

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

CASE NO.: 2018-42619-CA-01

COMPLEX BUSINESS LITIGATION
SECTION

ALAN POTAMKIN,
an individual,

Plaintiff,

v.

SC RESIDENCES CONDOMINIUMS LLC,
a Florida limited liability company,

Defendant.

**DEFENDANT’S REPLY IN SUPPORT OF ITS MOTION
TO DISMISS OR ABATE PLAINTIFF’S COMPLAINT**

Defendant SC Residences Condominiums LLC (“**Defendant**”), pursuant to the Florida Rules of Civil Procedure and Chapter 558, Florida Statutes, files this Reply in Support of its Motion to Dismiss or Abate Plaintiff Alan Potamkin’s (“**Plaintiff**”) Complaint, and states:

1. Defendant’s Motion to Dismiss or Abate Plaintiff’s Complaint (“**Motion**”) should be granted because Plaintiff failed to comply with the pre-suit requirements of Chapter 558, Florida Statutes. Plaintiff does not dispute that Chapter 558 applies. *See* Response at 13. Instead, Plaintiff argues that “Defendant through its actions and words . . . waived any right to rely upon any Notice of Claim provisions or right to repair provisions that may be applicable under Chapter 558 of the Florida Statutes or as set forth in the Contract.” Compl. ¶ 21. Plaintiff’s positions are contrary to Chapter 558 and the purchase agreement attached to the Complaint as Exhibit 1 (“**Agreement**”).

2. Section 558.003, Florida Statutes, states:

Action; compliance.—*A claimant may not file an action subject to this chapter without first complying with the requirements of this chapter. If a claimant files an action alleging a construction defect without first complying with the requirements of this chapter, on timely motion by a party to the action the court shall stay the action, without prejudice, and the action may not proceed until the claimant has complied with such requirements.* The notice requirement is not intended to interfere with an owner’s ability to complete a project that has not been substantially completed. The notice is not required for a project that has not reached the stage of completion of the building or improvement. (emphasis added).

The requirements of Section 558.003 are clear: if a claimant files an action alleging construction defects without first complying with the requirements of Chapter 558, the Court **shall** stay the action until the claimant complies with the requirements.

3. Plaintiff does not allege that he complied with Chapter 558 before filing the Complaint. Rather, Plaintiff contends that Defendant waived its rights to Chapter 558. Plaintiff’s arguments of waiver and estoppel are contradicted by multiple provisions in the Agreement:

- 34. Disclosures. (b) ANY CLAIMS FOR CONSTRUCTION DEFECTS ARE SUBJECT TO THE NOTICE AND CURE PROVISIONS OF CHAPTER 558, FLORIDA STATUTES.
- 39. Miscellaneous. . . . **Seller’s waiver of any of its rights or remedies (which can only occur if Seller waives any right or remedy in writing) will not waive any other of Seller’s rights or remedies** or prevent Seller from later enforcing all of Seller’s rights and remedies under other circumstances.
- 41. Entire Agreement. **The Agreement is the entire contract for sale and purchase of the Unit and once it is signed, it can only be amended by a written instrument signed by both Buyer and Seller** which specifically states that it is amending this Agreement. This Agreement contains the entire understanding between Buyer and Seller

Agreement ¶¶ 34, 39, 41 (emphasis added). Plaintiff does not allege that there are any written amendments to the Agreement or that Defendant waived any of its rights or remedies in writing.

The parties’ written Agreement controls over any alleged implied waiver of Chapter 558.

4. In considering a motion to dismiss, the court accepts as true all factual allegations in the complaint and views them in the light most favorable to the plaintiff. *See Seminole Tribe v. Times Publ'g Co.*, 780 So. 2d 310, 311 (Fla. 4th DCA 2001). When exhibits to a complaint are repugnant to its allegations (*i.e.*, negate the pleader's cause of action), the complaint fails to state a cause of action and should be dismissed. *See McKey v. D. R. Goldenson & Co.*, 763 So. 2d 409, 410 (Fla. 2d DCA 2000). The above-referenced provisions from the Agreement directly contradict Plaintiff's position that Defendant waived its right to insist upon the use of Chapter 558.

5. Plaintiff's futility argument also fails because Chapter 558 contemplates the involvement of more actors than just Plaintiff (the Unit owner) and Defendant (the developer). For example, Section 558.004(3) sets forth the timing within which the person served with a notice (such as Defendant) "may serve a copy of the notice of claim to each contractor, subcontractor, supplier, or design professional whom it reasonably believes is responsible for each defect specified in the notice of claim and shall note the specific defect for which it believes the particular contractor, subcontractor, supplier, or design professional is responsible" and each "may inspect the property as provided in subsection (2)." Defendant will suffer significant prejudice if this case continues without Plaintiff's compliance with Chapter 558. Plaintiff's noncompliance with Chapter 558 frustrates Defendant's ability to defend itself and utilize the statutory framework.

6. Finally, Plaintiff's reliance on *Banner Supply Co. v. Harrell*, 25 So. 3d 98 (Fla. 3d DCA 2009), which involves defective drywall, is misplaced because (1) the court never reached the issue of whether Chapter 558 even applies to that case and (2) the defendant contractor failed to correctly include the required "notice of claim" language in its contract. *Id.* at 100, n.5-6. Here, by contrast, (1) Plaintiff alleges that Chapter 558 applies to this case and (2) the Agreement includes the notice requirement of Section 558.005(6).

7. In summary, because all of Plaintiff's claims flow from alleged construction defects, this action must be dismissed or abated due to Plaintiff's failure to comply with Chapter 558, Florida Statutes.

WHEREFORE, Defendant SC Residences Condominiums LLC respectfully requests that this Court enter an Order (i) granting Defendant's Motion, (ii) dismissing or abating this action until Plaintiff complies with the requirements of Chapter 558, Florida Statutes, and (iii) granting Defendant such other and further relief as the Court deems just, fair, and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of September, 2019, that a true and correct copy of the foregoing was served to all counsel of record via an automatic email generated by the Florida Courts E-Filing Portal.

By: /s/ Richard D. Shane
Richard D. Shane, Esq.