Florida Land Title Association

FLTA

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How Many Trust Accounts Do I Really Need?

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During the boom times, many FLTA members were holding pre-construction deposits on condominium units. Under the Condominium Act, any deposits in excess of 10% of the contract price could be released to the developer to cover certain construction costs. The normal practice in many parts of the state was to require a 20% deposit. When the market turned, many purchasers under those contracts sought a refund of their deposits and were rarely successful.

Double AA International Investment Group, Inc. v. Swire Pacific Holdings, Inc., 674 F.Supp.2d 1344 (S.D. Fla. 2009), *aff'd in part, vacated in part*, 637 F.3d 1169 (11th Cir. 2011) held that the Condominium Act required an escrow agent holding pre-construction deposits in excess of 10% of the purchase price of a condo to maintain totally separate accounts for the amounts in excess of 10% of the purchase price. Under that case, separate accountings within a master trust account, or developer specific trust account, were simply not permitted – and the violation of this standard entitled a purchaser to a total refund of his deposit.

Feeling that the court had misinterpreted the Condo Act (and there was an Internal Division of Condo legal opinion concluding that a single escrow account, with clear accounting records was the correct interpretation), FLTA joined with our friends at the Real Property, Probate and Trust Law Section of the FL Bar to encourage the legislature to address this matter.

In May 2010 (even before the appeal of the Double AA case had been completed), we proudly reported our success in legislatively "reversing" this holding with this addition to §718.202, Florida Statutes:

> (11) All funds deposited into escrow pursuant to subsection (1) or subsection (2) may be held in **one** or more escrow accounts by the escrow agent. If **only one escrow account is used**, the escrow agent must maintain separate accounting records for each purchaser and for amounts separately covered under subsections (1) and (2) and, if applicable, released by the developer pursuant to subsection (3). **Separate accounting by the escrow agent of the escrow funds constitutes compliance with this section even if the funds are held by the escrow agent in a single escrow account. It is the intent of this subsection to clarify existing law.**

(Emphasis added)

We thought that ended the issue and the exposure of our developer friends and escrow agents to this type of claim. But on September 7, 2011, the Third DCA issued its ruling in CRC 603, LLC

v. North Carillon, LLC, Case nos. 3D10-2230 and 3D10-223 (Fla. 3rd DCA, 2011). Link Here Many consider this case "potentially cataclysmic" for condominium developers and secondarily for those attorneys and title agents and insurers who held pre-construction escrows on their behalf.

The CRC 603 case held that §718.202 required at least two totally separate escrow accounts – one for the first 10% of the deposit, and a totally separate second escrow account for the portion over 10% of the purchase price. Even though the statutory amendments were expressly designed to be retroactive in application, the court held that a retroactive application would impermissibly infringe on vested contract rights and was thus unconstitutional.

The court concluded that not strictly comply with Florida Statute § 718.202, by failing to use two separate escrow accounts for a buyer's purchase deposits, would entitle a buyer to recover their entire deposit as well as their attorneys' fees and costs from the developer. Depending on the facts of an individual case, the developer might then assert a claim against the escrow agent for not following the statute in handling the deposits.

The statute of limitations has not yet run for condos built late in the boom cycle. So, developers anticipate some continuing efforts to recover deposits on defaulted contracts. And that leaves their escrow agents with potential (albeit secondary) exposure from this case.

FLTA believes the CRC 603 case was wrongly decided and has been encouraging the parties to bring an appeal to the Florida Supreme Court where we might have an opportunity to participate as an Amicus. In the meantime, we strongly suggest that our members who held pre-construction escrows on condominiums discuss their escrow practices, any potential exposure under this case and possible risk mitigation with their legal counsel.