

CONVERSION CONDOMINIUM OWNERS RECEIVE \$2.3 MILLION VERDICT

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This summer, the Association of Unit Owners of Hilltop Condominiums at Uptown (“Hilltop Association”) took a major construction defect dispute to trial. After a six week long bench trial in Multnomah County, the Hilltop Association was awarded over \$2.3 million in damages for the developer’s breach of fiduciary duties, breach of contract, and negligence. The developer was Uptown Heights Condominiums, LLC, a Kehoe Group entity. The damages related to deck problems that were not adequately disclosed or repaired by the developer.

The Hilltop Association presented the testimony of 32 witnesses over the six week trial, including unit owners, repair contractors, adverse witnesses, and experts (such as CAI President Jim Main). Technology played a critical role in the presentation of the evidence. The lawsuit involved a number of complex legal issues that are on the cutting edge of association law, conversion condominium law, and construction defect law in Oregon. Some of the more important legal issues addressed at trial include the enforceability of as-is and release/waiver clauses under Oregon’s Condominium Act and the nature and extent of a developer’s fiduciary duties where acting as an interim board of directors for a condo association. On each of these issues, the Court found in favor of the Hilltop Association and against the developer. The Court’s award of damages on the Hilltop Association’s breach of fiduciary duties claim was particularly validating and reinforced the association’s theory that condominium developers have a duty to act in good faith, with loyalty, and in the best interests of an association where acting as an interim director or officer of a condominium association. It also helps for insurance coverage purposes. The fiduciary duty arises both under Oregon’s Condominium and Non-Profit Acts as well as the Hilltop Condominium’s Declaration and Bylaws which govern the association.

This was a good result, in a very tough and challenging case. Prior to trial, there were no settlement offers on the table (nor were there any offers from the developer during the course of litigation). At trial, the defense asserted that the repair costs would be \$55,000 (about 40 times less than the verdict amount). And it took a lot of hard work and dedication from the owners and the witnesses. The defense had a squadron of good litigators which tag-teamed each witness and tried to present multiple roadblocks to the presentation and flow of the Associations case-in-chief.

Here are some answers to frequently asked questions:

WHO WON?

The Hilltop Association won. The bottom line objective criteria is whether settlement offers (none), as well as competing evidence on damages (defense claimed repair costs should be \$55,000), were exceeded by the \$2.3 million verdict (less the costs of going to trial). Under this criteria, the Hilltop Association won decisively.

WHY DID THIS CASE GO TO TRIAL?

As noted above, this was a conversion condominium case that involved as-is and waiver/release language in the unit sales agreements. Further, many of the defects were the result of faulty apartment construction and repair which were apparently not known to the developer. These factors, coupled with the developer’s business practices and insurance issues, and the developer’s failure to take full and complete responsibility for its actions, caused the case to go to trial.

WAS THE VERDICT ENOUGH TO COVER REPAIR COSTS?

For the decks, it is close. For the rest of the problems, there is not enough money to do full repairs all at once. As noted above, the judge awarded damages of \$2.3 million for deck repairs. The Hilltop Association put on evidence that the deck repair costs were approximately \$2.3

million. That was good. However, we also tried to fold in the damages to repair defects to the rest of the buildings and tie these defects to the decks, but the judge did not accept our theory, instead limiting the developer’s liability to the decks (which it was clear that the developer knew about and should have repaired).

WHAT ABOUT THE CONTRACTORS AND CONSULTANTS THAT WERE INVOLVED IN THE IMPROPER APARTMENT CONSTRUCTION AND REPAIRS (PRIOR TO THE CONVERSION)?

These parties got dismissed out of the case before trial because of the as-is and waiver/release provisions in the unit sales agreement. This is now on appeal and currently in mediation.

HOW ARE EFFORTS GOING TO COLLECT THE VERDICT?

On track. We are currently litigating the insurance coverage issues. There is a good possibility of increasing the amount to be collected because of additional attorney fee awards.

IS TRIAL WORTH IT?

In certain circumstances, yes.

IS TRIAL FUN?

Sometimes.

DID A COMMUNITY MANAGER HAVE TO TESTIFY?

Not in this case (no depositions, no trial testimony).

CAN WE ASK YOU FURTHER QUESTIONS?

Yes. Please do. This was a unique case, but the lessons learned at trial can be applied to all defect cases.

¹ Dean Aldrich and Adele Ridenour are with The Aldrich Law Office, P.C., a Portland Oregon law firm which specializes in complex construction litigation and defect law. The Aldrich Law Office has significant trial experience in defect cases. We wish to thank everyone in our firm, and every witness, each of whom showed toughness and resiliency and contributed to the result.