Forum Restrictions in Condominium Governing Documents

by Steven Nudelman

In May 2015, the Colorado Court of Appeals decided that a homeowner's association could not remove a stipulation from its declaration mandating arbitration as the means of dispute resolution unless the builder/developer consents to its removal. The decision in *Vallagio at Inverness Residential Condominium Association, Inc. v. Metropolitan Homes, Inc.*[1] disturbed counsel for community associations since it essentially allowed a developer to require that all disputes against it—sounding in construction defect or otherwise—be resolved by arbitration in perpetuity. Thus, the unit owners were forever precluded from amending the declaration after they assumed control of the condominium association to remove this forum restriction.

By way of background, in 2007 Metro Inverness, LLC, together with its manager and general contractor, Metropolitan Homes, Inc. (MHI), formed the Vallagio at Inverness Residential Condominium Project in Englewood, Colorado. To establish the project as a condominium development under Colorado law, the developer (also known as the declarant), was required to prepare and record a formal declaration under the Colorado Common Interest Ownership Act (CCIOA).[2] As the declarant, Metro recorded the declaration for the project, which included a number of 'pro-developer' provisions.

Section 16.6 of the declaration mandated arbitration to resolve any construction defect claims. This section also provided that its terms, "shall not ever be amended without the written consent of declarant and without regard to whether declarant owns any portion of the real estate at the time of the amendment."[3] After the unit owners took control of the association, they voted to amend the declaration for the project to remove this section in its entirety (without the consent of Metro).[4]

Shortly thereafter, the association sued Metro, MHI and others, seeking damages for construction defects at the project. The defendants moved to compel arbitration based on Section 16.6 of the declaration. The defendants argued that the amendment was invalid because the association failed to obtain Metro's consent prior to promulgating it.[5] The district court denied the defendants' motion, finding the association did *not* require Metro's consent.[6] The defendants filed an interlocutory appeal.

The Colorado Court of Appeals reversed, holding that the declaration was: 1) not ambiguous and enforceable as written; and 2) not violative of the CCIOA.[7] As a result, the association was required to arbitrate its construction defect claims against Metro.

Noting that arbitration is favored as a "convenient and efficient alternative to resolving disputes by litigation," the Court interpreted the declaration using ordinary contract principles.[8] "[A]s a matter of contract interpretation, the declaration required unit owners to obtain Metro Inverness' consent before amending the declaration to remove section 16.6, including its arbitration provision."[9]

Since the Supreme Court of Colorado granted a petition for *certiorari* in *Vallagio* this past June, the issue in Colorado remains unsettled.[10]

What about New Jersey? May a developer include a *Vallagio*-like forum restriction in the master deed for a New Jersey condominium association? In New Jersey, the CCIOA is inapplicable; one must instead look at the New Jersey Condominium Act (NJCA)[11] and the case of *Mirmanesh v. Brasslett*.[12]

In *Mirmanesh*, unit owners in a five-unit condominium development had disputes among themselves regarding alleged violations of certain restrictions in the master deed. Among other things, the master deed restricted how unit owners could store and dispose of trash, and where and when they could place patio furniture and speakers on the common elements. The defendant unit owners asserted control over the board of trustees of the condominium association and voted to relax these restrictions. The plaintiffs claimed the defendants' conduct was wrongful and contrary to the master deed, which could not be amended by its terms.[13]

The trial court ruled in favor of the plaintiffs, finding the applicable section of the master deed could not

be enforced because it was contrary to the NJCA. The Appellate Division disagreed.

Section 11 of the NJCA provides, in pertinent part:

> The master deed may be amended or supplemented in the manner set forth therein. Unless otherwise provided therein, no amendment shall change a unit unless the owner of record thereof and the holders of record of any liens thereon shall join in the execution of the amendment or execute a consent thereto with the formalities of a deed. Notwithstanding any other provision of this act or the master deed, the designation of the agent for service of process named in the master deed may be changed by an instrument executed by the association and recorded in the same office as the master deed.[14]

The Appellate Division found that Section 16.01 of the master deed is not contrary to this provision of the NJCA. Specifically, the Court held that "N.J.S.A. 46:8B-11 permits the master deed to be amended at any time, except when a provision 'therein' precludes an amendment. Here, the Master Deed specifically bars the adoption of an amendment prior to the expiration of the forty years specified in the Master Deed."[15] Thus, the lower court's decision was reversed and the Appellate Division enforced the plain language of the master deed—much the same way the court of appeals did in *Vallagio*. Therefore, one could anticipate that New Jersey courts will likely enforce a *Vallagio*-like forum restriction the same way as enforced by the Colorado appellate court.

The important takeaways from these intermediate appellate decisions: Neither court found the applicable provision contrary to public policy. Both courts enforced the declaration/master deed according to its terms. While the Community Association Institute has warned that the *Vallagio* decision "gives developers unfettered power to immunize themselves from liability by taking away every association's ability to remove self-serving provisions from its governing documents," that is simply not the case.[16] At best, the restrictions in these governing documents limit the forum in which disputes may be heard to arbitration; they in no way immunize developers from liability for defective construction. ■

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Endnotes

1. No. 14CA1154, 2015 Colo. App. LEXIS 693 (Colo. Ct. App. May 7, 2015).
2. Colo. Rev. Stat. § 38-33.3-101 *et seq.* (2005).
3. *Vallagio, 2015* Colo. App. LEXIS 693, at *3.
4. *Id.*
5. *Id.* at *4.
6. *Id.* at *5.
7. This article does not address the association's arguments under the CCIOA, which were rejected by the court of appeals.
8. *Id.* at *6.
9. *Id.* at *11.
10. No. 15SC508, 2016 Colo. LEXIS 618 (2016). The Supreme Court summarized the issues for review as follows:

> Whether the court of appeals erred by holding as a matter of first impression that [the] CCIOA permits a developer-declarant to reserve the power to veto unit owner votes to amend common interest community declarations.
>
> Whether the court of appeals erred in holding that Colorado's Consumer Protection Act ('CCPA') claims are subject to pre-dispute mandatory arbitration provisions where this Court previously held, 'We leave open the question of whether CCPA claims might be deemed non-arbitrable,' *Ingold v. AIMCO/Bluffs, LLC Apartments*, 159 P.3d 116, 122 n.5 (Colo. 2007).

11. N.J.S.A. 46:8B-1 to -38.
12. No. A-3433-13T3, 2015 N.J. Super. Unpub. LEXIS 1508 (App. Div. June 23, 2015). By way of full disclosure, the author's law firm represented the appellants in *Mirmanesh*, although the author had no involvement in that representation.
13. Article 16.01 of the master deed provided, in pertinent part:

    The provisions of this Master Deed shall be perpetual in duration, shall run with and bind all of the land included in the Condominium and shall inure to the benefit of and be enforceable by the Association and the Unit Owners, their respective successors, assigns, heirs, executors, administrators, and personal representatives, except that *the covenants and restrictions set forth in Article XI shall have an initial term of forty years from the date this Master Deed is recorded in the Office of the Cape May County Clerk, at the end of which period such covenants and restrictions shall automatically be extended for successive periods of ten (10) years each, unless at least three-fifths (3/5) of the Unit Owners at the time of expiration of the initial period, or of any extension period, shall sign an instrument, or instruments (which may be in counterparts), in which they shall agree to change said covenants and restrictions in whole or in part;* (Emphasis added.)

14. N.J.S.A. 46:8B-11(emphasis added).
15. 2015 N.J. Super. Unpub. LEXIS 1508, at *11.
16. Br. of *Amicus Curiae*, CAI, at 14 (supporting the petition for review of the appellate court's decision in *Vallagio* submitted to the Supreme Court of Colorado).