IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CASE NO.: 2021-15089 CA 01
COMPLEX BUSINESS LITIGATION

In re: Champlain Towers South Collapse Litigation

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ORDER PRELIMINARILY APPROVING "ALLOCATION SETTLEMENT AGREEMENT"

I. INTRODUCTION

Before the Court is the Receiver's "Motion for (I) Approval of Allocation Settlement Agreement Among Receiver, Unit Owners, and Wrongful Death Class; (II) Approval of Form, Content and Manner of Notice of Settlement and Bar Order; (III) Entry of Bar Order; and (IV) Scheduling a Hearing, with Incorporated Memorandum of Law." Upon careful review, and for the reasons set forth herein, the motion is GRANTED.

II. RELEVANT BACKGROUND

In the early hours of June 24, 2021, the Champlain Towers South Condominium Building ("South Tower") suffered a catastrophic failure and partial collapse, resulting in the loss of 98 lives and the eventual destruction of 136 condominium units.[1] Only a portion of the South Tower collapsed, enabling many

[1] While only 55 units were destroyed immediately upon the partial collapse, the remainder of the building eventually had to be demolished.

occupants to survive this unimaginable tragedy. But despite the herculean (and round the clock) toil of courageous first responders who risked their lives in a valiant rescue effort, everyone in the portion of the building that collapsed (with one exception) perished.

Multiple lawsuits quickly ensued, including this putative class action brought on behalf of all those who suffered loss of life and/or economic harm. Plaintiffs, through their Second Amended Complaint ("SAC"), seek to represent a global liability class comprised of all victims and also may, for subsequent damage trials, seek certification of a "Personal Injury Sub-class, Non-Owner Personal Injury Sub-class, and an Economic Loss Sub-class." SAC, ¶ 306. *See, e.g., Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006). Nine Defendants have been sued in this case: 8701 Collins Development, LLC; Terra Group, LLC; Terra World Investments, LLC; John Moriarty & Associates of Florida, Inc.; NV5, Inc.; DeSimone Consulting Engineers, LLC; Champlain Towers Condominium Association, Inc.; Morabito Consultants, Inc.; and Becker & Poliakoff, P.A.

At the first hearing, the Court asked the Board of Directors ("Board") of the Champlain Towers South Condominium Association ("Association") to consider stepping aside and consenting to the appointment of a receiver to assume control of the Association, marshal its assets, defend against the anticipated avalanche of claims, and otherwise assume all duties/powers the Board possessed pursuant to

Chapter 718 *et seq* of the Florida Statutes and common law. The next day the Board agreed not to oppose Michael Goldberg, Esq.'s appointment as Receiver. The Court appointed Mr. Goldberg on July 2, 2021. (D. E. 25).[2]

On July 16, 2021, the Court entered an order which: (a) appointed a "Class Action Leadership Structure"; (b) directed the filing of a "consolidated amended class action complaint"; and (c) stayed all other civil actions arising of the collapse. (D. E. 73).[3] As this is likely a limited fund case – meaning that the aggregate losses sustained by victims will eclipse the amount that will be available to compensate for the collective harm suffered – the Court appointed lead counsel to represent the putative global liability class, as well as separate counsel to represent the interests of putative "personal injury and wrongful death" and "economic loss and property damage" subclass members. (D. E. 73). Separate representation for these potential

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[2] The Court again commends the surviving members of the Board for acknowledging that they were in no position to handle the countless issues that had to be immediately addressed, and recognizing that the appointment of a receiver was in the best interest of all concerned, particularly victims. The Board's decision to step aside, based in part upon the sage counsel of its attorney, Paul Singerman, Esq., saved valuable time and judicial effort, and enabled Mr. Goldberg to hit the ground running with the Board's complete cooperation. This proved to be extremely valuable, as Mr. Goldberg wasted no time and has, as the Court expected, done a remarkable job.

[3] Leadership counsel agreed to assume this representation on "a pro bono basis, with **no** legal entitlement to receive **any** attorney's fees," with the Court reserving the right to "consider paying their 'lodestar' at the conclusion of the case if they are successful in securing a recovery." (D. E. 73). The attorneys serving in a leadership role in this case are amongst the most skilled and successful our community has to offer, and have earned national reputations in class action, commercial and personal injury litigation. Their willingness to undertake this representation with no assurance of compensation was an extraordinary act of benevolence and compassion, especially given the magnitude and complexity of this case, and the tremendous amount of time they knew would have to be devoted to it. The Court hopes that those harmed appreciate this largesse, and realize that counsel would ordinarily be entitled to recover 33 1/3 – 40 percent of any recovery, thereby substantially reducing the amount available to compensate victims. The Court would be remiss if it did not also acknowledge the efforts of equally formidable counsel for the Defendants, who have timely investigated these claims and explored the prospect of resolving them if such resolution is in the best interest of their clients. Suffice it to say, the bar has risen to the occasion here.

subclasses was necessary given that allocation disputes were virtually certain to arise, and each group of victims required conflict-free counsel to advocate their respective positions.

Substantial progress has been made in the eight (8) months since this case was filed. Approximately $30 million in insurance proceeds have been tendered by the Association's property carrier, and another $18 million in insurance proceeds have been tendered by the Association's liability carriers. A contract for sale of the real property underlying the condominium for the sum of $120 million is in place,[4] and Plaintiffs' counsel and the Receiver have already secured substantial litigation recoveries.[5] As anticipated, the victims of this tragedy are in disagreement over how these funds (and any future recoveries) should be divided.

Those who sadly perished *and* who owned units will be eligible to recover proceeds distributed to both the "economic loss and property damage" subclass and the "personal injury and wrongful death" subclass. So while an allocation decision (or agreement) might impact their estates/survivors, the true conflict here lies primarily between those who suffered only economic loss (i.e., surviving Unit

[4] The contract is a "stalking horse" bid subject to higher offers and an auction procedure should other prospective buyers elect to pursue an acquisition.

[5] The Court has been advised that settlements have been reached with Defendants DeSimone Consulting Engineers, LLC; Morabito Consultants, Inc.; and Becker & Poliakoff, P.A. The remaining claims are currently, or soon will be, subject to mediation conferences pursuant to this Court's orders.

Owners) and the families of non-owners who lost their lives (i.e., tenants/invitees).[6] Some families of those who perished, but did not own units (i.e., tenants/invitees), believe that *no* funds should be allocated toward economic loss until and unless wrongful death claimants receive full compensation, something that is unlikely to happen. Put simply, families of tenants/invitees (or at least some of them) believe that surviving Unit Owners are entitled to *nothing* for the value of their homes.

The surviving Unit Owners see things differently. Insisting that they are without fault, they say they are entitled to their proportionate share of the assets they would have received had the building collapsed *sans* any loss of life; those assets being the funds realized from a sale of the property and the tendered $30 million of property insurance. Assuming the extant land contract closes, surviving Unit Owners (or at least some of them) therefore believe they are entitled to their proportionate share of the $120 million to be realized for the land and the $30 million already recovered from their property insurer (i.e., $150 million), and that *none* of these funds should go towards satisfying wrongful death claims.

The Court has repeatedly expressed the hope that it would not be called upon to adjudicate an allocation (or any other) dispute amongst the victims of this tragedy.

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[6] As the Court has acknowledged many times before, no amount of money can ever compensate for the loss these families have suffered. The law will, however, ascribe a "value" to each wrongful death claim. Survivors of a decedent/owner with an extremely valuable wrongful death claim may fare better if more funds are allocated to the wrongful death subclass, whereas survivors of a decedent/owner with a less valuable wrongful death claim may fare better if more funds are allocated to the economic subclass. But generally speaking, survivors of decedent/owners have less of a stake in an allocation dispute than survivors of those decedents who did *not* own a unit.

Rather, from the outset the Court made clear its preference that those Unit Owners fortunate enough to have survived be compensated an agreed upon amount for their property, thereby allowing them to exit this case, secure new homes, and attempt to rebuild their lives. The Court therefore recruited Bruce Greer, Esq. to mediate this allocation dispute; a process it knew would be extremely difficult to navigate. Mr. Greer generously agreed to assume this weighty and time consuming charge *pro bono*, with the Court retaining the discretion to compensate him for his time. To facilitate the process, the Court also directed the Receiver to secure an appraisal of each unit, valued on the day prior to the collapse.[7]

The Court also had to ensure that the process was indisputably conflict-free, appreciating that counsel with clients in both the economic loss and wrongful death subclasses could not ethically advocate that funds be allocated in favor of either group. For that reason, the Court appointed Gonzalo Dorta, Esq. (who represents clients having *only* economic loss claims) to lead the negotiations on behalf of surviving property owners. The Court appointed Judd Rosen, Esq. (who represents *only* clients with wrongful death injury, but *no* property claims), to lead the negotiations on behalf of the wrongful death victims. Given the experience,

[7] The aggregate appraised value of the 136 units is approximately $96 million, but for present purposes it makes no difference whether this appraised value is subject to reasonable debate.

competence and integrity of these attorneys, the Court was assured that competing positions would be thoroughly researched and zealously advanced.

III. THE ALLOCATION SETTLEMENT AGREEMENT

After long and arduous negotiations the parties, with Mr. Greer's guidance, reached a resolution of their allocation dispute. The negotiated "Allocation Settlement Agreement" ("Agreement") provides for an $83 million "Common Fund" to be paid to Unit Owners as compensation for their condominiums and contents. Each Unit Owner will be paid a proportionate share of this "Common Fund" based upon their ownership share of the Condominium, per the Declaration. After hearing from the parties the Court may (or may not) reduce an owner's recovery by any insurance payment received to compensate them for the value of their unit (not contents), and while the Agreement is silent on this point, the Unit Owners also may be required to pay – out of the aggregate $83 million "Common Fund" – attorney's fees and costs to compensate counsel for services performed solely on behalf of the economic loss subclass.

Upon receipt of their proportionate payment, Unit Owners will be relieved from any liability for injury/wrongful death claims, and will have been deemed to have satisfied the assessment being made by the Receiver pursuant to the agreement; an assessment the Receiver believes is authorized by section 718.119, Fla. Stat. Any

claims participating Unit Owners have against third parties are assigned to the Receiver, and surviving Unit Owners will be removed as putative class members.

Put simply, upon acceptance of their proportionate share of the $83 million Common Fund, surviving Unit Owners will leave this case with no further liability, *except* to any tenant or guest who may have occupied their particular unit at the time of the collapse. All assessment liability and other potential claims against these Unit Owners will be extinguished and judicially barred. The same is true for the families of deceased Unit Owners who accept their proportionate share of the $83 million Common Fund. Their wrongful death claims, however, are unaffected by the Agreement.

As for the timing of payment, in the event the Court grants final approval, and once its final approval order becomes non-appealable, Unit Owners will receive $50 million of the first $100 million recovered from all sources. The remaining $33 million will be paid out of the first dollars recovered over $100 million. All other funds recovered will inure solely for the benefit of the wrongful death claimants.

A Unit Owner electing to forego their proportionate share of the $83 million Common Fund, and the other benefits of the Agreement, may opt-out and challenge the Receiver's section 718.119 assessment. If that challenge is successful, the Unit Owner *might*, absent some other basis of liability or legal impediment, receive their proportionate share of the funds realized from the sale of the land and property

insurance. If unsuccessful, Unit Owner(s) electing to opt-out risk receiving nothing for the value of their unit(s).[8]

IV. PRELIMINARY APPROVAL

This Agreement is *not* a class action settlement governed by Fla. R. Civ. P. 1.220(c), as it is an allocation settlement between the Plaintiffs themselves. The Court will, however, employ the procedural mechanism, and apply the substantive legal principles, governing the approval of class action settlements, as the Agreement impacts the rights of those who are technically non-parties. For this reason, as well as others, the Agreement should initially receive preliminary approval; all affected parties should be given notice and an opportunity to be heard; the Agreement should then be approved *only* if the Court concludes that it is fair, adequate and reasonable; and, as agreed by the parties, Unit Owners who wish to forego their right to receive the benefits provided for by the Agreement should be allowed to opt-out, thereby retaining the opportunity to recover a greater amount, and assume the risk of recovering nothing for the value of their condominium. The only issue now before the Court is whether the Agreement warrants preliminary approval. It clearly does.[9]

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[8] While the Court has tried to summarize the material terms of this compromise, all interested parties will have access to the entire "Allocation Settlement Agreement" and are encouraged to read it carefully and discuss it with class counsel, the Receiver, or their individual counsel/advisors. In the event of a conflict between the Agreement and this Court's description of its terms, the Agreement shall control.

[9] The standard for preliminary approval is not high, and a proposed settlement should be preliminarily approved so long as it falls "within the range of possible approval" and there is "probable cause" to notify affected parties and "to

First, as a matter of procedure, this Agreement was exhaustively negotiated by competent, experienced and conflict free counsel. The Agreement also was approved by other counsel serving on the Court's leadership structure, consisting of the most experienced and reputable members of the class action, commercial and personal injury bar. The mediation was led by Mr. Greer, who the Court considers to be one of the most capable mediators not only in South Florida, but nationwide. Representatives from each victim group also participated in the process. Suffice it to say, this settlement is the product of a lengthy arms-length negotiation. *See, e.g., Tadepalli v. Uber Techs., Inc.*, 2015 WL 9196054 (N.D. Cal. Dec. 17, 2015) (when, as is the case here, a proposed settlement is the result of lengthy, non-collusive arms-length negotiations between experienced counsel and an experienced mediator, it comes clothed with a presumption of fairness).

Second, and turning to its substance, the Agreement passes muster with flying colors. As the Court said earlier, the surviving Unit Owners (or at least some of them) believe they are entitled to receive all proceeds from the sale of the property and the $30 million of property insurance tendered, with none of that recovery going to satisfy wrongful death claims. The wrongful death claimants (or at least some of them) believe that surviving property owners are entitled to nothing because: (a) they

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hold a full-scale hearing on its fairness . . . ." *In re Mid-Atl. Toyota Antitrust Litig.*, 564 F. Supp. 1379, 1384 (D. Md. 1983).

bear some responsibility for this tragic occurrence; and (b) they are subject to being assessed up to the "value" of their units in order to satisfy uninsured/underinsured wrongful death claims.

In support of their position, the wrongful death claimants rely heavily on Florida Statute § 718.119, a provision within the Condominium Act that has received scarce judicial attention. It provides:

> (1) The liability of the owner of a unit for common expenses is limited to the amounts for which he or she is assessed for common expenses from time to time in accordance with this chapter, the declaration, and bylaws.
> (2) The owner of a unit may be personally liable for the acts or omissions of the association in relation to the use of the common elements, but only to the extent of his or her pro rata share of that liability in the same percentage as his or her interest in the common elements, and then in no case shall that liability exceed the value of his or her unit.
> (3) In any legal action in which the association may be exposed to liability in excess of insurance coverage protecting it and the unit owners, the association shall give notice of the exposure within a reasonable time to all unit owners, and they shall have the right to intervene and defend.

§ 718.119, Fla. Stat. While no court has taken a deep dive into precisely how this legislation operates, our rules of statutory construction are well settled. As our Supreme Court has repeatedly reminded us:

> Our purpose in construing a statute is to give effect to the Legislature's intent. When a statute is clear, courts will not look behind the statute's plain language for legislative intent or resort to rules of statutory construction to ascertain intent. Instead, the statute's plain and ordinary

> meaning must control, unless this leads to an unreasonable result or a result clearly contrary to legislative intent.

State v. Burris, 875 So. 2d 408, 410 (Fla. 2004) (citations omitted). *See also*, *Atwater v. Kortum*, 95 So. 3d 85, 90 (Fla. 2012) ("[w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning"); *Donato v. Am. Tel. & Tel. Co.*, 767 So.2d 1146, 1154 (Fla.2000) ("[i]t is only if the statutory language is ambiguous that 'the Court must resort to traditional rules of statutory construction to determine legislative intent' "); *DMB Inv. Tr. v. Islamorada, Vill. of Islands*, 225 So. 3d 312, 317 (Fla. 3d DCA 2017) ("[t]he Legislature must be understood to mean what it has plainly expressed and this excludes construction. The Legislative intent being plainly expressed, so that the act read by itself or in connection with other statutes pertaining to the same subject is clear, certain and unambiguous, the courts have only the simple and obvious duty to enforce the law according to its terms").

Section 718.119, as plainly written, vests the Association (now the Receiver) with authority to assess owners up to the "value" of their unit to cover uninsured/underinsured liability the "association may be exposed to . . . ." *Id.* This Association carried $18 million of liability coverage, and there can be no doubt that it is exposed to potential liability for hundreds of millions of dollars. For that reason, the statute, as plainly written, suggests that surviving owners (as well as the estates

of deceased owners) can be assessed up to the "value of his or her unit" in order to satisfy wrongful death claims in excess of $18 million. *See, e.g., Cooley v. Pheasant Run at Rosemont Condo. Ass'n, Inc.*, 781 So. 2d 1182, 1184 (Fla. 5th DCA 2001) (section 718.119 ". . . allow[s] individual unit owners to be personally liable for an additional assessment by the association in relation to the use of the common elements").

Some would argue that section 718.119 does not contemplate an outlier event such as this, where owner "value" would be eviscerated, and question whether, as a matter of public policy, property owners should forfeit the entire value of their condominiums if negligence on the part of their association results in an unforeseeable (at least to the owners) disaster. They would say that this is a harsh result unanticipated by the Legislature, and insist that the statute was "really" intended to address more commonplace occurrences, such as where an isolated injury results in liability exceeding insurance coverage – but not by so much: an example being an association with a $10 million liability policy facing a $15 million death claim arising out of a drowning in the condominium pool. But the statute draws no distinction between a case presenting a run-of-the-mill tort claim and a proverbial black swan event resulting in mass fatalities.

Others would forcefully argue that application of the statute serves the salutary purposes of: (a) ensuring that condominium associations carry adequate

insurance; and (b) motivating condominium boards (and residents) to properly maintain their property, and that there is nothing remotely unjust about owner "value" being statutorily subordinated to claims of those injured or killed as a result of a negligently maintained and underinsured condominium. And the legislature, in enacting section 718.119, *may* have agreed.

In any event, ". . . legislative intent must be determined primarily from the language of the statute and not from this [a court's] view of the best policy." *Citizens Prop. Ins. Corp. v. Perdido Sun Condo. Ass'n, Inc.*, 164 So. 3d 663, 667 (Fla. 2015); *Rollins v. Pizzarelli*, 761 So. 2d 294, 299 (Fla. 2000) ("[a]n interpretation of a statutory term cannot be based on this Court's own view of the best policy"); *State v. Ashley*, 701 So. 2d 338, 343 (Fla. 1997) (". . . the making of social policy is a matter within the purview of the legislature – not this Court"). A court's role is to apply the statute as written and say "what the law is, and not what [it may think] it should be" as a matter of public policy or fairness. *L.P. v. Dep't of Children & Family Services*, 962 So. 2d 980, 982 (Fla. 3d DCA 2007). So if section 718.119 applies here, and operates to wipe out owner "value," ". . . the law is the law. Notwithstanding [what some might consider] the distasteful consequences of applying it in this case, it must be served." *Spencer v. EMC Mortg. Corp.*, 97 So. 3d 257, 262 (Fla. 3d DCA 2012).

There is no question that: (a) we are in unchartered waters; (b) § 718.119 has not been judicially refined; and (c) the issue of whether the statute can/should be applied here and decimate owner "value" would be a hotly debated one of first impression. If this dispute were to be litigated, surviving Unit Owners are at risk of walking away empty handed, and the wrongful death claimants could be denied the $67 million (and possibly more depending upon the price ultimately realized for the land) benefit realized from this settlement, as it is possible that all funds generated from the sale of the land and property insurance proceeds could be allocated to only economic claims. There also is a middle ground: the Court could conclude that the statute, read literally, permits an assessment of only the aggregate value of the "units" (i.e., approximately $96 million), and that Unit Owners are entitled to receive the proceeds of the land sale and property insurance ($150 million), less the $96 million aggregate unit value subject to assessment, leaving them with a total of approximately $54 million. One thing, however, is certain: both sides would face substantial risk and any payment(s) could be delayed for years. This settlement mitigates both side's litigation risk, allows victims to begin receiving much needed compensation, and appears eminently fair and reasonable.

V. CONCLUSION

"[S]ettlements are highly favored," as litigants should be encouraged to resolve their disputes without judicial intervention whenever possible. *Robbie v.*

City of Miami, 469 So. 2d 1384, 1385 (Fla. 1985). This judicial policy is particularly strong "where complex class action litigation is concerned," *Allen v. Bedolla*, 787 F.3d 1218, 1223 (9th Cir. 2015), and weighs heavily in favor of approval here, as this Court would be loath to second-guess the parties' negotiated compromise.

This Agreement, negotiated between competent and experienced counsel, with the assistance of a highly skilled mediator, *and* with the participation of victims in each affected class, possesses all the indicia of a reasonable compromise of competing claims – the essence of a settlement. Absent some defect being brought to the Court's attention, it is highly likely to secure final approval, and clearly warrants preliminary approval. Accordingly, it is hereby **ORDERED**:

1. The "Allocation Settlement Agreement" presented to the Court is preliminarily approved.
2. The Receiver shall immediately post the entire Agreement and this Order on his website. Class counsel also shall email to each of their clients a complete copy of the Agreement and this Order. The Court finds that these forms of notice are the best practicable under the circumstances and will provide all affected parties with actual notice of the Agreement and their rights thereunder, including all objection/opt-out rights.
3. The Court will conduct a Final Approval Hearing on **March 30, 2022 at 2:00 p.m. in Courtroom 9-1 of the Miami Dade County Children's**

Courthouse, 155 NW 3rd Street, Miami, Florida 33128. Any objections to this "Allocation Settlement Agreement" must be in writing and filed with the Court no later than March 23, 2022, with service upon all counsel of record. No untimely objections will be entertained. Any party may (but is not obligated to) file a written response to any objection(s) by the close of business on March 28, 2022.

4. In the event the "Allocation Settlement Agreement" receives final approval, any Unit Owner wishing to forego their rights as provided for by the settlement will have ten (10) days after the Court enters its Final Approval Order to exercise their right to opt-out.

DONE AND ORDERED in Chambers at Miami-Dade County, Florida this 6th day of March, 2022.

MICHAEL A. HANZMAN
Circuit Court Judge

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