DAILY BUSINESS REVIEW
LAW ▪ REAL ESTATE ▪ FINANCE
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OCTOBER 31, 2007 www.DailyBusinessReview.com

LITIGATION

Insurance firm ordered to pay for costs of completing Miami Beach condo project

by **Mike Seemuth**
Special to the Review

The issuer of a construction performance bond for a Miami Beach condominium has been ordered to pay to finish the building after the first general contractor was fired for faulty work and more mistakes followed.

Miami-Dade Circuit Judge Mary Barzee Flores ordered American Alliance Insurance to pay $4.54 million plus interest to 200 Ocean Drive to make up for "a linear series of compounding mishaps."

American Alliance, a surety bond unit of Cincinnati-based American Financial Group, issued a $3.78 million construction performance bond to a venture led by South Miami developer Scott Greenwald.


JILL KAHN

Attorney Steve Siegfried says of his client: 'A person with less fortitude could have easily thrown in the towel.'

Surety companies like American Alliance issue performance bonds to ensure the proper completion of construction projects in case a general contractor defaults, caused by events ranging from defective work to job actions by workers.

A surety company's options in a contractor default can include paying the bond amount to the developer, repairing defective work and finishing the construction itself.

In this case, "the surety elects to complete the project," Barzee wrote. "While at the helm of the completion efforts, the surety causes extensive damage to the project, abandons it and leaves the developer in the proverbial creek in search of a paddle."

The judge awarded damages to 200 Ocean Drive on Oct. 17 after an eight-day, nonjury trial last month.

The total judgment against American Alliance is expected to be $6,059,064 after the judge approves the developer's interest expense, said attorney Steve Siegfried, who represented Greenwald's venture.

Borrowed money from his father helped Greenwald obtain additional bank financing to finish the condo's construction and pursue damage claims against American Alliance.

"If he did not have the ability to do that, his lender would not have extended any more money, I believe, and he would have been in bankruptcy," said Siegfried, senior partner of Siegfried Rivera Lerner De La Torre & Sobel in Coral Gables.

"This was his first venture into condominiums. He learned a lot," Siegfried said. "A person with less fortitude could have easily thrown in the towel. He stuck with it."

American Alliance abandoned the unfinished construction project in 2001 after spending up to the $3.78 million limit of its performance bond. It took Greenwald another three years to finish the project, including repairs for damage and deterioration.

Construction was started in 1998, completed in 2004 and temporarily suspended along the way. Miami Beach halted construction in 2000 following the discovery of multiple code violations that included the absence of steel-and-cement reinforcement required for the condo's concrete-block exterior walls. The deficiencies were discovered by an engineering firm the developer hired to inspect the project.

In pretrial rulings, Barzee concluded American Alliance breached its obligations under the performance bond by failing to complete the work, and damages to the developer were not limited to the bond amount.

American Alliance plans to appeal to the 3rd District Court of Appeal, said attorney Bruce King, whose law firm Carlton Fields represents the surety company.

"She was a good judge. I thought she tried to do her best," King said. "We just thought she made a fundamental error before the trial ever started by saying the surety had unlimited liability just because we took over the job."

On a motion for summary judgment, the judge rejected American Alliance's defenses and focused the trial on a determination of damages owed to the developer.

"The whole case was about damages. We had already lost the case based on the judge's ruling of summary judgment," King said. "We're going to be appealing not so much from her trial rulings, but we need to appeal the summary judgment she entered against us before the trial even started."

One defense the judge rejected was American Alliance's so-called "completion agreement" with the 200 Ocean Drive venture.

American Alliance claimed the agreement allowed it to take over construction while limiting its costs to the $3.78 million penal sum of the performance bond.

"The court disregarded that [agreement], saying it somehow meant nothing," King said.

Similar completion agreements have been ruled unenforceable by other courts that forced surety companies to finish projects they assumed even if the cost exceeded the bond amount, Siegfried said.

"The courts consistently say that there is no consideration for that. You can't force someone to sign a document that may change someone's rights … you're already obligated" to honor, Siegfried said.

Missing rebar and other serious deficiencies in construction went unnoticed during the first two years of construction despite periodic inspections by the project architect, city building officials and a special structural inspector.

"For something like this to happen, everybody has to screw up. It's just not supposed to happen," Siegfried said.

The deficiencies led to the termination of the project's first general contractor, Miami-based Arkbet Construction, and the takeover by American Alliance, which retained Miller & Solomon General Contractors as the new general contractor.

Despite the new GC, many of the old subcontractors were retained to repair their own questionable work, including Master Construction Enterprises, which was in charge of constructing the building shell, the judge found.

Using the same subcontractors was part of American Alliance's $750,000 original estimate to finish construction. The developer ultimately wound up building some parts of the building twice, the judge found.

"Arkbet's subcontractors, who were still working on the project, performed 'repair work' in a shoddy way, causing extensive additional damage to the project, including damage to much of the work that was complete and in good condition," the judge wrote.

Building deterioration also was evident. Deficiently installed windows and sliding glass doors had been removed under the direction of American Alliance, exposing the interior to the open air.

The court judgment favoring 200 Ocean Drive represents a much slower return on investment than originally projected.

The judge wrote that the developer presented substantial evidence that, "but for the delays caused by Arkbet and American Alliance's breaches, it would have sold out the project in 2000 and realized approximately $2,683,070 in developer profits and the return of the original equity investment." ■