

**STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION
DIVISION OF FLORIDA LAND SALES, CONDOMINIUMS, AND MOBILE HOMES**

IN RE: PETITION FOR ARBITRATION

**Lynne B. Reader and
Clinton Belch,**

Petitioners,

v.

Case No. 2006-00-4360

Fifth Horizons Condominium, Inc.,

Respondent.

FINAL ORDER

Procedural Matters

Pursuant to notice, the undersigned arbitrator of the Division of Florida Land Sales, Condominiums, and Mobile Homes convened a formal hearing in this case on September 20 and 25, 2006. During the hearing, the parties presented the testimony of witnesses, entered documents into evidence and cross-examined witnesses. This order is entered after consideration of the complete record in this matter.

The Association contends that the Petitioners' January 20, 2006, and March 11, 2005, requests for access to the association's records should not be considered due to insufficient pre-arbitration notice. By order dated September 19, 2006, the undersigned denied the Association's Motion to Dismiss Petition or in the Alternative to Amend Affirmative Defenses, which sought to dismiss the petition for lack of pre-arbitration notice or in the alternative leave to amend the petition to assert the affirmative defense of lack of pre-arbitration notice. In that order the undersigned noted the defense of failure to provide pre-arbitration notice is waived if not asserted by a motion to dismiss

made prior to the filing of the answer. Rule 61B-45.019, Fla. Admin. Code. The Association did not file such a motion to dismiss prior to filing its answer. Moreover, as to the March 11, 2005, records access dispute, the court case was sufficient pre-arbitration notice. See *Jarwood v. The Halcyon of Palm Beach Condo. Assoc., Inc.*, Arb. Case No. 2003-06-0885, Order Denying Motion (June 2003)(Arbitrator found that where the respondent association successfully moved to dismiss petitioner's circuit court counter-claim for failure to arbitrate the dispute, the counter-claim constituted adequate notice as required by section 718.1255, Florida Statutes). As such both the March 11, 2005 and January 20, 2006, requests for access to the Association's records will be considered in this proceeding. However, any requests to inspect the official records made subsequent to January 20, 2006, will not be considered separate requests, and will only be considered to the extent they are follow-up letters regarding the aforementioned requests.

Appearances

For the Petitioners:

Josefa M. Velis, Esq.
Velis & Associates, P.A.
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Coral Gables, Florida 33114

For the Association:

Stephane R. Dupont, Esq.
Law Offices of Mark Perlman, P.A.
1820 E. Hallandale Beach Blvd.
Hallandale, Florida 33009

Statement of the Issue

The issue presented in this case is whether the Association denied the Petitioners access to its official records, and if so, if such denial was willful entitling the Petitioners to statutory damages.

Findings of Fact

1. Fifth Horizons Condominium Inc. (the Association) is the legal entity responsible for the operation of the Fifth Horizons Condominium (the Condominium).
2. Lynne B. Reader and Clinton Belch (the Petitioners) are the record owners of unit number 302 I (the unit) located at the condominium.
3. In January 2005, Lynne B. Reader and her son, Clinton Belch, took ownership of the unit via a trustee's deed recorded the same month.
4. Richard H. Reader is Ms. Reader's husband.
5. On March 11, 2005, Mr. Reader sent Robert Harding, president of the Association, a follow-up letter regarding the prior request to inspect the Association's financial records made by letter dated March 4, 2005. Specifically, Mr. Reader requested access to the Association's financial records for the years 2003 and 2004 and the months of January and February 2005, and annual financial reports for the years 2003 and 2004.
6. By letter dated March 12, 2005, addressed to Mr. Reader, Mr. Harding acknowledged receipt of Mr. Reader's request and indicated that he would not permit Mr. Reader access to the records because he is not a unit owner. Mr. Harding also addressed Mr. Reader's claim that his wife owned the unit noting that the county property appraiser's records indicated that the unit was owned by Helen Border Kann.

Mr. Harding further indicated that he was under the impression that the estate of Helen Broder Kann was subject to probate proceedings and that no deed had been issued transferring ownership of the unit from the estate. Therefore, Mr. Harding requested that Mr. Reader provide proof of ownership and that he was authorized to represent the owner.

7. By letter dated March 29, 2005, the Association's attorney further requested that Mr. Reader provide proof of ownership of the unit.

8. In early April 6, 2005, the Petitioner's attorney provided the Association's attorney with a copy the Trust Deed confirming that the Petitioners owned the unit.

9. On May 14, 2005, the Association filed a lawsuit against the Petitioners in the Circuit Court of Broward County seeking the removal of a tenant.

10. On December 6, 2005, the Petitioners filed a counter claim in the court case seeking access to the Association's records based upon the above described letters.

11. By order dated January 17, 2006, the court directed that the counter claim regarding inspection of records be submitted to arbitration.

12. By letter dated January 20, 2006, addressed to the Association's attorney, Petitioner Reader, through her attorney, requested to inspect or copy all of the official records of the Association for the years 2003, 2004 and 2005. The letter was received by the Association on January 25, 2006.

13. By letter dated January 26, 2006, the Association informed the Petitioners that the Association would make its records immediately available for inspection.

14. By letter dated January 27, 2006, from the Petitioner's attorney, Ms. Reader again asserted her request for access to the records. The letter also designated Mr. Reader as Ms. Reader's representative to inspect the records.

15. On February 2, 2006, an appointment was made for inspection of the Association's records at Mr. Harding's residence. However, in the following days, disagreement arose as to who would be permitted to inspect the records. Petitioner Reader intended to have her attorney and her husband inspect the records together. However, the Association was of the view that only one representative was authorized by the law to inspect the records, and, therefore, it denied the request that both Mr. Reader and the attorney be permitted to inspect the records simultaneously. Since this dispute was not resolved, the record inspection did not occur.

16. Eventually, another inspection was scheduled for March 24, 2006, which Mr. Reader attended at the offices of the Association's management company. Mr. Harding delivered all the Association's records in his possession to the management company.

17. Mr. Reader spent approximately 45 minutes inspecting the records. Upon reviewing a financial report for the Association for June 1 to June 30, 2005, which he believed to be inaccurate, Mr. Reader ceased inspecting the records because he thought it would be useless.

18. Subsequently, Mrs. Reader and her attorney informed the Association in writing of documents that they claimed were not available at the inspection. The Association maintained that all records in its possession were produced; however, it attempted to reschedule the inspection for May 12, 2006. Due to a communication error, the

Petitioners were not informed of the appointment until the day the appointment and, due to the short notice, were not able to attend.

Conclusions of Law

1. Fifth Horizons Condominium (the condominium) is a condominium as defined by section 718.103, Florida Statutes.

2. The undersigned has jurisdiction over the parties and subject matter of this dispute, pursuant to section 718.1255, Florida Statutes.

3. Section 718.111(12)(b), Florida Statutes, provides that the records of the association shall be made available to a unit owner within 5 working days after receipt of written request by the board or its designee.

4. Section 718.111(12)(c), Florida Statutes, provides in pertinent part as follows:

The official records of the association are open to inspection by any association member or the authorized representative of such member at all reasonable times. The right to inspect the records includes the right to make or obtain copies, at the reasonable expense, if any, of the association member. The association may adopt reasonable rules regarding the frequency, time, location, notice, and manner of record inspections and copying. The failure of an association to provide the records within 10 working days after receipt of a written request shall create a rebuttable presumption that the association willfully failed to comply with this paragraph. A unit owner who is denied access to official records is entitled to the actual damages or minimum damages for the association's willful failure to comply with this paragraph. The minimum damages shall be \$50 per calendar day up to 10 days, the calculation to begin on the 11th working day after receipt of the written request.

5. The records to which the Petitioners sought access are official records of the Association to which it is required to permit a unit owner access in accordance with the statute. However, the statute clearly intends that the Association's official records are to be available for inspection only by a unit owner or the owner's representative.

Therefore, it is reasonable for an Association not to permit a non-unit owners access to its records until it is provided adequate proof that the person is the authorized representative of a unit owner.

6. In the instant matter it was reasonable for the Mr. Harding on behalf Association to initially deny Mr. Reader's March, 2005, request to inspect its official records until he provided proof that he was the authorized representative of an owner. This is especially so considering the contradictory information that was available to Mr. Harding such as property appraiser records and Association records that indicated that at the time the unit was not owned by Ms. Reader.

7. In *Young-Ling v. Ebb Tide Condo. Ass'n, Inc.*, Arb. Case No. 93-0212, Summary Final Order (February 16, 1994), the arbitrator found where the association refused accept registered mail requesting access to records, but where the arbitrator served a copy of the letter on the association in conjunction with the arbitration order requiring answer, the failure of the association to provide copies of the documents during the pendency of the arbitration supported a finding of willful failure to provide access. Similarly, in the instant case the filing of the counter claim seeking inspection of the official records made it quite clear that Mr. Reader's request to inspect the records was made on behalf of Ms. Reader. Moreover, considering that the counterclaim was filed on December 6, 2005, and the Association did not offer to permit access to its official records until January 26, 2006¹, in response to the Petitioner's January 20, 2006, letter requesting access to additional records, the Association's failure to permit access to its official records was unreasonable and willful as to the March 2005 request. As such the

¹ The Association offered to make the records available with conditions. The propriety of Association's conditions will be addressed below.

Association willfully failed to provide access for over a month entitling the Petitioner to the maximum statutory damages of \$500.00.

8. The Petitioners' March 2005 request to access the Association's official records was limited to specific documents. However, in their letter dated January 20, 2006, the Petitioners' expanded their request seeking access to all the official records of the Association. As such, this will be treated a separate request.

9. The Association initially responded in a timely fashion to the January 20, 2006, request by letter dated January 26, 2006, cooperating with the scheduling of an inspection on February 2, 2006. However, the Association consistently asserted the position that Ms. Reader, her attorney or authorized representative, in any combination, would not be permitted to inspect the records simultaneously.

10. The Association argues that section 718.111(12)(c), Florida Statutes, requires that the official records of the association are open to inspection by any association member or the authorized representative of such member. Therefore, the Association contends that the disjunctive language does not require the Association to permit access by a unit owner and her representative simultaneously. Also, the Association apparently contends that it only has to permit access by a single representative.

11. The Association's interpretation of the statute is unreasonable. If conjunctive language is substituted for the disjunctive language, then using the Association's reasoning, a unit owner would not be permitted to inspect the Association's official records unless she is accompanied by a representative.

12. Where a unit owner is not familiar with the types of documents to which she seeks access, it is quite reasonable to expect the unit owner to be accompanied by a

representative, such as an attorney or accountant, who is more familiar with the types of documents the unit owner needs. In fact it might be quite futile and a waste of time for the unit owner to attend the inspection on her own. Moreover, there is no prohibition in the statute or rules that prohibit a unit owner from attending a records inspection along with her representative or limiting the number of representatives a unit owner may designate.²

13. Based upon the foregoing, the undersigned finds that the Association's refusal to allow the Petitioners to inspect the records while accompanied by a representative or to permit multiple representatives to inspect the records was unreasonable. The resulting delay caused by the policy supports a finding that the Association willfully failed to comply with the Petitioners' January 20, 2006, request for access to its official records in a timely manner. Therefore, the Petitioners are entitled to the maximum statutory damages of \$500.00.

14. Eventually, on March 24, 2006, the Association permitted the Petitioners untimely access to its inspection at records inspection session attended by Mr. Reader at the offices of the Association's management company. Upon reviewing a financial report for June 1 to June 30, 2005, which he believed to be inaccurate, Mr. Reader ceased inspecting the records because he thought it would be useless.³ Therefore, Mr. Reader could not provide competent and substantial testimony to rebut the Association's claim that it had made all its records available.

² This is not to say that it would be unreasonable for the Association to restrict the number persons accessing its official records simultaneously where it demonstrated a security risk. However, that has not been established in the instant case.

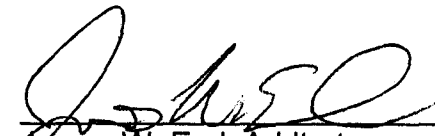
³ The Petitioners appear to be concerned that the Association has possibly failed to properly prepare financial reports. In such a case, the precise violation is failure to maintain records, not failure to provide access to them. See *Brown v. Wellington L. Condo. Ass'n, Inc.*, Arb. Case No. 94-0363, Final Order (February 20, 1995).

15. Petitioners have established that on at least two occasions they made written requests to inspect the official records of the Association in accordance with section 718.111(12), Florida Statutes, and that the Association willfully failed to make its official records available for inspection in a timely manner entitling the Petitioners to statutory damages. The Petitioners have not established the Association failed to eventually make its official records available at the March 24, 2006, inspection. Therefore, the Petitioners' requested injunctive relief will not be granted.

Based upon the foregoing, it is ORDERED:

Due to the Associations' willful failure to permit the Petitioners timely access to its official records on two occasions and the length of such denials, the Petitioners are entitled to the maximum statutory damages of \$500.00 for each denial, totaling \$1,000.00. Therefore, within ten (10) days of the date this order, the Association shall pay the Petitioners \$1,000.00.

DONE AND ORDERED this 26th day of January, 2007, at Tallahassee, Leon County, Florida.



James W. Earl, Arbitrator
Department of Business and
Professional Regulation
Arbitration Section
1940 North Monroe Street
Tallahassee, Florida 32399-1029

Trial de novo and Attorney's Fees

This decision shall be binding on the parties unless a complaint for trial *de novo* is filed in accordance with section 718.1255, Florida Statutes.

Attorney's Fees

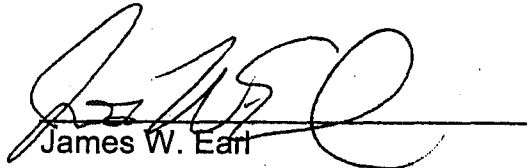
As provided by section 718.1255, Florida Statutes., the prevailing party in this proceeding is entitled to have the other party pay reasonable costs and attorney's fees. Any such request must be filed in accordance with Rule 61B-45.048, F.A.C.

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing final order was mailed by U.S. mail this 26th day of January 2007 to:

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