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Condo buyers' class-action suit bears watching

< A group of unhappy condominium owners has commenced a class action against the developer of their Thornhill condominium project, claiming that the common expenses shown in the sales materials were significantly understated.

Between 1999 and 2002, Cantertrot Investments (an H&R project) was marketing condominium units in The Residence of Beauclaire, on New Westminster Dr., in Thornhill.

Before entering into the agreements, purchasers received a flyer indicating that maintenance fees for the units were "estimated at $0.32 per square foot," including utilities, visitor parking, concierge and one locker.

Before signing agreements, the purchasers also received a disclosure statement as required under the Condominium Act. The statement indicated that $413,000 were the "total funds required" to be contributed by all owners in the form of common expenses during the first year following registration of the condominium.

Based on the proposed budget and the draft condominium declaration, monthly common expenses for units in the project would range from $171.42 to $421.65, depending on unit size.

The condominium declaration was registered on June 28, 2002 and, by law, the developer was responsible for any shortfall between the proposed budget and the actual budget for the first year of operation.

A year later, the new board of directors reviewed the finances of the building and had no choice but to approve a budget showing increases of more than 62 per cent in common expenses for the second year of operation.

Even after the increase, the new budget implemented a deficit of $48,000, which was funded by a special assessment of about $15 per unit each month for four years.

In 2004, a group of the original purchasers retained Samuel Marr and Vadim Kats, of the Toronto law firm, Landy Marr LLP (http://www.landymarr.com), to launch an intended class action against the developer, its principals and the real estate brokers involved in marketing the condominium units.

In order to start a class action in Ontario, a judge must be satisfied that certain tests are met and the legal proceedings would be more efficient if handled under one umbrella rather than having dozens of individual plaintiffs each commence their own lawsuits.

After months of legal manoeuvring by both sides, Superior Court Justice Maurice C. Cullity recently certified the action as a class proceeding, allowing it to proceed with two plaintiffs Solly Lewis and Hersl Kalif representing themselves and those with similar interests.

Irvin Schein and Stephen C. Nadler, of Toronto's Minden Gross, are representing the developer, and have applied for permission to appeal Cullity's certification order.

The allegations in the claim of the plaintiffs are that, as a result of the alleged understatement of common expenses, the original buyers from Cantertrot suffered increased maintenance fees after the condominium's first year, loss of the services that had to be cut back to keep the budget in line, and diminished property values.

The plaintiffs' case against the developer and its principals is based on alleged negligence, misrepresentation, breach of the Condominium Act, oppression and other legal grounds.

They claim that the marketing materials and disclosure statements were "inaccurate, false, deceptive and misleading."

In their claim, the plaintiffs allege that before the purchasers closed their transactions, and before the registration of the declaration, the developer was warned in writing by the property manger "that unless drastic adjustments are made, the second-year budget will likely be doubled."

The defendants, of course, dispute the allegations.

The trial of the case if it gets that far is a long way off, and none of the plaintiffs' claims have yet been proven in court.

Materials filed in court last year on one of several appearances before Cullity show that 120 plaintiff unit owners are claiming damages of $10,572 to $12,643 for smaller units, and $26,004 to $31,101 for larger units.

The damages are based on two expert reports, and have yet to be tested at trial.

The total loss claimed by the class members is in a range of $2.1 million to $2.5 million.

Experts retained by the defendants, on the other hand, have estimated that the total losses of the buyers would be between zero and $52,300.

Obviously one class action, where the issues and facts are all similar, is preferable to the enormous costs of 120 separate Superior Court actions, where some of the damages might fall within the $10,000 Small Claims Court jurisdiction.

Unless the matter is settled earlier, a trial of the action could well be two or more years into the future.

For condominium builders and owners, it will be a fascinating case to watch as it unfolds.

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