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IN THE SUPREME COURT OF FLORIDA

ASSOCIATION OF GOLDEN GLADES CONDOMINIUM CLUB, INC., etc., Petitioner, vs. SECURITY MANAGEMENT CORP., Respondent.	)	Case No. 71,909
CONDOMINIUM ASSOCIATION OF PLAZA TOWERS NORTH, INC., Petitioner, vs. PLAZA RECREATION DEVELOPMENT CORP., et al., Respondents.	)	Case No. 71,594

SUPPLEMENTAL BRIEF OF RESPONDENTS

Alan C. Sundberg
Sylvia H. Walbolt
CARLTON, FIELDS, WARD, EMMANUEL, SMITH & CUTLER, P.A.
First Florida Bank Building
Post Office Drawer 190
Tallahassee, Florida 32302
(904) 224-1585

and

CYPEN & CYPEN
825 Arthur Godfrey Road
Miami Beach, Florida 33140
(305) 532-3200

Attorneys for Respondents

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Introduction

By its order dated February 9, 1989, this Court granted leave for the parties in each of these consolidated proceedings to file supplemental briefs addressing the effect on these cases of the enactment of Chapter 88-225, Laws of Florida, and of the decision of the Third District Court of Appeal in Sky Lake Gardens Recreation, Inc. v. Sky Lake Gardens Nos. 1, 3 & 4, Inc., 14 F.L.W. 324 (Fla. 3d DCA Jan. 31, 1989). The petitioners served their respective supplemental briefs on February 20, 1989. This brief is filed on behalf of the respondents in both cases.

Before June 4, 1975, no legislation in Florida addressed the validity of rent escalation clauses in condominium recreation leases; parties were free to contract on whatever terms the common law allowed. Effective that date, the Legislature enacted Section 711.231, Florida Statutes (subsequently renumbered Section 718.401(8)), which declared such escalation clauses to be void if they are based on the cost-of-living index. Each of the leases involved here predates that statute.

In Fleeman v. Case, 342 So.2d 815 (Fla. 1976), this Court held that the new statute was not intended to be retroactive and that, in any event, it could not be applied constitutionally to a lease signed prior to June 4, 1975. In later decisions, this Court has held that, in certain limited circumstances, Section 718.401(8) may apply to rent escalations that are effective after June 4, 1975, even if the lease predates that date. Angora

Enterprises, Inc. v. Cole, 439 So.2d 832 (Fla. 1983), cert. denied, 466 U.S. 927, 104 S. Ct. 1710, 80 L.Ed. 2d 183 (1984); Century Village, Inc. v. Wellington Condominium Association, 361 So.2d 128 (Fla. 1978).

It is not true, as petitioner Plaza asserts, that the statute has been held to be applicable where, without more, only the Declaration of Condominium contains an incorporation of the Condominium Act "as it may be amended from time to time,"[1] nor is it true that the lessor is bound by the Declaration if it has a **"loose"** relationship with the declarer. Rather, this Court's decisions require both that the Declaration of Condominium evidence an intent to apply the Florida Condominium Act "as the same may be amended from time to time" and that either (1) the declarer of the Declaration of Condominium and the lessor of the lease document that contains the escalation clause are one and the same party at the time the Declaration is recorded, or (2) the lessor of the lease document who is not the declarer expressly

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1/ At the oral argument, counsel for petitioner Plaza incorrectly represented to the Court that all that is required is that the Declaration automatically incorporate amendments to the Condominium Act, citing Century Village in support of that assertion. That incorrect assertion was again repeated in Plaza's Supplemental Brief, at page 1. That is not the law, however. In Century Village, contrary to counsel's representation, the lessor and the declarer were in fact one and the same. See Century Village, 361 So.2d at 130, 132-33. Likewise, in Angora Enterprises, the Court specifically noted that "the lessor . . . in his corporate capacity was both the developer and the management firm . . . ." 439 So.2d at 834 (emphasis added).

agrees to be bound by the Condominium Act or by the Declaration of Condominium or, at least, the automatic amendment provision of the Declaration.

In the cases now before the Court, the lessor was not the same party as the declarer at the time the condominium documents were executed and the lessor did **not** agree to be bound by either the Act or the Declaration. Rather, these cases present the same circumstances as Cove Club Investors, Ltd. v. Sandalfoot South One, Inc., 438 So.2d 354 (Fla. 1983), where this Court refused to apply the statute to a previously executed lease. Consistent with these controlling decisions, the District Court correctly held that it was not constitutionally permissible to apply Section 718.401(8) to the rental increases at issue.

The state of the law on this question is clear. The reasoning of the District Court's opinions is entirely consistent with -- indeed, compelled by -- this Court's prior opinions, including its opinions in Fleeman, Angora Enterprises, Century Village, and Cove Club Investors. In its decision in the Plaza case, the District Court specifically referred to and applied each of those decisions. Of course, Golden Glades was decided on the authority of Plaza. Accordingly, the certified question can be answered, and both of the decisions presented for review can be summarily affirmed, based upon the well-settled principles that the District Court applied.

Although the Court need not reach any additional issues to resolve these cases, there has been a statutory change since these proceedings were commenced that leads to the same result. Effective October 1, 1988, the Legislature has enacted a law that abolishes Section 718.401(8), the very provision under which the petitioners in both of these cases are proceeding. While the Legislature enacted a new statute at the same time, Section 718.4015, that statute states on its face that it applies only to rental escalations occurring on or after October 1, 1988.

In its opinion in the Sky Lake Gardens case, the Third District reasoned that the 1988 legislation eliminated the statute under which the plaintiffs were proceeding, thus terminating the litigation. Although petitioners assail the Sky Lake Gardens decision in scathing terms, it is consistent with the plain language of the new statute. As that court recognized, on the face of this new statutory scheme, there no longer exists any statutory basis for lawsuits under the old scheme. Like Sky Lake Gardens, both of these cases relate to rental escalations before the date now prescribed as a bar to such escalations.

Argument

The petitioners in both of these cases sought to proceed under Section 718.401(8), Florida Statutes (1985). That statute provided, in relevant part:

> It is declared that the public policy of this state prohibits the inclusion or enforcement of escalation clauses in land leases or other

> leases or agreements for recreational facilities, land, or other commonly used facilities serving residential condominiums, and such clauses are hereby declared void for public policy. For the purposes of this section, an escalation clause is any clause in a condominium lease or agreement which provides that the rental under the lease or agreement shall increase at the same percentage rate as any nationally recognized and conveniently available commodity or consumer price index.

During the **1988** legislative session, the Legislature adopted a new law, Chapter **88-225,** Laws of Florida, relating to condominiums and cooperatives. In Section **1** of that Act, the Legislature completely eliminated Section **718.401(8) --** the very statute that petitioners contend entitles them to relief in these cases -- by striking out the language of that section. Not only did the Legislature strike the statutory provision relied on by petitioners, in Section **2** of the same Act, the Legislature created a new statute, Section **718.4015,** which contains language similar to that previously found in Section **718.401(8)** but with a major qualification. Thus, by the express language of that new statute, it is **not** to be applied to divest fees accruing prior to October **1, 1988** under leases entered into before June **4, 1975** but rather applies only to rental escalations that occurred on or after that date:

> The application of [this section] to contracts entered into prior to June **4, 1975,** may not divest the parties of any benefits or obligations arising from the escalation of fees prior to October **1, 1988**, but only

prohibits further: escalation of fees pursuant to the escalation clauses, on or after October 1, 1988.

Section 718.4015(2), Florida Statutes (Supp. 1988).

Although petitioners argue that the Legislature nowhere indicated that Section 718.401 (8) was "repealed," that is simply a question of semantics. By striking the language of the statute in toto, the Legislature did much more than simply "amend" the statute. When, as here, the Legislature has stricken a statutorily-created defense and it has not reenacted that defense in substantially similar form, the decisions of this Court regard that defense as if it never existed.

In Yaffee v. International Co., 80 So.2d 910 (Fla. 1955), this Court addressed the principles governing the effect of the repeal of a statute. The Court concluded that, when a right or remedy has been created wholly by statute, when that statute is repealed, the right or remedy created by the statute "falls with it." Id. at 911-12. The Court recognized that, for this reason, the repeal of a statute creating the defense of usury had been held in other cases to render valid a contract that was subject to the defenses of the statute when made. Id. at 912; see also Griffith v. Florida Parole & Probation Commission, 485 So.2d 818 (Fla. 1986); Gewant v. Florida Real Estate Commission, 166 So.2d 230 (Fla. 3d DCA 1964).

The principles discussed in Yaffee should be followed here. This Court has recognized that the law relating to condominiums is purely a creature of statute. Century Village, 361 So.2d at 133-34. At the time that the parties entered into the recreation leases here, there was no prohibition on the type of escalation clauses that Section 718.401(8) later declared void. The remedy the petitioners claim they are entitled to under Section 718.401(8) -- voiding the escalation clause -- is entirely a legislative creation, which the Legislature can just as easily take away. That is exactly what has occurred here.

By its enactment of the 1988 legislation, the Legislature has taken away whatever protections Section 718.401(8) might have otherwise afforded to pre-1975 leases. The Legislature abrogated that statute in toto when it passed this new legislation. The Legislature also enacted a new statute, Section 718.4015, that differs in very material respects by expressly validating rent increases under pre-1975 leases before its effective date, October 1, 1988, and prohibiting such increases only after that date. Here, the rent increases in question occurred well before that date, so the new statute does not purport to reach them, and since the prior, unqualified statute no longer exists, no defense exists to the pre-1975 rental increases.

This Court's opinion in McKibben v. Mallory, 293 So.2d 48 (Fla. 1974), which petitioners place heavy reliance upon, is not to the contrary. There, in 1972, the Legislature enacted a

revised wrongful death act in an attempt to cure defects in previous acts. The new act provided that it was to take effect on July 1, 1972, and would not apply to deaths occurring before that date. The new act also provided that the old statutes were repealed when the new act took effect.

The defendants argued that the result of the repeal on the old statutes was to abolish any cause of action for wrongful death of any person in Florida when the death occurred prior to July 1, 1972. This Court disagreed. The Court noted that Florida had had a wrongful death act since 1883 providing for such recovery as the plaintiffs sought, and the Court stated that the plaintiffs had vested rights that accrued on the death of the decedent. Id. at 50-51. Because the legislative history did not indicate that the Legislature intended to impair vested rights, this Court opted for an interpretation of the legislation that would render the new act constitutional. Id. at 51.

The considerations that this Court found compelling in McKibben have no application here. Unlike the statute at issue in McKibben, Section 718.401(8) did not even exist at the time the parties entered into these leases. Whatever "rights" the enactment of that statute created for the petitioners, they were not "vested" rights that the Legislature could not take away. Additionally, unlike McKibben, the new law here contains language

that, by its own terms, affirmatively validates all benefits arising prior to October 1, 1988 from the escalation of recreation lease fees under leases which pre-dated June 4, 1975.

For similar reasons, the decision of the Third District in Goldenberg v. Dome Condominium Association, Inc., 376 So.2d 37 (Fla. 3d DCA 1979) -- also given heavy emphasis by the petitioners -- has no application here. That case involved the 1977 amendments to the Condominium Act. In those amendments, the Legislature replaced the prior prohibition against the inclusion or enforcement of escalation clauses in recreational leases, Section 711.231, Florida Statutes (1975), with Section 718.401(8). The defendant argued that the elimination of the 1975 statute rendered valid an escalation of rent that occurred prior to the effective date of the 1977 statute. The court disagreed, finding that a statute that is simultaneously repealed and reenacted in "slightly different form" is regarded as being continually in force. Id. at 38.

Unlike the 1977 amendments, in which the Legislature basically changed the section number of the statute, here the Legislature has not simply reenacted the same statute in a new location. The new statute explicitly provides that it only applies to bar rent escalations occurring after October 1, 1988, and it also recognizes the validity of any rent increases occurring before that date, stating that this new statutory provision does not deprive anyone of benefits under prior rental

escalations. Goldenberg cannot be stretched to allow the conclusion that this is the same statute, only in a "slightly different form."

Petitioners in both cases stridently attack the Third District's decision -- which faithfully follows the plain language of the statute -- by arguing that the result reached there contravenes the legislative intent in enacting the 1988 amendments. Petitioners argue that the Legislature did not intend to validate rental escalations that would have been illegal under the prior statute, but rather that the Legislature intended only to extend the "statutory protection" of Section 718.401(8) to leases that the prior legislation did not or could not reach. The inescapable fact remains, however, that the statutory language actually employed by the Legislature plainly requires the result reached by the Third District.

When the language of a statute is unambiguous and conveys a clear and definite meaning, it is improper to resort to the legislative history of the statute to arrive at an interpretation that is contrary to the literal meaning of the statute. Holly v. Auld, 450 So.2d 217, 219 (Fla. 1984).[2/] Here, the language of the

[2/] Petitioner in the Golden Glades case has cited a number of cases for the proposition that a statute should be construed so as to give effect to evident legislative intent, regardless of whether such construction varies from the literal meaning. (Supplemental Brief at 14-15). Each of those cases emphasized that the statute taken literally must conflict with a clearly discernible legislative intent -- a factor not present here. E.g., Beebe v. Richardson, 156 Fla. 559, 23 So.2d 718, 719 (1945) ("where the context of a statute taken literally conflicts with a

(footnote continued)

statute is clear: it does not apply to rent escalations predating October 1, **1988.** Regardless **of** whether the Legislature intended to preserve **"benefits"** certain lessees may have obtained under the prior statute, that is not what the Legislature did in enacting the new statute. Instead, the Legislature abolished the old statute and expressly provided in the new statute that it would not divest lessors of any benefits or obligations arising from the escalation of fees prior to October **1, 1988.**

Accordingly, although the legislative history indicates that the Legislature intended to circumvent Fleeman so as to reach leases that the prior statute could not **reach,**[3/] the Legislature's actual words are controlling. Hence, the Third District correctly followed the literal language of the statute in the Sky Lake Gardens case.[4/]

(footnote continued from previous page)
plain legislative intent clearly discernible, the context must yield to the legislative purpose") (emphasis added). Moreover, most of those cases involved an argument that a literal reading of the statute would render the statute unconstitutional -- a factor also not present here.

3/ The constitutionality of the new statute was not raised and is not at issue in either of these proceedings. Hence, it is not properly before the Court.

4/ It is improper for petitioners to suggest that this Court should overrule the Sky Lake Gardens case. That case is not now before the Court for review. This Court can either follow or decline to follow Sky Lake Gardens as it deems appropriate, but it would be inappropriate for the Court to opine on the merits of a case that is not before it.

CONCLUSION

The decisions of the District Court in these cases are correct under well-defined legal principles announced by this Court in its prior decisions, and these cases can be summarily affirmed on that basis. However, because the Legislature has eliminated the very statute under which the petitioners sought to proceed in each of these cases, this Court, should it choose to do so, can affirm the rulings of the District Court on that basis as well.

Respectfully submitted,

CARLTON, FIELDS, WARD, EMMANUEL,
SMITH & CUTLER, P.A.
First Florida Bank Building
Post Office Drawer 190
Tallahassee, Florida 32302
(904) 224-1585

CYPEN & CYPEN
825 Arthur Godfrey Road
Miami Beach, Florida 33140
(305) 532-3200

Attorneys for Respondents

By: Sylvia H. Walbolt, for
Alan C. Sundberg
Florida Bar No. 079381

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Nancy Schleifer, Esq., 801 Brickell Avenue, Suite 1200, Miami, Florida 33131, and Jeffrey E. Streitfeld, Esq., Emerald Lake Corporate Park, 3111 Stirling Road, Ft. Lauderdale, Florida 33212, this 2nd day of March, 1989.

By: Sylvia H. Walbolt
Attorney