POINTS AND AUTHORITIES

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ARGUMENT

I.

Spanish Court Two Does Not Dispute That the Affirmative Defenses Stricken by the Trial Court Were, as a Matter of Law, Germane to the Association's Claim for Possession, Regular Monthly Assessments, Late Fees and Attorneys Fees

Spanish Court Two attempts to confuse the issue by focusing only on the counterclaim brought by Lisa Carlson for money damages caused by the Association's failure for years to repair water infiltration damage in her fourth floor condominium unit, which was directly below the roof of the building. Spanish Court Two, in its appellee's brief, fails to address Carlson's Affirmative Defenses which disputed Spanish Court Two's right to take possession of Carlson's condominium unit, and recover regular assessments, late fees, and attorneys fees which are recoverable under the forcible entry and detainer statute only if the Association can show a right to take possession in the first place.

The Affirmative Defenses and the Counterclaim filed by Carlson are separate. Indeed, Spanish Court Two filed separate motions with respect to each. One motion was to strike the Affirmative Defenses (A23). A separate motion was to sever the counterclaim (A26). Carlson respectfully submits that the trial court erred as a matter of law in striking the Affirmative Defenses, and that the trial court abused its discretion by severing the counterclaim, which, for judicial economy reasons, should have been tried in the same proceeding, as indicated by the Illinois Supreme Court in *Rosewood Corporation v. Fischer, et al.,* 46 Ill.2d

249, 253 N.E.2d 833 at 839, 840 (1970).

Sawyier v. Young, 198 Ill.App.3d 1047, 556 N.E.2d 759, 145 Ill.Dec. 141 (1st Dist., 1990), a case relied upon by both parties in this appeal, illustrates the point. In *Sawyier,* the defendant did not file any affirmative defenses contesting the plaintiff's right of possession. In fact, the defendant in *Sawyier* conceded the issue of possession, which Carlson, in this case, has never conceded. The money damages sought by the defendant in *Sawyier* were completely unrelated to his right to possess a certain coach house. In fact, the defendant in *Sawyier* vacated the coach house and had no interest in the coach house.

This case is substantially different than *Sawyier*. The Affirmative Defenses asserted by Carlson allege sufficient facts to support the claim that Spanish Court Two was deliberately avoiding its obligation under the law to repair water leaks in the roof or exterior brick work that were causing substantial damage to the interior of Carlson's condominium unit. The Affirmative Defenses assert that the problem existed for several years, and despite several years of notice to the Board of Managers of Spanish Court Two, they ignored the problem.

Spanish Court Two does not dispute the fundamental contract law that no party to a contract can benefit from a contract unless he has also performed the obligations under the contract. There is no dispute that the forcible entry and detainer statute provision that affords a condominium association the right to evict a condominium unit owner is based on contract. 735 ILCS 5/9-111(a)

provides for forcible entry and detainer action for a condominium association based on the failure of a unit owner to pay his or her proportionate share of the common expenses of the property "lawfully agreed upon." The agreement between the parties, which is contained in the Condominium Declaration, expressly provides that the Board of Managers has the legal obligation to repair common elements, including the roof, with monies collected from the owners of the condominium units in the form of regular assessments.

Contrary to the argument posed by Spanish Court Two at page 8 of its brief, Carlson does assert a paramount right of possession and, in fact, challenges the enforceability of the condominium declarations. The evidence at trial was that Carlson even questioned the motivation of the Association in bringing the eviction action as retaliation for her personal injury action when she was thrown from a malfunctioning elevator. At all times Carlson has disputed the right of Spanish Court Two to take possession of her condominium unit or to charge her regular assessment fees, late fees on unpaid regular assessments or attorneys fees because the board managers engaged in conduct constituting a material breach of the covenants contained in the Condominium Declaration that would estope them from enforcing Carlson's contract oblications under the same Condominium Declarations.

Contrary to the inference raised by Spanish Court Two at Page 9 of its brief, Carlson does not dispute that the Illinois Condominium Act allows for the

board of managers of a condominium association to collect assessments from unit owners. However, as indicated in Carlson's Appellant's Brief, the Illinois Condominium Act also imposes a duty on a board of managers to repair the roof or any other exterior surface so as to prevent continuing water damage to a unit owner after repeated and reasonable notice is given about the problem.

Even if this court allows the counterclaim to proceed separately, as it has for the past several months in the trial court below, Carlson respectfully submits that this Court should reinstate the Affirmative Defenses, reverse the money judgments, and remand the case to determine whether or not Spanish Court Two has the right to possession, recovery of regular assessments, late fees on unpaid regular assessments or attorneys fees in light of evidence that it breached material contract provisions of the Condominium Declaration that estope it from acquiring possession to Carlson's unit or for seeking the money damages at issue.

II.

Spanish Court Two Does Not Effectively Refute That the $1,950 Assessment for an Interior Patio Door Inside Carlson's Unit Is Unenforceable Because It Is Contrary to the Plain, Ordinary Meaning of the Language Contained in the Condominium Declarations

The rules of construction for contracts govern this Court's interpretation of covenants contained in condominium declarations. *Forest Glen Community Homeowners Association v. Bishof*, 321 Ill.App.3d 298, 746 N.E.2d 1285, 284 Ill.Dec. 237 (2nd Dist., 2001). The interpretation and construction of a contract, including condominium declarations, are matters to be determined by the court

as questions of law. The meaning of the provisions of a contract, including condominium declarations, must be determined from the language, and courts will not arrive at a construction that runs contrary to the plain and ordinary meaning of the language used. *Forest Glen Community Homeowners Association, supra,* 321 Ill.App.3d 298 at 302.

As noted at page 21 of the appellant's brief, Article XIII of the Declarations provides that "each unit owner shall be responsible for the maintenance, repair and replacement of all glass panes in the windows and doors which serve his unit." The provision clearly distinguishes between glass doors and windows serving each condominium unit in the inside of the unit and "perimeter doors and windows" which are considered common elements under the Condominium Declarations, Bylaws and the Illinois Condominium Property Act, 765 ILCS 605/4.1(2).

Contrary to the assertion of Spanish Court Two at pages 9 and 10 of its brief, an interior patio door does not fall within the definition of a limited, common element as contained in Article I(h) of the Condominium Declarations. An interior patio door does not fall within the definition of a *perimeter* "wall, floor, ceiling, door, vestibule, window, entry way, all associated fixtures and structures therein '*as lie outside the unit boundaries*.'"

An interior patio door that runs on rails inside the boundary of a unit does not fall within the definition of limited common element or common element. As

was admitted by Brian Begun, a property manager with Nimrod Realty Group, at trial, some condominium owners, like Lisa Carlson, never received their new doors (R.61, 90, 91), and some unit owners have resisted having the new doors put into their units (R.61, 62).

The reason the judgment on this issue should be reversed is that Spanish Court Two, as a matter of law, does not have the authority to impose a special assessment on unit owners for the purpose of replacing an interior item within the boundary of their respective condominium units.

The assessment should fail also because there was no clear record that a specific vote was taken among condominium owners on the specific special assessment. Spanish Court Two agrees in its brief that there must be at least a vote taken by some percentage of unit ownership. The only evidence presented by Spanish Court Two relating to the passage of the special assessment for patio doors was Plaintiff's Trial Exhibit 3, the minutes of a meeting of the Board on December 16, 2009 which reflected the vote of board members, not unit owners. The fact that the minutes state "persons present were in favor to replace the doors" is not evidence of a vote of unit owners. The persons present could have been tenants of unit owners, family members, or employees. This is the reason Carlson argued at trial, and on appeal, that this particular special assessment was contrary to the law and against the manifest weight of the evidence. There was simply no proof presented by Spanish Court Two that any vote by unit ownership

was held and recorded for the purpose of approving the special assessment for patio doors.

III.

There Is No Evidence of Waiver by Carlson Disputing That Spanish Court Two Was Entitled to Recover Attorneys Fees

At no time, either in the trial court, or on appeal, has Carlson waived her position that Spanish Court Two is entitled to collect attorneys fees.

The so-called "agreed order" of January 18, 2011 (R.C0134) was entered ex-parte. On February 3, 2011 Carlson filed a motion to vacate the January 18, 2011 order because it did not reflect the agreement of the parties. As indicated in Carlson's motion to vacate, filed February 3, 2011 (R.C0151), the stipulation was for the amount of unpaid assessments not including attorneys fees. On January 31, 2011 the trial court vacated the "agreed" order of January 18, 2011 and entered an order allowing Spanish Court Two possession unless Lisa Carlson paid certain regular assessments by a certain date. Attorneys fees were not included in the January 31, 2011 order, which is on appeal here.

The record is clear that the January 18, 2011 order was not "agreed" and that there was no waiver by Carlson to any claim to recover attorneys fees by Spanish Court Two.

The second basis of waiver advanced by Spanish Court Two in its brief is also specious. Section 3 of Carlson's brief essentially reiterates, and relies upon, the arguments and authority contained in Section 1 of the Brief. The argument

is simple. Spanish Court Two is only entitled to attorneys fees in this case on the basis of the forcible entry and detainer statute, 735 ILCS 5/9-111, and the Illinois Condominium and Property Act, 765 ILCS 605/9.2.

If the evidence at trial upon remand demonstrates that Spanish Court Two breached its fundamental duties to Carlson pursuant to the contractual provisions of the Condominium Declarations, then the Association would not be entitled to possession of Carlson's unit, nor would the Association be entitled to collect regular assessments, late fees, or attorneys fees. If this Court finds that the trial court erred as a matter of law in not allowing Carlson to assert her affirmative defenses contesting the Association's right of possession, then the award of attorneys fees must also necessarily be reversed.

APPELLEE'S BRIEF ON CROSS APPEAL

I.

The Trial Court Correctly Refused to Enforce the Special Assessment for Elevator Improvement and the Arguments Raised by Spanish Court Two on Appeal Were Never Raised Below

The trial court did not enforce the 2011 special assessments for the elevator upgrade and fire alarm panel between January, 2011 and April, 2011 because there was no evidence presented by the Association during trial that it acted in accordance with its own procedures, as set forth in the Condominium Declarations, and there was no proof of any vote taken of unit owners who were in attendance at the meeting on November 22, 2010 when the special assessment

for a total amount of $80,000 was made (R.185).

The arguments now made by Spanish Court Two on appeal urging this Court to reverse the trial court were never made below. "It is well-settled that issues not raised in the trial court are deemed waived and may not be raised for the first time on appeal [citations omitted]" *Haudrich et al. v. Howmedica, Inc.,* 169 Ill.2d 525, 622 N.E.2d 1248, 215 Ill.Dec. 108 (1996). The theory upon which a case is tried in the lower court cannot be changed on review, and . . . an issue not presented to or considered by the trial court cannot be raised for the first time on review" *Kravis v. Smith Marine, Inc.*, 60 Ill.2d 141, 147, 324 N.E.2d 417 (1975). The Illinois Supreme Court in *Daniels v. Anderson*, 162 Ill.2d 47, 204 Ill.Dec. 666, 642 N.E.2d 128 (1994) concluded that allowing the defendant to change his theory of defense on appeal would "not only weaken the adversarial process in our system of appellate jurisdiction," but would likely prejudice the plaintiff, since he may have been able to present evidence to discredit the theory had it been raised in the evidence presentation stage, that is to say, in the trial court." *Daniels, supra,* 162 Ill.2d at 59.

All the arguments raised on appeal by Spanish Court Two were not raised before the trial court below and are therefore waived.

Notwithstanding the waiver, the arguments raised on appeal have no merit. First, there was no proof below that the special assessment was "mandated by law." Merely because the minutes of the November 2, 2010 board meeting

indicate that the special assessment was to upgrade the elevators (nothing about code) and fire alarm to code" is not proof that Spanish Court Two was mandated by law to pass the special assessment.

Secondly, reliance on Section 18.4(a) of the Illinois Condominium Act relating to expenditures for repair, replacement or restoration of existing portions of common elements is not supported by the evidence. There is absolutely no evidence in the record that the special assessment was for repair, replacement or restoration.

Thirdly, Spanish Court Two treated the special assessment as a special assessment, and not as part of the routine annual budget. Spanish Court Two cannot have it both ways. In this case, the special assessment was treated as a special assessment, not as part of the routine annual budget.

Lastly, Spanish Court Two has recently changed its Condominium Declarations and passed a special assessment for the elevator upgrades and fire alarm panel for a second time. This issue is now moot.

II.

Spanish Court Two Is Not Entitled to Attorneys Fees on Appeal

Ms. Carlson, and her attorney, have expended a significant amount of resources, expenses, and time, including the posting of a bond in order to resist heavy handed conduct, and hopefully, to clarify Illinois law in an area that leaves condominium owners with fewer and fewer rights.

The litigation has been prolonged because Spanish Court Two would not proceed to trial with the affirmative defenses at issue. Those affirmative defenses would have opened the door to evidence that would have demonstrated wrongful conduct on the part of certain board members, specifically directed to Lisa Carlson, that constitute a material breach of the contract provisions contained in the Condominium Declarations.

Like the few cases that have been decided by the Illinois Appellate Court involving a breach of fiduciary duty on the part of board members of condominium associations, this case is of note in the fabric of Illinois law. The relationship between condominium associations, and their boards, with unit owners, is essentially contractual in nature. If a condominium board engages in conduct that constitutes a material breach of its contractual obligation, like refusing to repair a common element, that has led, over time, to substantial damage of an owner's unit, that conduct, until remedied, should estope the association from pursuing its contractual rights against the owner of the damaged unit.

CONCLUSION

For the foregoing reasons, Lisa Carlson, the defendant-appellant/cross-appellee, respectfully requests that this Court reverse the money judgments and possession orders of January 31, 2011 and April 21, 2011, including the order of attorneys fees and costs entered in favor of Spanish Court Two Condominium

Association, remand so that Spanish Court Two's complaint may be tried with Lisa Carlson's Affirmative Defenses and Counterclaim in the same proceedings, and any other relief that this Court deems just.

Respectfully submitted,

DATED: January 6, 2012

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CERTIFICATE OF COMPLIANCE

I, Norman J. Lerum, certify that this Reply Brief conforms to the requirements of Rules 341(a) and (b). The length of this Reply Brief excluding the pages containing the Rule 341(d) Cover, the Rule 341(h)(1) Statement of Points and Authorities, the Rule 341(c) Certificate of Compliance, the Certificate of Service, and those matters to be appended to the brief under Rule 342(a) is 12 pages.

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Norman J. Lerum, Esq.