

How They Won It

Idle Boast Leads Levine Kellogg To Win For Bankrupt Condo

By **Nathan Hale**

Law360, Miami (August 7, 2017, 3:30 PM EDT) -- The comment came as a casual brag from an opposing witness during a break in a deposition, but it sparked a creative solution for attorneys from Levine Kellogg Lehman Schneider & Grossman LLP who were representing a bankrupt Miami condominium project — ultimately enabling them to provide money for unsecured creditors where none appeared likely.

Attorneys Tom Lehman and Jason Kellogg faced daunting prospects for collecting on a \$3.2 million judgment they had won for the Artecity condominium's debtors because the project's ex-contractor, Soares da Costa CS LLC, had gone out of business during the litigation, and mighty obstacles stood in the way of pursuing its Portuguese parent.

But Lehman recalled the defunct contractor's chief executive had predicted to him that his company would prevail against Artecity's breach of construction contract claims, boasting that the company was closing in on a win in a similar case with another Miami Beach condo.

The two attorneys searched public records and found that Soares da Costa had just won a \$2.4 million judgment against the developer of the Continuum Tower. The attorneys moved quickly to force a sheriff's sale of the contractor's rights in that lawsuit, which the Artecity entities bought at auction. They then stepped into Soares da Costa's shoes, worked out an agreement to work with their former opponent's counsel, and ultimately negotiated a multimillion-dollar settlement agreement that landed Artecity \$1.81 million.

In June, the bankruptcy court approved final distributions of the funds to Artecity's unsecured creditors, including investors, construction-related companies and other service providers. While the payout fell short of the \$21 million they collectively sought, it fulfilled Artecity's remaining obligations under its liquidation plan. On July 25, the bankruptcy court issued a final decree closing the case, which Levine Kellogg had started work on just over six years ago.

“To get anything from a defunct company is pretty good,” Lehman told Law360 in a recent interview. “I can't say the unsecured creditors had a great deal of faith that we'd recover anything.”

Construction had begun in 2005 on Artecity, a planned complex of five buildings on South Beach that drew heavily from Italian investors and buyers. But the project ran into trouble, with only three

buildings completed when the economic downturn tripped up its primary lender, according to case records.

That sent the property into Chapter 11 bankruptcy in 2010, and a year later the bankruptcy court confirmed a liquidation plan, which resulted in the sale of the complex to the debtors' secured lender.

After the property sale, the reorganized debtors' only remaining assets were their retained causes of action. Levine Kellogg determined that the only case that might produce a meaningful recovery was a state court breach of contract suit two of the Artecity entities had filed in 2008 against Soares da Costa, which had gone out of business in 2009, and its Portuguese affiliate and guarantor Soares da Costa Construção SGPS SA.

Levine Kellogg took the reins of the Soares da Costa litigation in August 2011 and undertook an extensive review, going through nearly 500,000 pages of client documents and interviewing the construction professionals who had worked on the project.

Levine Kellogg amended the complaint in 2012, but discovery stretched on for another two years. It was at a deposition during this period that Soares da Costa's CEO made the bragging comment that would send the proceedings down their unusual path.

“He very confidently told me during a break, in an effort to discourage me — he said, ‘Look, what you're doing is exactly what the Continuum Tower did. They sued us, and we countersued. We are going to win,’” Lehman recalled. “It was sort of like, ‘Let this be a warning to you that we have great lawyers and we have a great company.’ So I kept that in mind.”

The executive's confidence turned out to be misplaced, with Artecity winning the case after an eight-day trial in 2014. A \$3.2 million judgment was entered against Soares da Costa and its parent in January 2015.

But with Soares da Costa out of business in Florida, Levine Kellogg soon learned that numerous obstacles stood in the way of collecting the judgment from the contractor's Portuguese parent.

“Portugal is not a Hague Convention country, so it is very difficult to get a judgment in America recognized over there,” Lehman said, calling the situation “very frustrating.”

Portuguese courts will not recognize a U.S. judgment until all appeals are completed, and even when a final judgment has been made, the Portuguese judgment debtor can attack the U.S. judgment and relitigate the merits of its defenses to the original claim, Levine Kellogg learned through Portuguese counsel the firm consulted.

Complicating matters, Soares da Costa's parent was a holding company with assets tied up in stock of other companies, which would make it harder to collect under Portuguese law.

Brainstorming other means of collecting, Lehman recalled the executive's comment about the company's lawsuit involving the Continuum Tower. The firm found through a public records search that Soares da Costa had won a \$2.4 million judgment against a solvent developer, South Beach Ocean Parcel II Ltd., in Miami-Dade Circuit Court. The company also had a \$2.8 million claim pending for attorneys' fees and costs.

Artecity successfully moved in its litigation with Soares da Costa to commence a supplementary proceeding and, after reaching a determination that the contractor had no other executable property, obtained a court order directing the sheriff to hold execution sales of Soares da Costa's judgment and fee claim against the Continuum developer.

"This motion presents the unusual (and entirely legal) circumstance where a judgment creditor seeks to satisfy its judgment not through the execution and levy of the judgment debtor's land, goods or stock — but through the execution and levy of a separate final judgment that the judgment debtor holds against a third party in a separate lawsuit," Artecity explained in its motion.

Artecity also asked the court to let it pursue a declaration that any proceeds of a \$3.8 million surety bond SBOP's insurer posted to stay enforcement of the judgment should be applied to satisfying its judgment against Soares da Costa. Lehman described that bond as "legal gold."

Artecity placed a successful bid of \$300 at the sheriff's sale in October 2015 — "Who wants to buy a lawsuit? You've got to prosecute," Lehman said — and replaced Soares da Costa as the real party plaintiffs in the litigation against SBOP.

The strategy did not break new ground legally, but there were many hoops Artecity had to go through, including convincing judges in two cases and a sheriff not used to selling lawsuits, Lehman said.

"The sheriff asked, 'Can I do that?'" Lehman recalled, adding, "It's a lawsuit. It's something you can't touch or feel, but it's property."

And the path was still not completely cleared, as Artecity and Levine Kellogg's tactics prompted another controversy. Law firm Peckar & Abramson PC asserted to the courts that it held a \$1.6 million charging lien against Soares da Costa for its representation of the company in the Continuum case and that its position was superior to Artecity's claim.

Peckar & Abramson and Soares da Costa moved in the Artecity-Soares da Costa case to dissolve a writ of garnishment Artecity had obtained against SBOP and its insurer to collect any payments on Soares da Costa's judgment. In response, Artecity said the "true purpose" of the motion was to put the Artecity case's judge on notice of the charging lien, which it said was an issue for the judge in the Continuum case to decide. Artecity also challenged the amount claimed by the firm, saying it was unsubstantiated and included fees and costs incurred in other cases.

Peckar & Abramson eventually obtained a ruling in the Continuum case that it had a valid attorney's charging lien for \$1.6 million, which state law gives top priority. But Artecity was able to work out an intercreditor settlement agreement with the law firm and Soares da Costa under which Peckar & Abramson and Levine Kellogg became co-counsel for Artecity in the Continuum litigation; Soares da Costa agreed to drop its appeal of the judgment Artecity had won against it; and the parties agreed on how to divide any recoveries from the Continuum judgment and fee claim, according to Kellogg Levine and court records.

Lehman noted that Peckar & Abramson had worked on the Continuum case for five to seven years at that point: "We were occupiers. We had come in and occupied their case." The firm's initial resistance gave way, however, to a focus on the shared goal of collecting the judgment and fees claim, he added.

Counsel from Peckar & Abramson did not immediately respond to a request for comment on the matter,

but Lehman offered words of praise for the firm. He described it as “relentless and knowledgeable” and said working with the firm was “like driving a Ferrari.”

Working together, the firms presented the claim for fees and costs at a two-day hearing last August and obtained a \$2.85 million judgment on top of the \$2.4 million already won by Soares da Costa.

That fee judgment helped bring SBOP to the negotiating table, and a final settlement agreement was worked out between all of the parties for a payment of \$3.8 million made in two installments in October 2016 and this March, according to Kellogg Levine.

Artecity, which received \$1.81 million under the settlement, then returned to the bankruptcy court for approval to distribute the recovered funds.

“This is not easy,” Lehman said after recounting the winding journey the litigation took. “I lived it for six years.”

The cases are Artecity Park LLC et al. v. Soares Da Costa CS LLC et al., case number 2008-17586-CA-40; South Beach Ocean Parcel II Ltd. v. Soares Da Costa CS LLC, case number 2008-14398-CA-40; and Soares Da Costa CS LLC, case number 2008-11510-CA-40, in the Circuit Court for the Eleventh Judicial Circuit of Florida; and In re: Artecity Management LLC et al., case number 10-31406, in the U.S. Bankruptcy Court for the Southern District of Florida.

--Editing by Kat Laskowski and Mark Lebetkin.