

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

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IN RE: PETITION FOR ARBITRATION

**Captiva Lakes Villas
Condominium Association, Inc.,**

DBPR - REGULATION

Petitioner,

v.

Case No. 2006-02-6756

Unit Owners Voting For Recall,

Respondent.

FINAL ORDER

Appearances

For the Association: Edo Meloni, Esq.
 Fein & Meloni, Esqs.
 900 S.W. 40th Avenue
 Plantation, Florida 33317

For the Respondent: Gustavo Rodriguez, Esq.
 Law Offices of Octavio E. Mestre,
 7385 SW 87th Avenue, Suite 100
 Miami, Florida 33173

Procedural History

A final hearing was held in this matter on August 4, 2006, during which the parties presented the testimony of witnesses, submitted documentary evidence and cross-examined the other party's witnesses. Both parties have filed recommended orders as permitted by the arbitrator. This order is entered after consideration of the complete record in this matter.

Statement of the Issue

Should the written recall agreement served upon the Association have been certified?

Findings of Fact

1. Captiva Lakes Villas Condominium Association, Inc. (the "Association") is the legal entity responsible for operation of the Captiva Lakes Villas Condominium (the "condominium").
2. The Association contains 230 voting interests and there are three seats on its board of directors.
3. On April 24, 2006, the Association's management company received a written recall agreement consisting of 131 recall ballots¹. The recall ballots permitted the unit owners to vote to retain or recall Ivan Nunez, Maria Niz and Karel Haces, members of the Association's board of directors. However, the unit owners voted to recall Ivan Nunez and Karel Haces and to retain Maria Niz.
4. The board did not to certify the recall at a meeting held on May 1, 2006, for the following reasons:
 - a. Karl Haces resigned from the board on January 31, 2006.
 - b. The written recall agreement was not served on the board by certified mail or personal service as required by section 718.112(2)(j)2, Florida Statutes.

¹ The Association contends that the written recall agreement delivered to it consisted of 119 ballots that appear to have been altered ballots from a previous, unsuccessful recall effort (see footnote 2 below). However, there is competent and substantial evidence to support a finding that the written recall agreement consisting of 131 unadulterated ballots entered into evidence by the Respondent was the written recall agreement delivered to the Association.

- c. The ballots for units A-101, A-202, A-206, B-109, C-205, C-210, E-110, E-211, F-103, F-209, F-305, G-109, G-211, H-206 and J-207 were found to be invalid because the units are owned by more than one person who are not husband and wife and were signed by only one of the unit owners or by a non-owner and there was no voting certificate provided for the unit.
- d. At least 25 of the ballots appear to have been cut and pasted from a prior recall attempt.

5. However, after considering all of the evidence, the undersigned finds that:

- a. The ballot for unit G-211 was signed by "Lilly." The public records indicate that the unit is owned Maria Lilly Ceballos. It is not clear if this ballot was signed by the owner.
- b. The ballot for G-109 was signed by Evelyius Gaiti. Public records indicate that the unit is owned by Sergio E. Gaiti. It is not clear if this ballot was signed by the owner.
- c. The public records indicate that units B-109, C-210, E-211, F-209, and F-210 are each owned by multiple owners. However, the ballots cast for each of these owners were not signed by all the owners nor was there a voting certificate on file with the association designating a representative.
- d. The ballots for units A-202, A-206, C-205, E110, F-103, F-305, and J-207 were executed by all of the unit owners for each unit as listed in the public records.

- e. The minutes for the 2004 annual election show that the Association has previously enforced the voting certificate requirement.
- f. Karel Haces resigned during a board meeting on January 31, 2006 and Juan Alamnza was appointed to the board sometime in March 2006. However, Mr. Alamnza has never accepted the appointment nor has he acted as member of the board. Therefore, at the time the recall was served on the board, the board consisted of Ivan Nunez and Maria Niz.
- g. The ballot for unit F-103 is a pre-marked ballot that was rejected in the prior recall arbitration case.²

6. Section 718.112(2)(j), Florida Statutes, provides that any member of the board may be recalled and removed from office with or without cause by the vote or agreement in writing by a majority of all the voting interests.

7. Rule 61B-23.0028(1)(b)6., Fla. Admin. Code, states:

The failure of the association to enforce the voting certificate requirement in past association elections and unit owner votes shall preclude the association from rejecting a written recall ballot or agreement for failing to comply with a voting certificate requirement.

8. Rule 61B-23.0028(1)(g), Fla. Admin. Code, states, in pertinent part:

The written agreement or a copy shall be served on the board by certified mail or by personal service.... Service of the written agreement on an officer, association manager, board member or the association's registered agent will be deemed effective service on the association.... Personal service shall be effected in accordance with the procedures set out in Chapter 48, Florida

² The Respondent had previously attempted a recall by written agreement which was the subject of a prior arbitration proceeding, arbitration case number 2006-01-7317. The prior recall was found to be defective because the recall/retain lines on the ballots had been pre-marked with a computer generated "X".

Statutes, and the procedures for service of subpoenas as set out in Rule 1.410(d), Florida Rules of Civil Procedure.

9. Article VI.B, of the Association's bylaws provides, except in the case of a husband wife, that where a unit is owned by multiple persons, the owners must maintain a voting certificate with the association designating a representative to vote on behalf of the unit. The provision further provides that a vote cast in violation of the voting certificate requirement is not valid.

Conclusions of Law

1. The undersigned has jurisdiction over the parties and subject matter of this dispute, pursuant to sections 718.112(2)(j)3 and 718.1255, Florida Statutes. In accordance with section 718.112(2)(j)3, Florida Statutes, the unit owners voting in favor of the recall are the respondent in this matter.
2. The Association rejected the ballots for unit numbers A-101, A-202, A-206, B-109, C-205, C-210, E-110, E-211, F-103, F-209, F-305, G-109, G-211, H-206 and J-107 because the units are owned by more than one person who are not husband and wife and the ballots were signed by only one of the unit owners or by non-owner and there was no voting certificate provided for the unit. Article IV.B. of the Association's bylaws requires that units with multiple owners maintain a voting certificate designating an owner to represent the unit for owner votes. However, the ballots for units A-202, A-206, C-205, E110, F-103, F-305, and J-207 were executed by all of the unit owners for each unit listed in the public records. Therefore, the failure to maintain a voting certificate will not invalidate the ballots for these units, and the Association improperly rejected the ballots.

3. The public records indicate that units B-109, C-210, E-211, F-209, and F-210 are each owned by multiple owners. However, the ballots cast for each of these units were not signed by all the owners nor was there a voting certificate on file with the association designating a representative. The Association has enforced the voting certificate requirement in the past. Therefore, in accordance with article IV.B. of the bylaws, the Association properly rejected these ballots.
4. The Association properly rejected the ballot for unit F-103 as it was clearly a pre-marked ballot that was rejected in the prior recall arbitration case.
5. It is not clear if the ballots for units A-101, G-211 and G-109 were signed by the owners of the units. However, this issue is immaterial to the ultimate conclusion in this matter.
6. After considering the above properly rejected ballots and the ballots that may not have been signed by the correct owners, there are still a sufficient number of ballots in favor of the recall for it to succeed. Therefore, as to director Ivan Nunez, the recall is effective.
7. However, since Karel Haces resigned from the board prior to the service of the recall agreement on the board, the recall is not effective as to him. Therefore, the owners have recalled less than a majority of the seats on the board. Accordingly, the remaining board member(s) is permitted to appoint replacement members.
8. The Association objects to the Respondent delivering the written recall agreement by hand to the Association's management company. Rule 61B-

23.0028(1)(g), Fla. Admin. Code, permits service of a written recall agreement on an association's management company. The purpose of requiring the unit owners to serve the association with the written recall agreement is to officially place the board on notice that a recall has been attempted by the unit owners. See *Nautilus Condo. Assoc., Inc. v. Unit Owners Voting For Recall*, Arb. Case No. 99-2076, Summary Final Order (December 3, 1999). Furthermore, the purpose of service by certified mail is to provide proof of when the board was served, not to invalidate the actual recall effort. *The Beach Condo. Owners' Assoc., Inc. v. Owners Voting for Recall*, Arb. Case No. 92-0273, Order Dismissing Petition (January 22, 1993). Therefore, the undersigned finds hand-delivery of the written recall agreement adequate.

Based upon the foregoing, it is ORDERED:

The recall of Ivan Nunez is hereby certified and he is removed from the board of directors effective upon the date of the mailing this order. Within five days Mr. Nunez shall return all association records and property in his possession to the board. Since less than a majority of the seats on the board have been recalled, the remaining board member(s) may appoint a replacement candidate to fill Mr. Nunez's seat for the unexpired remainder of his term. Considering that Juan Alamnza never accepted his appointment to the board and the Association has not indicated that a replacement for Mr. Alamnza has been selected, it would appear that as of the effective date this order, the only remaining board member is Maria Niz. Ms. Niz is authorized to appoint replacement directors as necessary to comply with this order.

DONE AND ORDERED this 11th day of October 2006, 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

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing final order has been sent by U.S. Mail to the following persons on this 11th day of October 2006:

Edo Meloni, Esq.
Fein & Meloni, Esqs.
900 S.W. 40th Avenue
Plantation, Florida 33317
Attorney for Petitioner
Facsimile: 954.316.5890

Gustavo Rodriguez, Esq.
Law Offices of Octavio E. Mestre,
7385 SW 87th Avenue, Suite 100
Miami, Florida 33173
Attorney for the Respondent
Facsimile: 305.274.0737

James W. Earl, Arbitrator