

South Florida Developers Win Condo Purchase Fight Over Unit Sizes

by Lidia Dinkova

Two South Florida developers won against a contract holder who claimed unit sizes were inflated in sales materials for Sunny Isles Beach's Muse condominium tower, but the battle isn't over.

The would-be buyer's attorney said he will appeal and wants to disqualify Miami-Dade Circuit Judge William Thomas, claiming bias in favor of the developer.

Thomas, who declined comment on the bias allegation and disqualification push, issued an order granting developers PMG's and S2 Development LLC's motion for summary judgment against Pinellas County resident Stephen Hess and his companies.

Hess, his Clearwater Beach Co. LLC, Muse 2101 LLC, Muse 1901 LLC and Muse 2201 LLC sued PMG-S2 affiliate PMG-S2 Sunny Isles LLC asking to rescind their purchase contracts for three Muse units and get back over \$6.1 million in deposits.



(Photo: Courtesy Photos)

(L to R) Josh Rubens, Kluger Kaplan, and Michael Schlesinger

PMG-S2 co-developed the high-end 50-story oceanfront Muse at 17141 Collins Ave. with 68 units and floor-to-ceiling windows.

Hess and his companies claimed floor plans and fact sheets showed 3,635-square-foot units, roughly 400 square feet bigger than their actual size.

The developers wanted to confuse and mislead buyers by using a different method to calculate unit sizes that included balconies, corridors and other common areas not

truly part of the units, Hess claimed.

PMG-S2 also made a "sly" use of the phrase "A/C area" by including exterior spaces that aren't air-conditioned and included only "a tiny unreadable and confusing disclaimer" on the matter, the amended complaint said.

For its part, PMG-S2 in court filings called Hess' September 2018 move to rescind his purchase agreements "belated" because they were canceled months before after Hess missed an extended deadline

to close on the units, effectively forfeiting his deposits.

Thomas upheld PMG-S2's decision to end Hess' agreements. He also concluded there was no evidence to show Hess and his companies relied on the supposedly misleading advertising and promotional materials.

In reality, the purchase agreements stated the contracts were based only on the agreements and condominium documents such as a prospectus and declaration of condominium — not on the allegedly misleading sales materials.

Thomas pointed out Hess is experienced in these types of transactions since he buys and sells pre-construction condo units as an investment.

"It is the finding of the court that plaintiffs could not have reasonably relied, as a matter of law, on the alleged misrepresentations contained in the advertising or promotional materials," Thomas wrote in his order.

Hess timely received all material information about units measurements, Thomas continued, again agreeing with the developers. After Hess received the records for the first unit, he went on to sign for two more units.

Hess' contracts for Units 1901, 2102 and 2201 were signed from December 2014 to June 2016. A 23rd floor unit is on the market for \$6.9 million,

and a 19th floor unit is priced at \$5.95 million.

The decision holds larger implications, said Hess attorney Michael Schlesinger of Schlesinger Law Group in Miami.

"We feel that this is a statewide issue where developers admittedly are selling condominiums in their floor plans with a different measurement than the actual square footage," Schlesinger said. "My client is deeply disturbed that this is how the sale practices for condominiums is being done, and we are investigating everything we can do to have that stopped."

In the disqualification motion, Schlesinger said a bench trial was scheduled to start Monday but Thomas said in court that morning that he was writing a summary judgment order for PMG-S2.

"I don't think this comes close to misleading advertising. I'm sorry. I just don't. Factually, I just don't agree with you," the judge said based on a transcript. "I just can't find, based upon this record, that there is genuine issue of fact related to whether or not there was a material misrepresentation about square footage."

Schlesinger asked Thomas to either enter an order memorializing his oral ruling rejecting recusal or to reconsider that ruling and disqualify himself.

PMG and S2 were pleased with the summary judgment, PMG managing partner Ryan Shear said in an email.

"We always believed the case had no merit as it was lawyer driven from the beginning, and now that has become very clear," he added.

PMG-S2 attorney Josh Rubens, a Kluger Kaplan shareholder in Miami, touted the ruling as good news for his clients and other condo developers.

"The court determined that the customary and standard measurement methodologies and financing arrangements comply with Florida law," Rubens said in an emailed statement.

Hess also alleged PMG-S2 took out a project loan using Hess' deposits as collateral and didn't timely provide contract amendments.

After the Great Recession when many contract holders pushed to cancel their contracts, courts generally concluded exaggerated unit sizes listed in marketing materials were considered puffery and insufficient to void contracts.

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