

Construction Defect Litigation Begins With Authority To Sue

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Whether a plaintiff has standing or the authority to sue is a basic question that should be asked by all defendants upon service of a lawsuit, just as they should ask whether the plaintiff has complied with the statute of limitations. In cases involving individuals, standing is obvious — the injured party institutes suit. In the case of a condominium association, the question of standing and authority to sue is less clear.

A condominium association is a representative body that acts on behalf of the unit owners. It must be granted authority to act by the association bylaws, or it must follow the strictures of the bylaws to obtain authority to act on the unit owners' behalf. Despite these known truths, it appears that a condominium association's standing and authority to sue have widely been assumed by the defense, and lawsuits simply moved forward without challenge. A recent New Jersey trial court ruling has made clear that the defense in any jurisdiction should take affirmative steps to confirm a condominium plaintiff's compliance with its bylaws in obtaining standing and authority to sue. Though the case unfolded in New Jersey, Pennsylvania practitioners would do well to take note of the ruling's lessons and implications for them as well.

Port Liberte II Condominium Association v. AJD Construction brought this need into specific relief. In the New Jersey construction defect bar, the Port Liberte condominium project, which consists of numerous associations and is still undergoing construction today, is legendary. The first lawsuit, *Port Liberte I v. Sordoni*, was in

litigation for 11 years and was eventually tried as to one remaining defendant. As a result of the infamy of the *Port Liberte I* litigation, any lawsuit with the same name garners interest among the bar, in New Jersey and beyond.

The *Port Liberte II* lawsuit was filed in March 2008. Parties were impleaded and discovery began in the normal course. In reviewing the governing documents received from the plaintiff, which included the bylaws and master deed, a resourceful associate came across the requirements that must be met by the condominium association in order to file suit on behalf of the unit owners. Specifically, the bylaws required that a vote must be taken of the membership of the association prior to instituting suit. Other requirements existed, such as proper notice of the meeting when the vote would be held, the necessity of a quorum and what constituted a "member in good standing" of the association, but those requirements were never reached because the initial threshold of having a vote was not met. Noting these requirements, the meeting minutes and resolutions of the board that were produced by the plaintiff were reviewed and found to not contain any record of a vote of the association membership prior to filing suit. Additional discovery was requested from the plaintiff for meeting minutes and resolutions. None were forthcoming. In early 2011, a motion was filed to dismiss the plaintiff's complaint for lack of authority and standing to file the complaint as there had been no vote of the condominium association prior to the commencement of litigation.

After lengthy motion practice, the court agreed with the defendants that the Port

Liberte II Condominium Association must comply with its bylaws in order to obtain standing and authority to institute suit. These bylaws contained very specific requirements for the commencement of litigation, including the approval thereof by the membership of the association. The reasoning behind compliance with these provisions was addressed by the appellate court in *Billig v. Buckingham Towers Condominium Association I*, 287 N.J. Super 551, 564-565 (App. Div. 1996). In *Billig*, the court emphasized the need for proper authorization of all litigation by a condominium association, specifically in situations where the association is asserting an affirmative claim against a third party. The court went on to support its position by citing the financial burdens that litigation imposes on the members. In short, the court held that "we can insist, as a guide to future action, that the institution of litigation by a condominium association requires either collective board authorization or that it be conducted pursuant to a detailed, predetermined, uniformly applied protocol."

The courts of at least two other states, North Carolina and Illinois, have addressed the standing and authority to sue issue and came to the same conclusion: a complaint filed without the required approval does not survive a motion to dismiss. Those decisions came in *Peninsula Property Owners Association v. Crescent Resources*, 171 N.C.App. 89; 614 S.E.2d 351 (2005) appeal dismissed and discretionary review denied, 360 N.C. 177; 626 S.E.2d 648 (2005), and

River Plaza Homeowner's Association v. Healey, 389 Ill.App. 3d 298, 904 N.E.2d 1102 (2009).

While the standing and authority to sue issue as it relates to a condominium association is not one of first impression in New Jersey, it is one that is only now coming into the spotlight. The *Port Liberte II* ruling has spread like wildfire through the New Jersey construction defect bar, and bars in Pennsylvania, New York and other states are taking notice. Plaintiffs counsel are now cognizant of the issue and are, at least in theory, requiring that the proper steps be taken to ensure authority to sue has been given by the unit owners. Defense counsel are now reviewing the bylaws and master deeds with greater care and an eye toward strict compliance by the plaintiff association. The *Port Liberte II* ruling has highlighted yet another hurdle that plaintiffs must clear prior to moving forward with litigation. The requirements that must be filled to obtain authority to sue are specific and tedious. Associations and association counsel (who are generally not litigators) have not been shown to have an eye for these details. This is where defendants in construction litigation can make their mark and put the plaintiffs to task virtually before litigation even gets started. Condominium lawsuits are often filed on the eve of the expiration of the statute of limitations. Having a complaint dismissed for lack of standing could very well end the litigation. Litigation for the next phase, *Port Liberte III*, has been filed, so stay tuned.

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