



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO Box 800
TRENTON, NJ 08625-0800
(609) 292-6420

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

July 23, 2018

Jonathan L. Swichar, Esq.
Duane Morris LLP
30 South 17th Street
Philadelphia, PA 19103-4196

Via Electronic Mail
Debra A. Allen, DAG

Re: Arie Ehieli v. Bureau of Homeowner Protection
OAL Docket No. CAF 18338-16

Dear Parties:

Enclosed please find a copy of the Final Agency Decision in the matter referenced above. Should you wish to appeal from this Decision, you have the right to take an appeal with the Appellate Division of the Superior Court [Rules Governing the Courts of New Jersey, 2:2-3(a)(2)]. You must do so, however, within 45 days from the date of service of this Decision.

Sincerely,

Donald Palombi
Chief Regulatory Officer



**STATE OF NEW JERSET
DEPARTMENT OF COMMUNITY AFFAIRS**

FINAL DECISION

OAL DKT. NO. CAF 18338-16
AGENCY DKT. NO. BHP #712-09

ARIE EHIELI,
Petitioner,

v.

**BUREAU OF HOMEOWNER PROTECTION,
NEW HOME WARRANTY PROGRAM,**
Respondent.

I have reviewed the Initial Decision issued in this matter, dated April 23, 2018. For the reasons set forth at length below, I have determined to accept in part and modify in part the Initial Decision. The Administrative Law Judge's (ALJ's) findings of fact are adopted except as indicated herein. The facts in this Final Decision are derived from the Initial Decision unless otherwise indicated with a citation to the record.

Facts and Procedural History

The facts of this case are, for the most part, not in dispute. Rather, the critical issue is whether the windows and doors in Petitioner's condominium unit, and the components thereof, are part of the "Residential Unit" or the "Common Elements," as defined by the condominium's master deed. Petitioner, Arie Ehieli, purchased a condominium unit, Unit 981 (the "Unit"), at Riva Pointe in Weehawken, New Jersey in January 2007. Riva Pointe Development, LLC ("RPD") is the builder of the condominium development and the warrantor of the Unit under the New Home Warranty Program ("NHWP"). On February 7, 2008, Ehieli notified RPD that water was penetrating various locations in the Unit. Ehieli submitted a formal Notice of Claim and Demand to Respondent, Bureau of Homeowner Protection ("the Bureau") on March 4, 2008. A hearing was held at the Unit on November 25, 2008. The Claims Analyst from the Bureau inspected the Unit visually and did not observe any water infiltration, leaks, or wetness. The Claims Analyst created a punch list reflecting Ehieli's concern over the water infiltration and listed twenty-three other defects in the Unit. On December 26, 2008, the Bureau issued a determination letter concluding that defects existed in the Unit that gave rise to water infiltration and damage and ordered RPD to repair the defects.

On July 30, 2009, having been notified by RPD that the noticed defects were repaired, Two Claims Analysts from the Bureau reinspected the Unit. Based on the visual inspection and RPD's representation that the defects were cured, the Bureau determined that the defects identified in the December 2008 letter determination were remediated. Nevertheless, the Bureau subsequently ordered that the repairs should be monitored for an additional sixty days, or through the first significant rainfall, whichever came first.

Ehieli represented he continued to observe water infiltration into the Unit subsequent to the July 30, 2009 inspection. In response, the Bureau conducted another inspection of the Unit on October 9, 2009. After a thorough inspection of the Unit, no signs of new water damage, such as water stains, leaks, residue, or paint bubbling were observed. The Bureau determined RPD satisfied its repair obligations. On November 9, 2009, the Bureau issued a letter informing Ehieli that his claim was closed because he could not substantiate that the defect covered by the NHWP still existed. Ehieli appealed the decision to close his claim. The Department transmitted the matter to the Office of Administrative Law ("OAL") for an administrative hearing. On April 23, 2010, the OAL issued an Initial Decision dismissing Ehieli's warranty claim because Ehieli failed to establish a prima facie case substantiating the existence of a defect. The Commissioner of the Department of Community Affairs adopted the Initial Decision as its Final Agency Decision on May 17, 2010. Ehieli appealed the Commissioner's decision to the Superior Court of New Jersey, Appellate Division on June 11, 2010.

During the appeal, the Bureau moved to remand the case back to the agency to consider an expert report issued on May 5, 2010 by the Falcon Group (hereinafter the "Falcon Report"), which Ehieli presented after the close of the administrative record. The Falcon Report concluded there were still water infiltration issues at the Unit, and noted that water infiltration was visible after significant rain events in March 2010. The Appellate Division granted the Bureau's motion on December 16, 2010 and the matter was remanded to the agency. The Bureau reviewed the report and retransmitted the case to the OAL on January 31, 2011.

On October 15, 2012, Ehieli filed a separate lawsuit against the condominium association, Riva Pointe Condominium Association ("RPCA") and another unit owner in the Superior Court of New Jersey, Chancery Division in Hudson County alleging negligent maintenance of the common elements at Riva Pointe. RPCA filed a third-party complaint against RPD and other entities seeking indemnification, and the matters were consolidated in the Law Division. The litigation between RPCA and RPD concluded with a confidential settlement agreement. Ehieli was not a party to this agreement, nor did he file a complaint against RPD throughout the litigation. Correspondence with RPCA's counsel, admitted as evidence in this administrative proceeding, revealed that none of the funds received were earmarked to remedy unit-specific defects, nor did the settlement agreement "ha[ve] any provisions as to how the money was to be spent." (Initial Decision at 8).

On November 12, 2015, the OAL ordered that a reinspection of the Unit occur no later than December 12, 2015. Another Bureau Claims Analyst conducted that inspection, accompanied by Jeffery Major, Ehieli's retained expert in water-infiltration identification and remediation. During the inspection, a wind-driven rain event took place, during which the wind speed and direction were such that rain entered the Unit from the outside. During this event, both the Claims Analyst

and Major observed water damage in the Unit. Thermal imaging cameras and pinless moisture meters confirmed the existence of moisture behind the walls, ceiling, and trim work.

On January 14, 2016, the Bureau determined that Ehieli's claim should be denied because it was beyond the two-year statute of limitations pursuant to N.J.S.A. 46:3B-3 and because his claim was barred by his election of remedies pursuant to N.J.S.A. 46:3B-9.

In a June 8, 2016 letter, the Bureau, through counsel, requested a return of the case pursuant to N.J.A.C. 1:1-3.3 to permit it to assess the new evidence of water infiltration damage in the Unit and issue a revised administrative decision accounting for this information. To this end, the Bureau agreed to retain the services of an engineer to inspect the Unit and to review the Falcon Report, and an expert report prepared for RPCA by Berman Wright (the "Berman Wright Report"). These reports were intended to inform the Bureau's understanding of the source and extent of the unit-specific and common-element-related damage and to aid in the review of the matter in any subsequent administrative appeal. While the matter was under review, Ehieli's expert, Major, prepared a report and concluded the covered water defect specified in the December 2008 remediation was still present in the Unit (the "Major Declaration"). Additionally, Donald P. Schlachter, the Bureau's retained engineer, issued a report that concluded the substantiated Unit defects were not covered by the NHWP (the "Schlachter Report").

On October 24, 2016, the Bureau issued a determination letter denying Ehieli's warranty claim. Upon Ehieli's request for an administrative hearing to challenge this denial of claim, the case was transmitted to the OAL. On November 14, 2017, Ehieli moved for summary decision in the OAL. The Bureau opposed Ehieli's motion and cross-moved for summary decision on December 14, 2017.

Four expert reports were submitted in support of the cross motions for summary decision. The Falcon Report concluded there were a "significant number of ongoing leaks" because the slider doors and windows were not "installed and integrated properly," the Exterior Insulation Finishing System (EIFS) required specific remediation, and the lack of pan flashing and proper balcony coating allowed water to roll back into the Unit at the windows and sliding doors. The Falcon Report recommended installation of the pan flashings below the window basins, removal and replacement of the balcony coating, and EIFS above the balcony, and cleaning and resealing of the railing penetrations.

The Berman Wright Report identified issues with the EIFS system "that currently are and will continue to cause water intrusion and failure." It recommended that the EIFS be removed and replaced. (Initial Decision at 12). The Berman Wright Report also identified issues with the installation of the windows and doors. Specifically, the report claimed water accumulation behind the cladding resulted from the builder's failure to install pan flashing under the window. The Berman Wright Report recommended that the windows and doors be removed and reinstalled with proper flashing, pans, and sealant simultaneous with the installation of a new EIFS system to remedy these defects.

The Major Declaration identified issues with the pan flashing and the EIFS, and noted that the "absence of pan flashing with drip edges at window tops, as well as improper EIFS/flashing details

at sliding doors and concrete balconies, permits water to enter behind the waterproof surface.” (Initial Decision at 14). The Major Declaration recommended that all windows and doors be removed and that flashing details be installed before replacing the windows and doors. It also recommended that all failed wall components be opened and repaired, and that the exterior EIFS be refinished. (Initial Decision at 14).

The Schlachter Report confirmed the existence of the water infiltration and water damage outlined in the Berman Wright Report and the Falcon Report. The Schlachter Report, however, attributed the water infiltration to improper sealing of the exterior finish. The Schlachter Report recommended the EIFS be removed and replaced “as part of the installation of proper flashing, sealing, and draining of the EIFS around the window and door units.” (Initial Decision at 14). The Schlachter Report also concluded “[p]roper sealing of the windows and doors is likely to also include the removal of the door and window assemblies.” (Initial Decision at 14)

Analysis of the Initial Decision

On April 23, 2018 the ALJ granted Ehieli’s motion for summary decision and simultaneously denied the Bureau’s motion. The ALJ reached three pertinent conclusions in this Initial Decision. First, the ALJ concluded that the windows and doors “are part of the Unit and are not part of the common elements.” (Initial Decision at 19). Second, the ALJ concluded the “flashing and pans are part of the windows and doors, which are part of the individual unit, not the common elements.”¹ Third, the ALJ concluded that Ehieli has standing to bring his claim. I accept these conclusions in part, but modify the Initial Decision to clarify that the adopted conclusion as to the designation of certain components as common or unit elements is limited to the facts of this matter which demand a fact-sensitive deviation from the Department’s ordinary view of these components.

I. Based on the Proofs Submitted and the Master Deed at Riva Pointe, the Windows and Doors are Part of Ehieli’s Residential Unit.

As a general rule, the physical dimensions of a residential unit depends on what has been included in the common elements. See Siller v. Hartz Mountain Assocs., 93 N.J. 370, 382 (1983). “Whether an item is a common element ‘may be ascertained by examination of the statutory definition and the master deed.’” Belmont Condo. Ass’n, Inc. v. Geibel, 432 N.J. Super. 52, 84 (App. Div.) (quoting Siller, 93 N.J. at 382), certif. denied, 216 N.J. 366 (2013). “[T]he condominium unit is generally seen by owners as the ‘inside’ of their structure while the shell and ‘outside’ of the building is a common element.” Id. at 85 (quoting Soc’y Hill Condo. Ass’n, Inc. v. Soc’y Hill Assocs., 347 N.J. Super. 163, 172 (App. Div. 2002)).

The “common elements” are defined by both the New Jersey Condominium Act, N.J.S.A. 46:8B-1 to -7 (NJCA) and, in this case, Ehieli’s master deed. See N.J.S.A. 46:8B-3(d). The statute reads, in relevant part, that “common elements” means “as to any improvement, the foundations, structural and bearing parts, supports, main walls, roofs, basements, halls, corridors, lobbies, stairways, elevators, entrances, exits and other means of access, excluding any specifically

¹ Notably, the Initial Decision concluded that the EIFS is part of the common element. (Initial Decision at 26).

reserved or limited to a particular unit or group of units.” N.J.S.A. 46:8B-3(d)(ii). The NJCA also includes in the definition “such other elements and facilities as are designated in the master deed as common elements.” N.J.S.A. 46:8B-3(d)(viii). Thus, the NJCA states what must be included in the common elements, but carves out a method for condominium associations to further specify what is part of the common element in the master deed.

Here, the master deed defines a “Residential Unit” to include “all built in equipment, machinery, fixtures, doors, windows, interior walls and partitions[.]” (Initial Decision at 19). Furthermore, the master deed specifically states in the “Restrictions, Rules, and Regulations” section that “[e]ach Unit Owner shall be responsible for the maintenance, repair and replacement of all windows of his Unit.” (Joint Exhibit 1 at 28, ¶ 34(j)). The master deed, in conjunction with the language in the NJCA, lead to the conclusion that the windows and doors are part of the Residential Unit at RPCA, and thus not part of the common elements there.

The Initial Decision cites to Belmont Condo. Ass’n, 432 N.J. Super. 52, in support of the conclusion that the windows and doors are part of the Residential Unit and not of the Common Elements. However, I find this case distinguishable, in that the language of the master deed differs from the language of the master deed here. In Belmont, the master deed “simply makes no specific reference to the unit windows,” Id. at 87, contrary to the master deed here which, as stated above, includes windows and doors in the definition of a Residential Unit. The court in Belmont went on to reason that “the failure of the master deed to specifically list the unit windows as part of the ‘common elements’ adds substantial support to the conclusion that they are part of the individual units.” Id. at 87-88. To the contrary, the master deed at Riva Pointe makes clear that the windows and doors are part of the Residential Unit. To extend this fact-specific and deed dependent analysis to govern a property with different deed language would be inconsistent with the NJCA and the ALJ’s factual findings, to which deference is due.

II. Based on the Proofs Submitted and the Master Deed at Riva Pointe, the Flashing and Pans are Part of the Windows and Doors of Ehieli’s Residential Unit.

The Initial Decision concludes the flashing and pans are part of the windows and doors. Regarding this issue, Ehieli argued the flashing and pans were part of the windows and doors, citing to “industry standards, the agreed-upon repairs, and relevant caselaw” in support of his argument.² (Initial Decision at 20). The Bureau argued below that the flashing and pans were part of the EIFS, and thus part of the common elements, relying upon its expert’s report and two articles. (Initial Decision at 20). The ALJ, after weighing the evidence, concluded that the flashing and pans were part of the windows and doors, and thus part of the Residential Unit.

² Ehieli also argued that according to N.J.A.C. 5:25-3.5(f)(5)(i)(1), flashing is a performance standard, and any leak thereof is a deficiency for the purpose of the NHWP. While I do not disagree with Ehieli’s argument that here the leaks in Ehieli’s windows and doors are covered deficiencies under the NHWP, his proffered application of the law is incorrect, and does not inform the Department’s determination. N.J.A.C. 5:25-3(f)(5)(i)(1) relates to flashing which is installed on a roof, as evidenced by the fact that the regulations specifically lists the flashing defect under the subsection dedicated to roofing. Compare N.J.A.C. 5:25-3.5(f)(5) with N.J.A.C. 5:25-3.5(g).

I adopt this conclusion in the Initial Decision under the facts of this case, but clarify that this is not a general finding, but, rather a fact sensitive determination based upon the record in this case.

Neither the NJCA nor the statutes and regulations governing the NHWP make mention of flashing or weatherproofing as part of the common elements or the residential unit. The master deed at Riva Pointe also fails to consider whether flashing is part of the common element or the residential unit. Thus, this determination is a fact-sensitive inquiry and is ultimately governed by the proofs submitted in support of the motions for summary decision. Here, the record supports the conclusion that the flashing and pans are part of the window and doors, and not part of the EIFS.

Here, the record reflects that all of the expert reports recommend the windows and doors be removed in order to properly install the necessary flashing. The ALJ made explicit fact finding determinations regarding the expert reports and ultimately credited this mutually agreed-upon recommendation. Additionally, the standards cited by Ehieli, which the ALJ adopted, suggest that the flashing and pans are not part of the EIFS at all, and that they must be “integrated with . . . the window assembly.” (Initial Decision at 21). Furthermore, the ALJ concluded the Bureau’s articles provided little to no support for the conclusion that the flashing and pans were part of the EIFS. The ALJ specifically noted the Bureau’s second article shows the flashing must be placed before the window unit is installed, implying that the window must be removed to install the flashing. These proofs in conjunction with the language of Riva Pointe’s master deed support the ALJ’s conclusion that the Unit’s flashing and pans are not part of the EIFS or common elements.³ The Department defers to the ALJ’s factfinding in this regard as it accepts this application of the governing law.

III. Ehieli has Standing to Bring this Claim

The Department accepts the ALJ’s conclusion that Ehieli’s factual circumstances support the finding that he has standing. However, the Department declines to adopt the initial decision dictum suggesting Ehieli would have standing if the claims made were of the common elements. This superfluous language has no bearing on the agency’s decision here.

For all of the reasons set forth in detail above, I thus accept in part and modify in part the Initial Decision.

Date: 7/23/18



SHEILA Y. OLIVER
Lt. Governor
Commissioner

³ The Initial Decision once again cites to Belmont, 423 N.J. Super. 52, in support of its decision, stating the court in Belmont “implies that flashing is part of individual units and not common elements” because the Appellate Division “den[ied] the condo association standing, and establish[ed] that only the unit owners may bring claims for flashing.” (Initial Decision at 24). However, as stated above, this decision is distinguishable from the matter at hand, given that the master deed language is different from the master deed at Riva Pointe.