IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

THE MARSEILLES CONDOMINIUM OWNERS ASSOCIATION, INC.,

Appellant,

v.

TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA,

Appellee.

_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1D08-4283

Opinion filed October 30, 2009.

An appeal from the Circuit Court for Escambia County.
Jan Shackelford, Judge.

Bruce A. Norris, Douglas W. Ackerman, and April A. Atkins of Kirwin Norris, P.A., Winter Park, for Appellant.

E.A. "Seth" Mills, Jr., Brett D. Divers, and Ty G. Thompson of Mills Paskert Divers, Tampa, for Appellee.

VAN NORTWICK, J.

The Marseilles Condominium Owners Association, Inc. (Association) appeals a final summary judgment entered in favor of Travelers Casualty and Surety Company of America (Travelers) in the Association's action on

performance bonds issued by Travelers in connection with the construction of the Marseilles condominium development controlled and managed by the Association. The bonds, which guarantee the performance of the construction general contractor, Trustmark South, Inc. (Trustmark), expressly preclude an action by any "entity other than the Owner or its heirs, executors, administrators or successors." The named "Owner" under the bonds is the developer of the Marseilles condominium project, Marseilles, L.C. (Developer). We hold that, under the unique facts and circumstances of this case and the language of the contractual documents involved, the Association is a "successor" to the Developer under the bonds and, therefore, may bring an action on the bonds to cure the alleged defective and incomplete work of the contractor. Accordingly, we reverse the final summary judgment and remand for further proceedings.

Factual and Procedural Background

In 2002, the Developer entered into a construction contract with Trustmark for the construction of two seven-story condominium buildings with connecting common areas located on Perdido Key. Travelers issued two performance bonds for the construction of the project guaranteeing Trustmark's performance of the construction contract. The Developer was the named owner/obligee under the bonds. These bonds incorporated by reference the construction contract between the Developer and Trustmark. Trustmark failed to perform and, ultimately, the

Developer entered into a contract with another general contractor to complete the project.

During construction, disputes arose between the Developer and Trustmark. In the meantime, the Association was formed and its bylaws recorded on June 1, 2004. The disputes between Trustmark and the Developer resulted in Trustmark filing an action against the Developer in Escambia County in 2005. In that action, the Developer filed a third-party complaint against Travelers. An arbitration proceeding followed. The Association was not a party to the arbitration or litigation. Although the Developer was given notice that the Association was claiming construction defects, the Association's claims were not addressed in the litigation. On November 11, 2006, the Association assumed legal control of the condominium from the Developer.

Without the knowledge or participation of the Association, on January 21, 2007, the Developer settled the litigation with Trustmark and Travelers pursuant to which the Developer allegedly received payment of $1.575 million. As part of the settlement, the Developer agreed to mark the bonds "canceled" on their face, and Travelers agreed to have a stipulated final judgment entered against it and to satisfy the stipulated final judgment. The Association did not learn of the settlement until after it had been completed.

On January 30, 2007, the Association filed a complaint against the Developer and Travelers. The complaint alleges that the condominium project suffers both incomplete and defective construction work and that the Association notified the Developer continuously throughout 2006 about construction defects in the condominium project which had not been remedied or repaired. The Association alleged a claim for breach of various warranties against the Developer and a claim under the performance bonds against Travelers. The Developer failed to appear and a default was entered against it. Travelers answered the complaint and filed a motion for summary judgment arguing that the language of the bonds precluded an action by any entity other than the Developer or its successor. The trial court granted summary judgment in favor of Travelers. This appeal ensued.

Performance Bond and Construction Contract Provisions

The performance bonds contain the following provisions pertinent to this appeal:

> 1. The Contractor and the Surety, jointly and severally bind themselves, their heirs, executors, administrators, successors and assigns to the Owner for the performance of the Construction Contract, which is incorporated herein by reference.
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> * * *
>
> 6. . . . To the limit of the amount of this Bond, but subject to commitment by the Owner of the Balance of the Contract Price to mitigation of cost and damages on the

> Construction Contract, the Surety is obligated without duplication for:
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> 6.1 The responsibilities of the Contractor for correction of defective work and completion of the Construction Contract;
>
> * * *
>
> 7. The Surety shall not be liable to the Owner or others for obligations of the Contractor that are unrelated to the Construction Contract, and the Balance of the Contract Price shall not be reduced or set off on account of any such unrelated obligations. No right of action shall accrue on this Bond to any person or entity other than the Owner or its heirs, executors, administrators or successors.

(Emphasis added).

Article VI of the construction contract governs final payment under the contract and sets forth the contractor's responsibilities that must be met before the contractor can receive final payment. It provides, as follows:

> The warranties to be submitted hereunder shall include, without limitation, warranties of fitness and merchantability as to all elements of the Work, from the Contractor and all Subcontractors and material suppliers, which shall be for the benefit of the Owner, and all unit owners and any owners' association. The Contractor's and Subcontractor's warranties shall have the same scope and effect as any and all statutory or common law warranties which Owner grants to any unit owners or subsequent purchasers.

(Emphasis added).

In addition, the construction contract contains warranty provisions in section 3.5.1 which provide, in pertinent part, that the contractor warrants "that the Work will be free from defects not inherent in the quality required or permitted, and that the Work will conform with the requirements of Contract Documents."

The Association as a Successor under the Bonds

In the proceeding below, Travelers successfully argued that, since the bonds provided that "[n]o right of action shall accrue on this Bond to any person or entity other than the Owner or its heirs, executors, administrators, or successors," the Association was precluded from bringing this action as a third-party beneficiary under the bonds. Further, Travelers asserted that the Association was not a "successor" to the Developer, and, accordingly, the Developer, as the named obligee, was the sole party covered by the bonds. We reject Travelers' argument that the Association does not have standing to bring a claim against the performance bonds because it was not a named obligee under the bonds. Given the facts of this case, we hold that the Association was a "successor" to the Developer under paragraph 7 of the performance bonds and, as such, possessed standing to bring an action under the bonds. Our holding is based on our reading of the applicable provisions of the bonds and construction contract incorporated into the bonds and the nature of a condominium development, the type of development that is the subject of the bonds.

The term "successor" is not defined in the bonds that are the subject of this appeal. As a general rule, no one definition of "successor" suffices for all legal relationships. Safer v. Perper, 569 F.2d 87, 95 (D.C. Cir. 1977). Where the term "successor" is undefined in a contract, "the exact meaning of the word 'successor' as applied to a contract must depend largely on the kind and character of the contract, its purposes and circumstances, and the context." Enchanted Estates Cmty. Ass'n, Inc. v. Timberlake Improvement Dist., 832 S.W.2d 800, 802 (Tex. App. 1992).

We find Argonaut Insurance Co. v. Commercial Standard Insurance Co., 380 So. 2d 1066, 1068 (Fla. 2d DCA 1980), instructive in interpreting the meaning of "successor" as used in the bonds. In Argonaut, in the context of a performance bond, the Second District Court of Appeal adopted the definition of "successor" as "'he that followeth or cometh in another's place' or more recently as one 'who follows or takes the place another has left and sustains the like part or character'" id. (quoting Beatty v. Ross, 1 Fla. 198, 209 (1847), and Albury v. Century on Southern Florida Flood Control District, 99 So. 2d 248, 252 (Fla. 3d DCA 1957)), and rejected a narrow construction of the term successor "which would limit it to situations involving successor corporations." 380 So. 2d at 1068. In Argonaut, the general contractor had obtained a performance bond. It also engaged an air-conditioning subcontractor that obtained a performance bond naming the general

contractor as the obligee. During construction, the general contractor defaulted and its surety under the performance bond completed the construction. At the same time, the air-conditioning subcontractor refused to complete its work on the subject project. The general contractor's surety demanded that the subcontractor's surety reimburse it for the costs associated with the subcontractor's default. The subcontractor's surety refused on the grounds that the general contractor's surety was not a named obligee under the bond and, thus, had no standing to make a claim under the bond. The Second District Court of Appeal disagreed, holding that the general contractor's surety was a "successor" of the obligee under the bond.

There is no dispute between the parties here that, pursuant to the declaration of condominium and the amended declaration of condominium filed by the Developer, this construction project was submitted by the Developer to the condominium form of ownership and use as governed by the Condominium Act, chapter 718, Florida Statutes, and that the Association was created by the Developer to control and manage the condominiums upon completion. See § 718.104(2), Fla. Stat. (condominium is created by recording a declaration of condominium in the Florida records); see also § 718.104(4)(i) (The contents of the declaration of condominium must contain the name of the association). While the Developer controlled the Association at the time of filing the declaration of condominium and amended declaration of condominium, the Association

succeeded to control of the condominium pursuant to section 718.301(4), Florida Statutes. That statute provides, in pertinent part, as follows:

> At the time that unit owners other than the developer elect a majority of the members of the board of administration of an association, the developer shall relinquish control of the association, and the unit owners shall accept control. Simultaneously . . . the developer shall deliver to the association, at the developer's expense, all property of the unit owners and of the association which is held or controlled by the developer . . .

§ 718.104(4)(i).

As argued by the Association, the parties always understood that the bonds were guaranteeing a condominium project and that the Developer would not be the eventual end user of the project. A "developer" is defined in the Condominium Act as the "person who creates a condominium or offers condominium parcels for sale or lease in the ordinary course of business, but does not include an owner or lessee of a condominium . . ." § 718.031(16), Fla. Stat. The end users of the condominium project are the individual unit owners who own their respective units and share ownership in the common elements of the project. See § 718.103(11), Fla. Stat. (defining "condominium" as "that form of ownership of real property . . . which is comprised entirely of units that may be owned by one or more persons, and in which there is, appurtenant to each unit, an undivided share in common elements"). The Association is the legal entity responsible for operating and

maintaining the common elements owned by the collective unit owners. § 718.103(2), Fla. Stat. The face of the bonds indicates that they were issued for a condominium project. Thus, when Travelers issued the bonds, it knew that control over and operation and maintenance of the common elements would be vested in the Association.

Further, the performance bonds here expressly incorporated the construction contract as a part of the bonds. Under Florida law, where a written contract refers to and sufficiently describes another document, that other document may be regarded as part of the contract and is properly considered in its interpretation. Jenkins v. Eckerd Corp., 913 So. 2d 43, 51 (Fla. 1st DCA 2005). The fundamental purpose of the performance bonds was to ensure the faithful performance of the construction contract incorporated into the bonds by reference. See Collins v. Nat'l Fire Ins. Co. of Hartford, 105 So. 2d 190, 194-95 (Fla. 2d DCA 1958) (recognizing that when a bond incorporates a contract, the contract language becomes part of the bond and should be used in interpreting the contract and determining the intent of the parties to the transaction). This incorporation by reference is significant here because the construction contract expressly provides that the warranties in the contract "shall be for the benefit of the Owner, and all unit owners and any owner's association." Thus, because paragraph 1 of the bonds obligate the surety "for the performance of the Construction Contract" and

paragraph 6.1 obligates the surety "for correction of defective work and completion of the Construction Contract," the surety's obligations included the correction of all breaches of warranties for the benefit of the Association.

In Federal Insurance Co. v. Southwest Florida Retirement Center, Inc., 707 So. 2d 1119 (Fla. 1998), the performance bond, like the bonds in the case under review, incorporated the construction contract by reference, thereby guaranteeing the faithful performance of the construction contract according to its terms and conditions. Id. at 1120. The Florida Supreme Court held that, where a performance bond includes warranty obligations, the performance bond surety is liable to cure patent and latent defects in performance of the construction contract and the statute of limitations accrues on the date of accepting the project. Given this settled Florida law, when it issued the bonds here, Travelers became obligated to correct latent defects in the construction caused by Trustmark for a period of up to five years after the project was accepted. By virtue of the terms of the construction contract and the nature of a condominium development, Travelers had to know that the Developer would not be the owner when the construction was completed and that the condominium would be transferred to the unit owners and the Association.

Like the court in Argonaut Insurance Co. v. Commercial Standard Insurance Co., we hold that the term "successor" in the performance bond should not be

given a narrow reading. 380 So. 2d at 1068. The Association assumed the Developer's obligation of maintaining and operating the condominiums. Therefore, the Association is permitted to bring a cause of action to complete work on the portion of the condominium buildings within its control and cure warranty defects because the Association has replaced the Developer as the controlling and responsible party. Compare Safer v. Perper, 569 F.2d at 96 (recognizing that where there is a high degree of similarity in role and interest between two entities, facts may warrant one entity being a successor of the other); Enchanted Estates Community Ass'n, Inc., 832 S.W.2d at 802-03 (recognizing that, depending upon facts, subdivision homeowners association would be a successor to the developer so that it could bring an action against agency which owned and operated a waste water treatment plant to enforce a contract entered into by that agency and the developer). We necessarily reject the notion that the concept of a "successor" is always limited to corporate entities that have become vested with the rights and duties of another entity through amalgamation, consolidation, or other assumption of interest. See Black's Law Dictionary 1446 (7th ed. West 1999) (defining "successor" alternatively as "[a] corporation, that, through amalgamation, consolidation, or other assumption of interest, is vested with the rights and duties of an earlier corporation," and "a person who succeeds to the office, rights, responsibilities, or place of another; one who replaces or follows another.").

We recognize that a Texas appellate court has held that a condominium unit owners association was not a "successor" of the developer and named owner under a performance bond issued by a surety company. Augusta Court Co-owners Ass'n v. Levin Roth & Kasner P.C., 971 S.W.2d 119 (Tex. App. 1998). In Augusta Court, however, the owners association failed to timely raise the argument that the construction contract was incorporated as a part of the performance bond, and the issue was deemed waived by the court. Further, the court ruled that, even assuming the construction contract and performance bond were construed together and created an ambiguity, it would follow the rule of strict construction in Texas which requires an interpretation of the bond that favors the surety. Id. at 125. Unlike Augusta Court, here the Association preserved its argument that the terms of the construction contract were incorporated into the bond. Further, unlike Texas law, Florida follows the rule "that contracts of surety are regarded as analogous to contracts of insurance, and are to be strictly construed against the surety and in favor of the obligee." Gulf Power Co. v. Ins. Co. of N. Am., 445 So. 2d 1141, 1142 (Fla. 1st DCA 1984).

Further, Beach Point Condominium Ass'n, Inc. v. Beach Point Corp., 480 So. 2d 239 (Fla. 4th DCA 1985), does not control this case. In Beach Point, the court ruled that a condominium association was not a third-party beneficiary of a payment and performance bond secured by the general contractor in favor of the

original owner–developer of the condominium. Because we hold that, under the facts and circumstances of this case, the Association is a successor and may sue on the bonds, it is not necessary to reach the third-party beneficiary issue. Compare Aetna Cas. & Sur. Co. v. Crabtree, 383 So. 2d 657 (Fla. 1st DCA 1980) (recognizing that whether parties are entitled to maintain an action as third-party creditor beneficiaries of a bond depends upon the terms of the bond and evidence of related transactions between the parties).

REVERSED and REMANDED for a trial on damages.

KAHN, J., CONCURS; BENTON, J., DISSENTS WITH OPINION.

BENTON, J., dissenting.

I would affirm the summary judgment dismissing the complaint that The Marseilles Condominium Owners Association, Inc. (Association) filed against Travelers Casualty and Surety Company of America (Surety). The Association sought recovery on bonds the Surety had issued in favor, not of the Association, but of Marseilles, L.C. (Owner), to ensure performance of a construction contract to which the Association was never a party.

As the majority opinion acknowledges, each of the performance bonds plainly provides: "No right of action shall accrue on this Bond to any person or entity other than the Owner or its heirs, executors, administrators or successors." Not only is the Association not an heir, executor, administrator or successor to or of the Owner, but the Owner has itself also already sued the Surety—and settled claims paralleling the Association's claims against the Surety, in exchange for payment of some one and a half million dollars.

The Association and unit owners were well aware that the Owner had filed suit to recover from the Surety, but made no effort to intervene in the action to ensure that funds recovered by the Owner on account of the contractor's putative derelictions would be used to remedy the problems and defects that they (and the Owner) have alleged resulted. The Association did not participate even though nothing in this record rules out the possibility that the Association would have been

made whole if it had intervened.

A surety is free to draft a contract that reflects the risk it is agreeing to assume. See Fed. Ins. Co. v. Sw. Fla. Ret. Ctr., 707 So. 2d 1119, 1121 (Fla. 1998) ("The terms of the bond control the liability of [the surety.]" (quoting U.S. Fid. & Guar. Co. v. Gulf Fla. Dev. Corp., 365 So. 2d 748, 751 (Fla. 1st DCA 1978))); Crabtree v. Aetna, 438 So. 2d 102, 105 (Fla. 1st DCA 1983) ("A bond is a contract subject to the general law of contracts. A surety on a bond does not undertake to do more than that expressed in the bond, and has the right to stand upon the strict terms of the obligation as to his liability thereon." (citation omitted)).

While the performance bonds incorporate the construction contract, the bonds also specifically limit who may sue on the bonds. Surety contracts are "strictly construed against the surety and in favor of the obligee," Gulf Power Co. v. Insurance Co. of North America, 445 So. 2d 1141, 1142 (Fla. 1st DCA 1984), and any "ambiguity as to the nature of the bond should be construed against the surety company and in favor of granting the broadest possible coverage to those intended to be benefitted by the protection of the bond." General Insurance Co. of America v. Sentry Indemnity Co., 384 So. 2d 1305, 1306 (Fla. 5th DCA 1980). But the performance bonds at issue in the present case are not ambiguous: They state clearly who may, and who may not, bring an action on the bonds. See TRST Atlanta, Inc. v. 1815 The Exchange, Inc., 469 S.E. 2d 238, 239-40 (Ga. Ct. App.

1996) (holding owner's assignees were not "successors" entitled to bring suit on performance bonds).

There are valid reasons for limiting who may sue on a bond. Without such a limitation here, the Surety might have lawfully been subject to multiple suits on the bonds, which could potentially result in multiple judgments for overlapping damages exceeding the amounts of the bonds. To avoid this outcome, the performance bonds explicitly preclude an action by any entity other than the Owner "or its heirs, executors, administrators or successors."

The Florida Condominium Act does not define "heirs, executors, administrators or successors." These terms all refer to persons or entities that end up taking another's place by operation of law or by virtue of legal proceedings, even if in consequence of some voluntary act like merger or acquisition. Heirs are "those persons, including the surviving spouse, who are entitled under the statutes of intestate succession to the property of a decedent." § 731.201(20), Fla. Stat. (2008). An administrator is a person appointed by the court to manage the assets and liabilities of a person. See § 733.308, Fla. Stat. (2008). See also § 731.201(27), Fla. Stat. (2008) ("Personal representative" (formerly "executor" or "executrix") means "the fiduciary appointed by the court to administer the estate and refers to what has been known as an administrator, administrator cum testamento annexo, administrator de bonis non, ancillary administrator, ancillary

executor, or executor."). Florida Statutes also define a "successor entity,"[1] "successor,"[2] and "successor of a beneficiary"[3] for various specific purposes.

Nothing in the Florida Condominium Act supports the Association's claim to be the Owner's successor, although the term "developer" in the Act does include the Owner in the present case. A "developer" is defined to include a "person who creates a condominium or offers condominium parcels for sale or lease in the ordinary course of business, but does not include an owner or lessee of a condominium or cooperative unit who has acquired the unit for his or her own occupancy. . . ." § 718.103(16), Fla. Stat. (2008). The term "association" means

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[1] "'[S]uccessor entity' includes any trust, receivership, or other legal entity governed by the laws of this state to which the remaining assets and liabilities of a dissolved corporation are transferred and which exists solely for the purposes of prosecuting and defending suits by or against the dissolved corporation, enabling the dissolved corporation to settle and close the business of the dissolved corporation, to dispose of and convey the property of the dissolved corporation, to discharge the liabilities of the dissolved corporation, and to distribute to the dissolved corporation's shareholders any remaining assets, but not for the purpose of continuing the business for which the dissolved corporation was organized." § 607.1406(15), Fla. Stat. (2008). To like effect, see chapter 09-205, section 10, at 2051, Laws of Florida, concerning corporations not for profit.

[2] "The term 'successor' refers to an affiliated trust company or affiliated bank's or affiliated association's trust department which is substituted for a predecessor in the predecessor's trust relationships including all powers, duties, and responsibilities associated therewith." § 660.33(4)(c)8.c., Fla. Stat. (2008).

[3] "'Successor of a beneficiary' means a person who succeeds to substantially all of the rights of a beneficiary by operation of law, including a corporation with or into which the beneficiary has been merged or consolidated, an administrator, executor, personal representative, trustee in bankruptcy, debtor in possession, liquidator, and receiver." § 675.103(1)(o), Fla. Stat. (2008).

"in addition to any entity responsible for the operation of common elements owned in undivided shares by unit owners, any entity which operates or maintains other real property in which unit owners have use rights, where membership in the entity is composed exclusively of unit owners or their elected or appointed representatives and is a required condition of unit ownership." § 718.103(2), Fla. Stat. (2008).

Indeed, the Florida Condominium Act specifically contemplates that an association and a developer may have conflicting or competing interests. See, e.g., § 718.301, Fla. Stat. (2008). In the present case, the evident purpose of the Owner was to develop a condominium complex and to sell the property to prospective unit owners. In contrast, the basic purpose of the Association is to maintain and operate the common elements after sales to individual unit owners have diminished the Owner's role. To that end, the Association may institute and defend actions in its name on behalf of unit owners concerning matters of common interest. § 718.111(3), Fla. Stat. (2008).

That an association may, in some circumstances, represent unit owners in court and act on behalf of unit owners in other ways does not create a "high degree of similarity in role and interest between" the Association and the Owner, the developer here. See Safer v. Perper, 569 F.2d 87, 96 (D.C. Cir. 1977). On the contrary, the Association has filed suit against the Owner, as well as the Surety,

alleging that the Owner is also liable, both to the unit owners and to the Association, for construction defects.

Incorporation of the construction contract into the performance bonds by referencing it in the surety agreements did not make the Association the legal "successor" of the Owner. Nor were any "special facts" shown to exist here. Compare Enchanted Estates Cmty. Ass'n v. Timberlake Improvement Dist., 832 S.W.2d 800, 802-03 (Tex. App. 1992) (holding that, because homeowners' association assumed the rights and obligations of the developer under a contract with a waste treatment plant, receiving and paying invoices and in turn billing the subdivision residents, there was an issue of fact as to whether the association was the successor of the developer with regard to the contract).

Once the Association was "released" from the Owner's control, it did not assume the Owner's position. The newly autonomous Association took title to no unsold units, assumed no liability under the Owner's construction contract to any entity or person, and assumed no other liability for obligations the Owner incurred in developing the property. Cf. TRST Atlanta, Inc., 469 S.E. 2d at 240 (finding "no evidence of a duly authorized legal succession" because "the words 'successors' and 'assigns' have different meanings" (quoting S. Patrician Assoc. v. Int'l Fid. Ins. Co., 381 S.E. 2d 98, 99 (Ga. Ct. App. 1989))). By no stretch of the imagination did the Association step into the shoes of the Owner.

The fact that the Surety knew the performance bonds guaranteed construction of a condominium project and that the Owner would not be the ultimate end user of the project does not make the Association a legal "successor." The Florida Condominium Act does not even require sureties on construction contracts. Compare section 337.18, Florida Statutes (2008), which generally requires parties contracting with the Department of Transportation to provide a surety bond "in an amount equal to the awarded contract price." A surety is free to contract with private parties to bind itself for the discharge of obligations that are less than the obligations the principal obligor assumes, whether as to amount or as to the number of obligees.

The majority opinion looks beyond the Florida Condominium Act to Argonaut Insurance Co. v. Commercial Standard Insurance Co., 380 So. 2d 1066 (Fla. 2d DCA 1980), for the definition of "successor." Id. at 1068 ("one 'who follows or takes the place another has left and sustains the like part or character'" (citations omitted)). In that case, however, Argonaut Insurance was the contractor's successor because it "took over as completing surety to finish work on the apartments," and thus fit the definition of a successor because "it stepped into the shoes left by [the contractor] and assumed [the contractor's] rights and obligations in taking over . . . as general contractor." Id. at 1067-68 (footnote omitted).

Because the Association is not the owner or the Owner's heir, executor, administrator or successor, the contracts between the Owner and the Surety unequivocally preclude the Association from bringing actions on the performance bonds. No fact or circumstance gives credence to the notion that the Association has been invested with the rights or assumed the burdens of the Owner. The record in the present case is devoid of any showing of any kind of legal "succession" from Owner to Association.

While the Association operates or maintains the common areas and other real property in which unit owners have use rights, the individual unit owners own the units and an undivided interest in the common areas. As purchasers, they, not the Association, are the Owner's successors in title pro tanto. § 718.106(2), Fla. Stat. (2008). In contrast to a developer, who develops and sells condominium units to unit owners in arm's length transactions, the officers and directors of an association have a fiduciary duty to the unit owners. § 718.111(1)(a), Fla. Stat. (2008). An association like the Association in the present case does not "take[] the place" or "sustain[] the like part or character" of a developer like the Owner in the present case. Argonaut, 380 So. 2d at 1068.

Just as the Surety's liability is limited to the amount of the performance bonds (regardless of the amount the contractor might be liable for under the construction contract), so incorporation of the construction contract by reference

did not abrogate express conditions for recovering against the Surety set out in the performance bonds. Key here are the conditions that preclude accrual of any right of action in favor of the Association on the performance bonds. The Association's remedy is an action, not against the Surety, but against the Owner (with whom the unit owners are in privity) and an action against the contractor itself, remedies the record suggests the Association is already pursuing. § 718.203, Fla. Stat. (2008).

For these reasons, I respectfully dissent.