

STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION
DIVISION OF FLORIDA CONDOMINIUMS, TIMESHARES AND MOBILE HOMES

IN RE: PETITION FOR ARBITRATION

**Omega Villas Condominium
Association, Inc.,**

Petitioner,
v. **Case No. 2008-05-8941**

Unit Owners Voting For Recall,

Respondent.

SUMMARY FINAL ORDER

Issue Presented

The issue presented in this case is whether the written agreement used in a recall attempt substantially complies with Rule 61B-23.0028, Florida Administrative Code.

Procedural History

On October 23, 2008, Omega Villas Condominium Association, Inc., (the Association) filed a petition for recall arbitration. The unit owners voting in favor of the recall are the Respondent in this matter. On October 30, 2008, the arbitrator entered an Order Allowing Answer. On November 14, 2008, the unit owner representative filed a Motion to Certify the Recall Petition, with exhibits including the original documents, copies of which were served on the board as a "Petition to Recall". The Motion to Certify does answer those numbered paragraphs of the Petition for Recall Arbitration that list the reasons why the board voted not to certify the recall.

Statement of Facts

1. On October 9, 2008, the Association was served with a fourteen pages of documents represented as a recall by written agreement.

2. The total number of units in the condominium is 128. The governing documents provide for a 9 member board of directors, but one seat is currently vacant.

3. Each page of the written agreement consists of a title box and written explanation, or preamble, on the top half of a landscape or horizontal format, with a lined grid of rows and columns on the bottom half. Each row has blanks for unit owner information (name, address, signature, date) and five recall/retain boxes. Eight rows are provided on each page. As submitted some pages contain one signature; others contain seven or eight signatures. Each row provides boxes to recall or retain under the separate columns for Patty Sabates, Blair Lipides, Paula Gigliotti, Norma Aker and All Florida Management Services, Inc.

4. If all the recall entries of the agreement are accepted the totals as to each director sought to be recalled are: Sabates – 69; Lipides – 66; Gigliotti – 70; Aker – 67.

5. The title box on each page contains the words, “Petition to Recall Certain Board Members and Management Team from Serving on the Board at Omega Condominium Association, Inc.”.

6. The written text on the top of each page states:

Members/Unit Owners here at Omega Villas Condominium Association are upset at the current condition of the association. We are tired of the Mis-Management of Association Monies. We disagree with the current Management Team at Omega Villas

as they have not corrected the disrepair of our association to date. The Management Team/Board has added further damages to our community by hiring contractors that were not properly licensed, did not pull proper permits, nor repair the property correctly which left us with additional damages. Therefore we are requesting that the below named Board Members and Management Team be removed from office or the Board. This written agreement was written to comply with the Florida Administrative Code 61B-23.0028 & Chapter 718 of Florida Statutes.

Shawn Martin will be the authorized representative who will open the written agreements, tally the votes, serve copies on the board, and in the event the Board does not certify the recall by written agreement and files a petition for arbitration, receive pleadings (e.g., copies of the petition for recall; motions), notices, or other paper on behalf of the persons executing the written agreement.

We, the undersigned Omega Villas Unit Owners call upon the Board of Omega Villas Condominium Association for the immediate removal/termination of the following persons from serving on the Board:

Patty Sabates, President of Omega Villas; Blair Lipides, Board Member; Paula Gigliotti, Secretary; Ken & Norma Aker, Past President & Present board Member; and All Florida Management Services, Inc., Omega's Management Firm.

* Denotes that the Unit Owner is the Authorized in the manner required by the condominium documents to cast the vote for that unit.

Each check box must be checked in order to "**recall**", meaning to remove the Board Member from the Board or "**retain**" meaning to keep the Board Member on the Board.

(sic)

7. At a meeting on October 16, 2008, the board voted to not certify the recall, specifically rejecting the votes from 26 units, by row and page. The board also based the rejection on the fact the petition lacked a line for the unit owner to affirm authority to sign on behalf of the unit; the fact that the petition text requests the recall of Ken Aker, who is not a board member; and the fact that the text and the grid attempt to recall All Florida Management Services, Inc., which is not a board member.

Conclusions of Law

The arbitrator has jurisdiction of the parties and the subject matter of this dispute pursuant to Sections 718.112(2)(j) and 718.1255, Florida Statutes.

A Summary Final Order is appropriate in this case pursuant to Rule 61B-50.119, Florida Rules of Administrative Procedure, because no disputed issues of material fact exist.

After review of the original petitions, the minutes, pleadings and all exhibits filed by the parties, there is no dispute that the votes for the following units were properly rejected:

- a) 1721 NW 73 Ave., because it is admitted that the petition was signed by a relative who is not a unit owner.
- b) 1740 NW 72 Ave., because the signature on the petition is clearly that of a relative and not a named unit owner, despite the same last name. The person who signed the petition submitted an additional writing verifying the signature.
- c) 1949 NW 72 Ave., because the signature on the petition is clearly that of a relative and not a named unit owner, despite the same last name. The person who signed the petition submitted an additional writing verifying the signature.
- d) 1721 NW 72 Ave., because, despite the fact the person who signed is the spouse of the record owner, no title document includes her name. If a married couple chooses to hold title in only one name, the arbitrator is not free to ignore the choice and recognize the unnamed spouse as a unit owner.
- e) 1701 NW 71 Ave., or 1700 NW 71 Ave., Respondent alleges there was a mistake in writing the address. In any event, there is no evidence of title

ownership for the person who signed the petition.

f) 1752 NW 72 Ave., because there is no evidence of title ownership for the person who signed the petition.

g) 1736 NW 71 Ave., because there is no evidence of title ownership for the person who signed the petition, who is identified as a renter in the telephone directory filed by Respondent.

After deducting the votes for the seven units listed above, the recall by written agreement cannot succeed because it did not provide the required vote of 65 unit owners to recall any of the directors. It would serve no purpose to keep this arbitration open to decide disputed facts alleged as to the rejection of votes for other units.

Although not necessary to the decision of this case, Petitioner's objections to the form and preamble of the petition will be addressed to provide guidance for any future recall effort. The problem of listing All Florida Management Services, Inc., within the grid is that it misrepresents that that entity is a board member and indirectly ties the fate of board members to dissatisfaction with the management company. The unit owner signing the petition could be misled into believing that the management company would necessarily be terminated by operation of the recall, when that is not provided for in chapter 718. Neither the current nor any subsequent board would be bound to terminate the management company.

The inclusion of the name of Ken Aker in the text of the petition further misleads, because, under chapter 718, Mr. Aker could immediately be appointed to serve on the board, if the recall were otherwise successful, while a recalled board

member could not. Including his name in the text would very likely lead a unit owner to believe that he would be excluded.

The text additionally seems to present a petition to the board to terminate All Florida Management, which is contrary to the operation and intent of a recall. While it may be reasonable for unit owners to petition a board to terminate an association manager, that could not be a recall. A recall is an action by unit owners which governs board action and is not dependent on board approval.

The statutory requirement for a meeting to certify or not certify the recall provides a safeguard to ensure a recall competently conveys the votes of a majority of the unit owners, but if it does, the board has no discretion to act or not act. By way of comparison, termination of an association manager falls within the power and authority of a board, but certification of a valid recall is a purely ministerial acknowledgement of the vote of the members of the association.

The arbitrator must look through the confusion and misrepresentations to decide whether the substance of the written agreement expresses the will of a majority of unit owners to recall a director. Rule 61B-50.105(5)(h), Florida Administrative Code, provides, in part, that the fact a unit owner may have received misinformation is not a valid basis for rejecting a recall agreement and shall not be considered by the arbitrator. It doesn't matter whether the misinformation is communicated in writing or by spoken words. Although the confusion and clutter of the top half of the petitions submitted in this case should be avoided, the grid does provide for proper and sufficient choices so that votes by actual unit owners would be given full effect.

Based on the foregoing, it is ORDERED that the decision of the board to not certify the recall is Affirmed.

Done and Ordered this 24th day of November, 2008, at Tallahassee, Leon County, Florida.

Bruce A. Campbell, Arbitrator
Dept. of Bus. & Prof. Reg.
Arbitration Section
1940 North Monroe Street
Tallahassee, Florida 32399-1029

Certificate of Service

I certify that a copy of the foregoing Summary Final Order was furnished by U.S. Mail on November 24, 2008 to the following:

Joel M. McTague, Esq.
Frank Weinberg
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Shawn Martin
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Bruce A. Campbell