as an investment.

He changed his mind about buying the property after he saw the finishes of the units and the poor quality of the building's amenities, he said. He and his wife, Erika, had been attracted to the building because renowned Miami architectural firm Arquitectonica designed the project. But what was delivered was nothing like what had been promised by the developer, he said.

"I went to the unit, I looked at it and it wasn't something that I wanted to invest more money into," said Saltzman, 68, who lives with his wife in a six-bedroom home in Davie and considered making the condo their retirement home. "The unit and the common areas are plain. It is a pity."

Saltzman hired Fort Lauderdale attorney Altschul to help him get the deposit back. Altschul soon realized BCRE had kept his client's deposits in one account.

Altschul said he can't wait for the 3rd DCA to take on this issue. The higher court opinion will create a precedent and guide circuit court judges on how to rule on the escrow question.

"It would provide clarity for other judges," said Altschul. "Right now, no state appellate court has spoken on it as far as I know."

Claim Denied

When the 3DCA addresses the issue, it would interpret not only the "original statute but the amendment as well and whether it can be applied retroactively," Altschul said.

Until then, judges may continue disagreeing on how to interpret the law.

On Jan. 25, Miami-Dade Circuit Judge Beatrice Butchko ruled in favor of BCRE on another deposit recovery lawsuit. In that case, Butchko ruled that the statute didn't require two escrow accounts so she denied the claim. The case is still pending on other counts, said solo practitioner Goodkind.

On Feb. 4, Acting Miami-Dade Circuit Judge Norma Lindsey also ruled in favor of BCRE in a similar case. Lindsey said the buyer, 1106744 Ontario Inc., didn't have the right to rescind the contract and get its money back because its deposit was held in one account. She also said the 2010 legislative amendment was a mere clarification of the law and didn't affect the buyer's vested rights.

Goodkind said it was common for developers during the boom to keep the deposits in one account because they followed a recommendation from the Florida Department of Business & Professional Regulation.

"There was a legal opinion by the DBPR in 1999 telling developers the statute required one account; so, everybody used one account," he said.

Saltzman isn't interested in explanations from developers and plans to keep fighting.

"The banks and the developers made billions and billions of dollars on the average citizen and using the average citizen's greed and avarice to their benefit," he said. "They encouraged and allowed what happened to happen. And they want me to pay a price that is incredibly inflated for that unit? They should be held accountable for that, not just in my case, but in general."

While the 3DCA is reviewing the issue, a federal appeals court also plans to tackle the same question in mid March.

But its decision won't be binding for cases argued in front of the state court judges.

Last March, U.S. District Judge Cecilia Altonaga ordered Swire Pacific Holdings to return to Double AA International Investment Group's \$232,000 deposit from 2004. Double AA had agreed to buy a \$1.16 million condo at Asia, a condo high rise in the Brickell area.

Altonaga ruled that Swire Pacific Holdings and title company Lawyers Title Insurance had to return the money because they failed to create two separate escrow accounts. The developer appealed to the 11th U.S. Circuit Court of Appeals.

Shortly after Altonaga's ruling, would-be-buyers began amending their lawsuits against developers to add this new claim to their complaint, said Miami attorney Alexander Lian, who represented Double AA.

But days after Lian's win in court, developers rushed to Tallahassee to have state law amended. The amendment became effective July 1.

Attorneys who represent developers say they have no doubt that their clients will emerge victorious.

"I will be interested to see what the 3rd DCA does with it," said Miami attorney Hugo Alvarez, a partner with Alvarez & Barbara. "The law has evolved in a manner that it should favor developers."