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Condominium Developers Beware! New Illinois Supreme Court Decision Confirms Chicago Municipal Code Creates a Broad Private Cause of Action for Misrepresentation

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On Nov. 4, 2015, the ***Illinois Supreme Court*** issued its ruling in ***Henderson Square Condominium Association v. LAB Townhomes, LLC.*** *Henderson Square Condominium Association v. LAB Townhomes, LLC,* 2015 IL 118139. The decision holds that condominium unit owners have a broad private cause of action for misrepresentation against condominium sellers and their principles under Section 13-72-030 of the Chicago Municipal Code. Chicago Municipal Code § 13-72-100 (amended Nov. 16, 2011). This section of the Municipal Code states:

> No person shall with the intent that a prospective purchaser rely on such act or omission, advertise, sell, or offer for sale any condominium unit by (a) employing any statement or pictorial representation which is false and (b) omitting any material statement or pictorial representation.

The decision holds that the private cause of action created by this ordinance does not require the plaintiff to allege or prove common law fraud. This means that plaintiffs do not need to allege or prove the existence of a false statement of pre-existing fact. Instead, the ordinance creates a private cause of action and a

damages remedy (plus recovery of attorney fees) that can be based on misrepresentations made by a seller in the course of marketing real estate, including promises about future conduct that may be made before the construction is complete. The cause of action is also not limited to false statements about the specific information sellers are required to include in "property reports" required by the Municipal Code. Moreover, contractual disclaimers contained in a developer's selling materials will "have no application to a tort action based on a violation of an ordinance that seeks to protect prospective purchasers from being induced to enter [into] condominium sales by false statements." 2015 IL 118139 at ¶ 71. For all of these reasons, the court held that the plaintiff's alleged a viable claim under Section 13-72-100, and that it was error for the trial court to dismiss the claim.

It is difficult to overstate how broadly Section 13-72-100 applies based on the supreme court's analysis. According to the court: "any false statement employed in connection with the advertising or sale of a condominium unit with the intent that the prospective purchaser rely upon it is actionable." 2015 IL 118139 at 68. As the dissent (authored by Justice Burke) makes clear, the majority decision makes actionable statements contained in the developers' sales brochure that previously would have been considered to be "mere puffing" under Illinois law. For example, the majority decision finds actionable the following statements: (a) that the units reflected "new architectural energies and solid construction skills," (b) that the developer was committed to "quality construction and detail," and (c) that the developer consistently delivered "quality buildings" and "successful developments" which succeed "architecturally, aesthetically and economically." Id. at ¶ 91. In addition, the decision finds a false statement of fact regarding the kind of insulation that was to be installed in the units actionable, even though the claims at issue regarding water seepage were not based on or related to the lack of any insulation. Id.

The decision also holds that the association's breach of fiduciary duty claim could not be properly dismissed. This claim was asserted against the individual defendants who served on the condominium's original board of directors based on Section 9 of the Illinois Condominium Act. See 765 ILCS 605/9(c)(2) (imposing a duty to provide "reasonable reserves for capital expenditures and deferred maintenance for repair or replacement of the common elements"). The Supreme Court rejected the defendants' attempt to invoke the business judgment rule because the plaintiff's complaint included specific allegations "that defendants acted fraudulently and in bad faith when they knew of the shoddy construction yet failed to account for those repairs (that would have been immediately required in 1996 had the unit owners known about the latent defects) when they set the reserves." 2015 IL 118139 at ¶ 79. The court held that the question of whether the developer adequately funded the reserve account was a question of fact not properly decided on a motion to dismiss.

Finally, the supreme court held that the statute of limitations for the claims did not expire until five years after the plaintiffs knew or should have known of that an injury occurred and that it was wrongfully caused. The decision holds that the four year construction statute of limitations and the ten year stature of repose contained in Section 13-214 of the Code of Civil Procedure do not apply to fraud or misrepresentation claims involving construction defects. 735 ILCS 5/13-214. Instead, the five year statute of limitations contained in Section 13-205 of the Code

of Civil Procedure applies to these kinds of claims. 735 ILCS 5/13-205. Further, the "discovery rule" applies, which means that the cause of action does not accrue, and the statute of limitations does not start to run, until the plaintiff knows, or should have known, both that an injury occurred and that it was wrongfully caused.

As applied in this case, the lawsuit was permitted to proceed even though it was filed 15 years after the alleged misrepresentations occurred. The condominiums were marketed and sold in 1996, but the unit owners claimed they did not initially discover water seepage defects until 2007. In 2009, the association hired an exterior restoration consultant and engineer to investigate the problem, and allegedly learned for the first time that the water seepage was a result of poor quality construction work and that repair of the defects would require substantial reconstruction of the units. The lawsuit was filed 2011. The supreme court found that it was possible that the minor initial repairs coupled with the limited nature of the water infiltration experienced was enough to reasonably delay plaintiffs' hiring of professionals to open the walls and discover the latent defects. The court concluded that "the date when plaintiffs knew or reasonably should have known that an injury occurred and that it was wrongfully caused was a question of fact not to be decided on a motion to dismiss under the circumstances of the present case." 2015 IL 118139 at ¶ 59.

In light of the Henderson decision, those who sell condominiums in Chicago need to be aware that statements contained in selling materials can become grounds for later (much later) misrepresentation claims. All selling materials and property reports should be carefully reviewed with counsel before they are released to the public. In addition, the decision highlights the need for developers, particularly those who sit on the initial board of directors, to adequately fund reserves. At the same time, those who buy condominiums in Illinois now know they have a powerful additional cause of action for misrepresentation, and possibly breach of fiduciary duty, that can be asserted under certain circumstances long after the initial sale of the condominium units occurred.