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

IN RE: PETITION FOR BINDING ARBITRATION - HOA

Pine Island Bay
Homeowners Association, Inc.,

Petitioner,

v. **Case No. 2009-01-1842**

Homeowners Voting for Recall,

Respondent.

_____/

FINAL ORDER OF DISMISSAL

Procedure

On March 9, 2009, Pine Island Bay Homeowners Association, Inc. (Association) filed a Petition for Binding Arbitration seeking an order affirming the decision of the five member board of directors (board) not to certify the recall of three members of the board. On March 11, 2009, counsel for Respondent filed a Notice of Appearance, and on March 12, 2009, Respondent filed a response to the petition, followed by an amended response on March 13, 2009.

Since Respondent filed an answer before an Order Allowing Answer could be entered, an order was entered on March 16, 2009, treating Respondent's amended response as Respondent's answer and allowing the Association time to file a reply. On March 16, 2009, the Association filed a Motion to Abate because a second recall had been served on the board purporting to recall the entire board. Respondent filed a response to the motion on March 17, 2009. On March 18, 2009, the Association filed a Supplemental Motion to Abate indicating a recall meeting was scheduled to address the

second recall. On March 19, 2009, Respondent filed a response and an amended response to the supplemental motion to abate.

On March 24, 2009, the Association filed a Motion to Dismiss as Moot alleging that the Association had certified the second recall. Respondent filed a response on March 24, 2009 and the Association filed a reply to the response on the same day.

On April 9, 2009, Respondent filed a Motion for Order Requiring Alleged Replacement Board to Cease & Desist. On April 13, 2009, the Association filed a reply to Respondent's motion.

On April 28, 2009, an order was entered requiring the parties to file supplemental information. In response to the order, the parties filed a joint stipulation on April 29, 2009.

On May 12, 2009, a case management conference was held with both parties appearing by telephone. As required at the case management conference, the Association filed copies of the recall ballots served on the board in the second recall and the minutes of the March 20, 2009 meeting at which the board certified the second recall.

Findings

There are 148 voting interests in the Association. The recall of a board member requires a majority vote of the total voting interests - 75 valid votes.

At the time of the initial recall, the board consisted of five members: Mike Gorzeck, Louis Cohen, Gina McMullen, Elizabeth Castro and Jimmy Newton.

The individuals subject to recall in the initial recall filed on March 9, 2009, were Mike Gorzeck, Louis Cohen and Gina McMullen, and the replacement candidates were Mary Anne Tong, Thana Cushen and Danielle Phillips.

It is undisputed that the initial written recall agreement, consisting of 87 recall ballots, was served on the board at approximately 9:45 p.m. on Friday, February 20, 2009, and the board held a meeting to address the recall on Monday, March 2, 2009. At the meeting, the board voted not to certify the recall rejecting various ballots for one or more reasons.

A subsequent recall agreement was served on the board on March 17, 2009, which the board voted to certify on March 20, 2009. The recall agreement consisted of 77 ballots. This subsequent recall agreement sought the recall of all five board members who were members of the board at the time of the initial recall: Mike Gorzeck, Louis Cohen, Gina McMullen, Elizabeth Castro and Jimmy Newton. As stated above, Mike Gorzeck, Louis Cohen and Gina McMullen were the subjects of the initial recall.

The replacement candidates in the subsequent recall that was certified by the board are Randall Clutter, Ann Marie Burgess, Carol Whitlow, Todd Duke and Liane Sassi. None of these replacement candidates are the same as the replacement candidates in the initial recall: Mary Anne Tong, Thana Cushen and Danielle Phillips.

According to the minutes of the March 2, 2009 meeting of the board to consider the initial recall, certain ballots were rejected because: recall ballots appeared to be executed by someone other than a record title owner/member of the Association; the signature on the recall ballot did not appear to match the signature on file with the Association; no such address exists as that provided on the recall ballot; and certain ballots were rescinded by the owner prior to service of recall upon the board.

Conclusions

The initial recall that the board did not certify involved the recall of three board members with three replacement candidates. The subsequent recall that the board

certified involved the recall of all five board members and a slate of replacement candidates that did not include any of the replacement candidates in the initial recall.

The case at hand is analogous to *Lakeview Condo. Owner's Ass'n, Inc. v. Unit Owners Voting for Recall,* Arb. Case No. 2005-03-2327, Final Order of Dismissal (July 27, 2005). On June 15, 2005, the association for *Lakeview* filed a petition for recall arbitration following the decision of the board of the Association not to certify the recall of two members of the board. On July 22, 2005, the association filed a notice that on July 5, 2005, the board accepted a subsequent recall removing all members of the board. The arbitrator held that "The removal of the board members subject to the recall effort in the present matter renders this case moot." *Id.* (citing *Boca Pinar Condo. Ass'n, Inc. v. Unit Owners Voting for Recall,* Arb. Case No. 02-5059 (July 5, 2002)). The rationale is that a subsequent recall that is certified is the latest expression of the will of the owners. Based upon *Lakeview*, the instant case must be dismissed as moot. Nevertheless, certain arguments made by Respondent will be addressed for future reference.

Respondent argues that the initial recall should be certified, because the board did not hold timely the meeting to address the recall. The initial written recall agreement was served on the board at approximately 9:45 p.m. on Friday, February 20, 2009, and the board held a meeting to address the recall on Monday, March 2, 2009.

In pertinent part, the relevant law is as follows:

> Section 720.303(10)(b) 2., Fla. Stat.:
> (10) RECALL OF DIRECTORS.--
> . . .
> (b)
> . . .
> 2. The board shall duly notice and hold a meeting of the board within 5 full business days after receipt of the agreement in writing or written ballots.

Fla. Admin. Code R. 61B-80.105
(1) Recall Time Calculation. In computing the five full business days prescribed by subsections 720.303(10)(b)2., 720.303(10)(c)2., and 720.303(10)(d), F.S., and these rules, in which the board is required to duly notice and hold a board meeting and file for recall arbitration with the division, the day that the board is served with notice of the recall and the day of the board meeting shall not be included. The last day of the period shall be included unless it is a Saturday, Sunday or legal holiday as prescribed by Section 110.117, F.S., in which event the period shall run until the end of the next business day.

Fla. Admin. Code R. 61B-81.003
(1) Form of Written Agreement. All written agreements used for the purpose of recalling one or more directors shall:
. . .
(g) The written agreement or a copy shall be served on the board by certified mail or by personal service. Service on the board after 5:00 p.m. on a business day or on a Saturday, Sunday or legal holiday, as prescribed by Section 110.117, F.S., shall be deemed effective as of the next business day that is not a Saturday, Sunday, or legal holiday.

Because the recall ballots were served on the board after 5 p.m. on Friday, February 20, 2009, service is deemed effective on Monday, February 23, 2009. Fla. Admin. Code R. 61B-81.003(1)(g). Because the board is deemed to be served on Monday, February 23, 2009, that day is not included for purposes of computing the five full business days in which to have the recall board meeting. Fla. Admin. Code R. 61B-80.105(1).

Fla. Admin. Code R. 61B-80.105(1) appears contradictory with respect to whether the last day of the period is included within the calculation for computing the five full business days. The first sentence of the rule provides in pertinent part, "the day of the board meeting shall not be included." (emphasis added). The next sentence of the rule provides, "The last day of the period shall be included unless it is a Saturday, Sunday or legal holiday as prescribed by Section 110.117, F.S., in which event the period shall run until the end of the next business day." Under either scenario, the

board meeting held on March 2, 2009, to address the initial recall was held within the required five full business days. In any event, a resolution of this apparent contradiction is not necessary in this case, because this case has been rendered moot.

Similarly, Respondent argues that the Association improperly rejected a number of ballots in the initial recall. While it appears to be true that the Association improperly rejected certain ballots, this case has been rendered moot by the subsequent recall that was certified by the board.

Respondent also argues that because the initial recall should have been certified by the board, the three board members in that recall were recalled at the conclusion of the board meeting convened to address the recall, and the three replacements should have taken their place. However, once a board decides not to certify a recall, Fla. Admin. Code R. 61B-81.003(3)(b) is triggered which provides, in pertinent part,

> (3)
> . . .
> (b) Non-certification of Recall by the Board. If the board votes not to certify the written agreement to recall for any reason, the following provisions apply:
> . . .
> 2. Any director sought to be recalled shall, unless he or she resigns, continue to serve on the board until a final order regarding the validity of the recall is mailed by the arbitrator.

Thus, even if this case was not rendered moot because of the subsequent certified recall, the board members subject to recall in the first attempted recall would serve until a final order was entered.

Finally, in Respondent's response to Petitioner's motion for dismissal as moot filed on March 24, 2009, Respondent argues the following with respect to the subsequent recall:

> Ballots in this "intervening recall" . . . were obtained by threatening homeowners of [sic] increased assessments, repeated harassment by

> recalled board members approaching the same homeowner 2 and 3 times in one day, and creating a situation where it was impossible for homeowners who later wanted to rescind the ballot for this "intervening recall" to do so.

Respondent filed the affidavit of three different homeowners two of which claimed that after signing a ballot in the second recall, the affiant attempted to retrieve the recall ballot from the board member to whom the person had given the ballot, but the affiant was unable to get the ballot back. The rules governing homeowner recall by written agreement provide that "Any rescission or revocation of a homeowner's written recall ballot or agreement must be done in writing and must be delivered to the board prior to the board being served the written recall agreements." Fla. Admin. Code R. 61B-81.003(1)(k). The affiants did not follow the clear direction of the rule to deliver timely a written rescission to the board.

Two affiants stated the board member who solicited their recall ballot told the affiant that if he did not sign the recall ballot, the affiant would have to pay an assessment. The truth or untruth of statements about assessments made to an owner in the course of soliciting the owner to sign a recall ballot is not a basis for the arbitrator to reject such recall ballot. See, e.g., *Terrace Park of Five Towns Ass'n No. 19, Lexington Building*, Arb Case No. 93-0079, Final Arbitration Order (June 28, 1993)(generally, focal point in recall arbitration is whether the procedures of statute and rules have been followed, thus underlying basis for why owner signed recall ballot is irrelevant and allegations of duress or coercion based on affidavits that some of the unit owners seeking recall made statement that owners would not be entitled to use recreational facilities are not a true threat but rather political assertions); *Laguna Club East Condo., Inc. v. Unit Owners Voting for Recall*, Arb. Case 97-0122, Summary Final Order (April 28, 1997)(statute provides board members may be recalled without cause

and political process, with all its free speech attributes, including untrue and malicious statements, applies to association matters, including recall process); and *Pier Point South Condo. Ass'n v. Unit Owners Voting For Recall*, Arb. Case No. 03-04-7161, Summary Final Order (May 28, 2003)(owners presumed capable of making their own decisions in face of misinformation or ambiguous information, and if unsure, owner can ask for clarification or withhold vote).

Based upon the foregoing, it is **ORDERED**:

1. The Association's March 24, 2009, Motion to Dismiss as Moot is GRANTED and Arbitration Case Number 2009-01-1842 is DISMISSED as moot.

DONE AND ORDERED this 19th day of May, 2009, at Tallahassee, Leon County, Florida.

Glenn Lang, 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 19th day of May 2009:

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