

IN THE COUNTY COURT OF THE THIRTEENTH JUDICIAL CIRCUIT  
OF THE STATE OF FLORIDA, IN AND FOR HILLSBOROUGH COUNTY

NICK DURHAM  
Plaintiff(s)

CASE NO.: 08-10362

vs.

DIVISION: J

BELLEFONTE HOMEOWNERS  
ASSOCIATION, INC.  
Defendant

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ORDER DENYING MOTION TO TAX COSTS AND ATTORNEY FEES

THIS CAUSE came on before the Court on November 12, 2008. Plaintiff appeared Pro Se. Defendant was represented by Daniel F. Pilka, Esq. The Plaintiff objected to the court considering Defendant's Motion to Tax Costs and Attorney Fees, asserting the defendant failed to strictly comply with Florida Statute 720-311. It appeared to the court that Plaintiff properly submitted to Defendant a "Statutory Offer to Participate in Pre-Suite Mediation". A copy of Plaintiff's letter is attached. Defendant responded within twenty (20) days, but its response (a copy attached) did not select one of the five listed mediators in Plaintiff's offer.

The Court finds that the failure of Defendant to select one of the five mediators in Plaintiff's offer constituted a violation of the Statute 720.311 2(b) which provides that "the failure of any party....to agree upon a mediator....shall constitute the failure or refusal to participate in the mediation process and shall operate as an impasse in the presuit mediation by such party. "Additionally, persons who fail or refuse to participate in the entire mediation process may not recover attorney fees and costs." The motion is therefore denied.

DONE and ORDERED in Tampa, Hillsborough County, Florida this 25<sup>th</sup> day of  
November, 2008.



Donald C. Evans  
Senior Judge

Copies furnished to:

Nick Durham  
1007 Morfield Lane  
Brandon, Florida 33511

Daniel F. Pilka  
P.O. Box 3470  
Brandon, Florida 33509-3470

## EXHIBIT X1

December 1, 2007

Nick Durham  
1007 Morfield Lane  
Brandon, FL 33511-6334

Bellefonte Homeowner's Association, Inc.  
Post Office Box 2731  
Brandon, FL 33509

**VIA First Class US Mail**

Bellefonte HOA/Board/Officers/Registered Agent:

As I have outlined to the Bellefonte HOA on numerous occasions, there exists quite a litany of deficiencies in the operations and conduct of the HOA. Over the last few years these issues have become increasingly more pronounce and more expensive to the community as a whole. The association members have experienced a lack of annual dues optimization through the lack of financial forecasting, substandard performance/quality of project completion, a lack of attention to common area maintenance, absence of architectural standard enforcement, and the overall decrease in community property values directly attributable to the actions and inactions of the HOA.

In addition, the Association has left its members financially liable for its actions in such matters as the hiring of contractors without proper licenses/insurance, signing of contracts for services without proper approvals/procedures, complete lack of intermediate and long term financial planning, deferred maintenance costs, and participation in violating the overall rights of the members.

The inability of the HOA to acknowledge, analyze, evaluate, and correct its deficiencies in any conceivably reasonable manner has left me no choice but to issue the attached "*Statutory Offer to Participate in Pretrial Mediation*." I have dedicated much of my personal time over the past year in an effort to educate, advise, and inform the HOA of its rights and legal responsibilities to the membership.

However, this does not absolve the HOA of its liability for damages it has caused to me as a member of the association; including but not limited to statutory monetary damages, diminished value of my property, and civil damages. Many of the protections afforded me under the laws of the State of Florida have been repeatedly violated by the Association and form the subject matter of my claim.

Sincerely,



Nick Durham

CC: Bellefonte Homeowner's Association, Inc.  
Byron E. Holley  
Registered Agent  
1011 Cherwood Lane  
Brandon, FL 33511

VIA US First Class Certified Mail with Return Receipt Requested  
Article Number 7006010000091814823

## STATUTORY OFFER TO PARTICIPATE IN PRESUIT MEDIATION

The alleged aggrieved party, Nick Durham, hereby demands that Bellefonte Homeowner's Association, Inc., as the responding party, engage in mandatory presuit mediation in connection with the following disputes, which by statute are of a type that are subject to presuit mediation:

1. Changes to the common areas
  - a. Common area landscaping
    - i. Source of constant complaints from members
    - ii. Conflict of interest with maintenance vendor
  - b. Wall repair project (due to motor vehicle accident)
    - i. Unlicensed, uninsured contractor hired
    - ii. Substandard work accepted by Association
    - iii. Retained excess insurance proceeds
  - c. Wall painting project
    - i. Board "not interested" in hiring an impartial 3<sup>rd</sup> party to review its condition
    - ii. Unlicensed, uninsured contractor hired
    - iii. Project not completed within specifications of the contract as represented by Board to membership
    - iv. Contract not circulated before vote on this special assessment item
    - v. Wall not restored to its original condition
      1. Two sections of brick embossing removed without consent
      2. All contrasting embossed brick mortar joints removed
    - vi. No corrective action taken by the Association
  - d. Maintenance and projects exceeding 10% of annual revenues are completed without competitive bids
2. Covenant enforcement disputes
  - a. 1001 Edgemont Place
    - i. Lack of Covenant enforcement regarding commercial equipment stored on parcel (hydraulic man lift & trailer)
    - ii. Lack of Covenant enforcement regarding unpermitted out-building (shed) #1
    - iii. Lack of Covenant enforcement regarding unpermitted out-building (shed) #2
      1. Installed September 14, 2007
  - b. General failure to adhere to the Covenants and architectural standards
3. Disputes regarding amendments to the Association documents
  - a. Absence of Association governing documents other than the recorded Covenants
4. Disputes regarding meetings of the Board
  - a. 1001 Edgemont Place
    - i. Out-buildings discussed as being approved based on the fact that the parcel owner being "nice people" with no regard for written guidelines
  - b. Lack of recorded/distributed minutes
5. Disputes regarding committees appointed by the board
  - a. Architectural Committee
    - i. Final decisions made regarding the expenditure of association funds in closed meetings (i.e. long term street lighting replacement lease)
    - ii. 1001 Edgemont Place
      1. Existence of two out-buildings (sheds) with no plans, nor written approvals
      2. Unpermitted outbuildings (sheds) are clearly visible from the street and do not meet with the character of the neighborhood

- iii. Closed meetings on approval/disapproval of residential property architectural decisions
- iv. No minutes, reports, or documentation of/from Committee meetings
- v. Lack of enforcement of the standards set forth in the recorded Declaration of Covenants
  - 1. No plans and specifications submitted and lack of written approval of the Committee
  - 2. No consideration of the effect and appearance of such constructions
  - 3. Exterior additions made without application and approval are deemed to be in violation and have not been addressed by the Association
  - 4. Committee is entitled and empowered to stop all construction in violation of the Covenants
  - 5. Any out-building must be approved with written consent from the committee, and shall have a setback from the rear lot line of 10 feet
  - 6. No mechanical devices or anything used for building purposes shall be stored on the lot for longer than the reasonable time of construction
- 6. Membership meetings
  - a. Inaccurate minutes
  - b. Most recorded minutes missing from the prior 7 years
  - c. Specific prohibition from videotaping membership meeting
  - d. Lack of proper written voting proxies issued to absentee members
  - e. Lack of disclosure, details, and understanding regarding subject matter for special assessments and projects
  - f. Board fosters, politics, and contributes to a non-orderly, hostile environment
- 7. Access to the official records of the association
  - a. Failure of the association to provide access to the records within 10 business days after receipt of written requests
    - i. March 13, 2007 - Last 7 year of tax returns & Association Articles of Incorporation
    - ii. April 3, 2007 - Certificate(s) of Insurance
    - iii. April 12, 2007 - New Insurance policies
    - iv. May 1, 2007 - Last 5 years of tax returns
    - v. May 31, 2007 - Member accounting records
    - vi. June 23, 2007 - 2007 association financial budget as compared with actuals
    - vii. July 30, 2007 - 2 alternate proposals for "wall painting project" per statute as it exceeded 10% of annual revenues
    - viii. November 17, 2007 - Request for architectural approvals for 1001 Edgemont (\$50 per calendar day beginning December 3, 2007 to a max of 10 days)
  - b. Failure of the association to pay minimum statutory damages of \$50 per calendar day up to 10 business days after receipt of the written request for each of the above 7 ignored requests - [7 requests @ \$50 per calendar day x10 days each = \$3500 plus Item (a)(viii) above]
  - c. Lack of overall statutory recordkeeping and record retention

Pursuant to section 720.311, Florida Statutes, this demand to resolve the dispute through presuit mediation is required before a lawsuit can be filed concerning the dispute. Pursuant to the statute, the parties are required to engage in presuit mediation with a neutral third-party mediator in order to attempt to resolve this dispute without court action, and the aggrieved party demands that you likewise agree to this process. If you fail to participate in the mediation process, suit may be brought against you without further warning.

The process of mediation involves a supervised negotiation process in which a trained, neutral third-party mediator meets with both parties and assists them in exploring possible opportunities for resolving part or the entire dispute. By agreeing to participate in presuit mediation, you are not bound in any way to change your position. Furthermore, the mediator has no authority to make any decisions in this matter or to determine who is right or wrong and merely acts as a facilitator to ensure that each party understands the position of the other party and that all options for reasonable settlement are fully explored.

If an agreement is reached, it shall be reduced to writing and becomes a binding and enforceable commitment of the parties. A resolution of one or more disputes in this fashion avoids the need to litigate these issues in court. The failure to reach an agreement, or the failure of a party to participate in the process, results in the mediator declaring an impasse in the mediation, after which the aggrieved party may proceed to court on all outstanding, unsettled disputes. If you have failed or refused to participate in the entire mediation process, you will not be entitled to recover attorney's fees, even if you prevail.

The aggrieved party has selected and hereby lists five certified mediators who we believe to be neutral and qualified to mediate the dispute. You have the right to select any one of these mediators. The fact that one party may be familiar with one or more of the listed mediators does not mean that the mediator cannot act as a neutral and impartial facilitator. Any mediator who cannot act in this capacity is required ethically to decline to accept engagement. The mediators that we suggest, and their current hourly rates, are as follows:

1. Patricia Gunn Zimmerman, 2980 Haines Bayshore, Clearwater, FL, 33760, 813-404-4234, Certified Volunteer Mediator
2. Jesse V. Dominguez, 105 South Armenia Avenue, Tampa, FL, 33609, 813-874-1182, \$175/hour
3. Jean Brasel, 1243 South Martin Luther King, Clearwater, FL, 727-441-4070, \$200/hour
4. Irving G. Lawrence, 101 Butler Road, Brandon, FL, 33511, 813-689-4096, \$200/hour
5. Lynwood Arnold, PO Box 3350, Tampa, FL 33601, 813-639-9599, \$300/hour

You may contact the offices of these mediators to confirm that the listed mediators will be neutral and will not show any favoritism toward either party. The Florida Supreme Court can provide you a list of certified mediators.

Unless otherwise agreed by the parties, section 720.311(2)(b), Florida Statutes, requires that the parties share the costs of presuit mediation equally, including the fee charged by the mediator. An average mediation may require three to four hours of the mediator's time, including some preparation time, and the parties would need to share equally the mediator's fees as well as their own attorney's fees if they choose to employ an attorney in connection with the mediation. However, use of an attorney is not required and is at the option of each party. The mediators may require the advance payment of some or all of the anticipated fees. The aggrieved party hereby agrees to pay or prepay one-half of the mediator's estimated fees and to forward this amount or such other reasonable advance deposits as the mediator requires for this purpose. Any funds deposited will be returned to you if these are in excess of your share of the fees incurred.

To begin your participation in presuit mediation to try to resolve the dispute and avoid further legal action, please sign below and clearly indicate which mediator is acceptable to you. We will then ask

the mediator to schedule a mutually convenient time and place for the mediation conference to be held. The mediation conference must be held within ninety (90) days of this date, unless extended by mutual written agreement. In the event that you fail to respond within 20 days from the date of this letter, or if you fail to agree to at least one of the mediators that we have suggested or to pay or prepay to the mediator one-half of the costs involved, the aggrieved party will be authorized to proceed with the filing of a lawsuit against you without further notice and may seek an award of attorney's fees or costs incurred in attempting to obtain mediation.

Therefore, please give this matter your immediate attention. By law, your response must be mailed by certified mail, return receipt requested, and by first-class mail to the address shown on this demand.

Nick Durham  
1007 Morfield Lane  
Brandon, FL 33511

RESPONDING PARTY: YOUR SIGNATURE INDICATES YOUR AGREEMENT TO THAT CHOICE.

**AGREEMENT TO MEDIATE**

The undersigned hereby agrees to participate in presuit mediation and agrees to attend a mediation conducted by the following mediator or mediators who are listed above as someone who would be acceptable to mediate this dispute:

(List acceptable mediator or mediators.)

I/we further agree to pay or prepay one-half of the mediator's fees and to forward such advance deposits as the mediator may require for this purpose.

\_\_\_\_\_  
Signature of responding party #1

\_\_\_\_\_  
Telephone contact information

\_\_\_\_\_  
Signature and telephone contact information of responding party #2 (if applicable)(if property is owned by more than one person, all owners must sign)

SENDER: COMPLETE THIS SECTION	COMPLETE THIS SECTION ON DELIVERY
<ul style="list-style-type: none"> <li>Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.</li> <li>Print your name and address on the reverse so that we can return the card to you.</li> <li>Attach this card to the back of the mailpiece, or on the front if space permits.</li> </ul>	<p>A. Signature <input checked="" type="checkbox"/> Agent <input checked="" type="checkbox"/> Addressee</p> <p>B. Received by (Printed Name) _____ C. Date of Delivery <u>12/5/07</u></p> <p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No</p>
<p>1. Article Addressed to:  <b>Belkfonte Homebased Assoc, Inc.</b>  <b>Byron E. Holley</b>  <b>Registered Agent</b>  <b>1011 CHEERWOOD Lane</b>  <b>Brandon, FL 33511</b></p>	<p>3. Service Type  <input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail  <input type="checkbox"/> Registered <input type="checkbox"/> Return Receipt for Merchandise  <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.</p> <p>4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes</p>

Article Number (Transfer from service label) **7006 0100 0000 9181 4823**

S Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540

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BRANDON, FL 33511

Postage	\$ 00.58	0125
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Return Receipt Fee (Endorsement Required)	\$ 2.15	
Restricted Delivery Fee (Endorsement Required)	\$ 0.00	
<b>Total Postage &amp; Fees</b>	<b>\$ 5.38</b>	12/01/2007

BRANON, FL 33511  
 Byron E. Holley Reg. Agent  
 1011 Cheerwood Lane  
 BRANDON, FL 33511

PS Form 3800, June 2002 See Reverse for Instructions



# PILKA & ASSOCIATES, P.A.

ATTORNEYS AT LAW

O REGINALD OSENTON\*\*  
DANIEL F. PILKAT  
KIM E. WELLS

\*CERTIFIED CIRCUIT CIVIL MEDIATOR  
\*\*ALSO ADMITTED IN VIRGINIA, WEST  
VIRGINIA AND DISTRICT OF COLUMBIA

PLEASE REPLY TO: BRANDON ADDRESS  
TELEPHONE (813) 653-3800  
TELEPHONE (863) 687-0780  
FACSIMILE (813) 651-0710  
E-mail Address [aw@pilka.com](mailto:aw@pilka.com)

MICHAEL T. EATMAN  
ROBERT FRASER  
OF COUNSEL

December 17, 2007

***Via Certified Mail and Regular U.S. Mail***  
***Receipt #7007 1490 0002 4787 2505***

Mr. Nick Durham  
1007 Morfield Lane  
Brandon, FL 33511-6334

Re: Bellefonte Homeowners Association, Inc.  
Our File No. : 27-2293

Dear Mr. Durham:

Please be advised that I have recently been retained by the Bellefonte Homeowners Association, Inc., to act as legal counsel for the Association and specifically in this case, to respond to your letters of December 1, 2007 and December 3, 2007, when you requested, among other things, that the parties submit to pre-suit mediation.

On behalf of the Bellefonte Homeowners Association, Inc., please be advised that the Association has no objection to participating in pre-suit mediation. However, in reviewing your list of mediators, I would suggest that we select a mediator who has more knowledge and experience with homeowners associations and the application of Fla.Stat. Ch. 720. Perhaps you would consider Samuel J. Crosby of the law firm of Miller, Crosby & Miller located at 2323 South Florida Avenue in Lakeland, Florida; telephone number 863-688-7038. Another certified mediator is Brian Moss from Tampa Florida. His telephone number is 813-246-5393.

In the meantime, in looking at the various issues that you wish to address at mediation, I would strongly suggest to you that given the relative size of your Association and your's and your wife's prior involvement as Board members of the Association, the issues which you are raising still do not seem to warrant either the cost or expense of litigation. Rather, it is a matter which really should be raised and addressed at Board meetings, where you have the option to have matters placed on the agenda for consideration by all of the members. As your long history of correspondence to the prior Board seems to suggest, you appear to be very well versed in the requirements and obligations

Mr. Nick Durham  
December 17, 2007  
Page 2

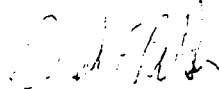
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of Chapter 720, upon the Association and its membership. As such, I would urge you to consider utilizing those options in bringing your concerns not only to the Board's attention, but also to the membership's attention. In particular, I would urge you that rather than simply writing innumerable letters to the Board and demanding responses, most of the issues you have raised can be and should be addressed at a general Board meeting, either called by the Board, or at a special meeting demanded by the membership in accordance with Florida statutes.

As such, after you have had an opportunity to review this letter, it would be greatly appreciated if you would please contact me so that we can make arrangements to determine how you want to proceed in handling this matter, either through another Board meeting or through the pre-suit mediation.

I look forward to receiving your response

Sincerely yours,



Daniel F. Pilka

DFP:lw  
cc. Mr. Scott Ubillos