

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

IN RE: PETITION FOR ARBITRATION

STEPHEN SMITH,

Filed with  
Arbitration Section

Petitioner,

APR 27 2010

v.

Div. of Fl. Condos, Timeshares & MH  
Dept. of Business & Professional Reg.

Case No. 2009-03-4877

WATER BRIDGE 2 ASSOCIATION, INC.,

Respondent.

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**FINAL ORDER ON DEFAULT**

This matter comes before the undersigned upon the petition for mandatory non-binding arbitration, pursuant to § 718.1255, Fla. Stat. On July 27, 2009, Petitioner filed an amended petition naming Water Bridge 2 Association, Inc. (the Association) as Respondent. The amended petition claims that the Association improperly certified a recall against him, thereby causing his removal as a member of the board of directors. Although the type of petition filed in this case commonly is referred to as a "reverse recall," the petition is filed pursuant to section 718.1255(1)(b), Florida Statutes, and is not a "recall petition" filed pursuant to section 718.112(2)(j), Florida Statutes. As relief, Petitioner requests an order finding that his recall was invalid and requiring him to be re-seated on the Association's board of directors. The amended petition is incorporated by reference.

**Findings of Fact**

1. The order requiring answer and its enclosures were not successfully served on the Association by certified mail.

2. On August 18, 2009, the arbitrator entered an order requiring service directing Petitioner to serve the Association in accordance with the requirements of Rule 1.410, Fla. R. Civ. P., or Chapter 48, Florida Statutes.

3. The Association was provided with service of process in this matter on January 4, 2010.

4. The return of service notes that the person served was Andre Echevarria, the Association's vice president.

5. At the time of service, Andre Echevarria was also the Association's registered agent listed with the Florida Department of State, Division of Corporations.

6. The return of service states that, five minutes after serving Mr. Echevarria, the process server observed Mr. Echevarria throwing the documents with which he was served off of the third floor balcony.

7. The Association did not file a timely, responsive motion or an answer and a default was entered against the Association on February 3, 2010.

8. On February 12, 2010, the Association's attorney filed a Notice of Appearance and a Motion for Extension of Time to file an answer.

9. However, the Motion for Extension of Time ignored the fact that a default had been entered against the Association. Thus, the arbitrator ordered the Association to file a motion to set aside the default containing a sufficient explanation for why an answer was not timely filed. The Association was further ordered to attach its proposed answer to the motion to set aside the default.

10. On February 25, 2010, the Association filed a motion to set aside the default. The motion claimed that there was an instance of mistake, inadvertence, surprise

or excusable neglect that required the default to be vacated. Although the motion admitted that the petition was served on the "resident" [sic] agent for the Association, the Association claimed that the petition was "inadvertently lost prior to physical receipt by the Association." The motion further stated that the Association had a meritorious defense which was set forth in its proposed answer filed in connection with the motion.

11. On March 1, 2010, Petitioner filed a response in opposition to the Association's motion to set aside the default.

12. In order to resolve the issues raised by the Association's motion to set aside the default, the arbitrator conducted an evidentiary hearing on the motion on March 30, 2010.

13. At the hearing, the following individuals gave testimony: Petitioner Stephen Smith, Elaine Schwartz, Jock Coleman, and Andre Echevarria.

14. Mr. Echevarria testified that on January 4, 2010 he was at home with his roommate, Rolando Rodriguez. Mr. Rodriguez is 61 years old. There was a knock at the door and Mr. Rodriguez opened the door. The process server stood outside and announced that he was serving the Association by way of serving Mr. Echevarria. The process server then handed Mr. Rodriguez an envelope containing documents. Mr. Rodriguez then immediately gave Mr. Echevarria the envelope containing documents. Mr. Echevarria admitted that he then threw the envelope off of the third floor balcony, and it landed on the ground below. Mr. Echevarria claimed that he did not look inside the envelope.

15. Jock Coleman testified that he was the process server involved in this matter. He stated that he went to Mr. Echevarria's address, and he gave the petition

and supporting documents, which were contained in the envelope to Mr. Rodriguez. He informed Mr. Rodriguez of the contents of the envelope. He then observed Mr. Echevarria throwing the envelope off of the third floor balcony onto the ground below.

16. Elaine Schwartz testified that she witnessed Mr. Coleman hand paperwork to a person answering the door at Mr. Echevarria's residence. She then observed Mr. Echevarria yelling from the third floor at Petitioner Stephen Smith, who was standing on the ground below. Ms. Schwartz witnessed Mr. Echevarria throwing the paperwork down to the ground. Some time later that evening, she went back to see if the papers had been picked up. They had not been removed. The papers were blowing over the grass.

17. Petitioner Stephen Smith testified that he witnessed Mr. Coleman hand paperwork to a person answering the door at Mr. Echevarria's residence. Mr. Echevarria then appeared over the balcony, holding the paperwork and yelling at him "Don't you send anyone to my door at ten o'clock at night." Petitioner witnessed Mr. Echevarria throwing the paperwork down to the ground.

#### Conclusions of Law

The arbitrator finds that the Association was validly served with process in this matter on January 4, 2010. Because the Association did not file a timely responsive motion or an answer, a default was properly entered against the Association on February 3, 2010.

Fla. Admin. Code R. 61B-45.020 provides as follows:

#### Defaults and Final Orders on Default.

(1) When a party fails to file or serve any responsive document in the action or has failed to follow these rules or a lawful order of the arbitrator, the arbitrator shall enter a

default against the party where the failure is deemed willful, intentional, or a result of neglect. No service need be made on parties against whom a default has been entered, except that pleadings asserting new or additional claims against them shall be served in the manner provided for service of the original petition for arbitration.

(2) Final Order. Final orders after default may be entered by the arbitrator at any time. The arbitrator shall receive affidavits as necessary to determine damages.

(3) Setting Aside Default. If a final order after default has been entered, the arbitrator may set it aside for reasons of excusable neglect, mistake, surprise, or inadvertence. A motion setting aside the final order after default must be made within a reasonable time not to exceed 1 year after the final order was entered.

Defaults are ordinarily set aside as a matter of course. There is a strong preference for lawsuits to be determined on the merits, and courts should liberally set aside defaults under appropriate circumstances. *Geer v. Jacobsen*, 880 So.2d 717, 720 (Fla. 2d DCA, 2004), citing *Marshall Davis, Inc. v. Incapco, Inc.*, 558 So. 2d 206 (Fla. 2d DCA 1990). However, the key phrase in the above-cited passage is that defaults should be set aside under appropriate circumstances.

Fla. Admin. Code R. 61B-45.020 provides that a default may be set aside for reasons of excusable neglect, mistake, surprise, or inadvertence. In the instant case, the Association argues that the default should be vacated as there was an instance of mistake, inadvertence, surprise or excusable neglect because the petition was "inadvertently lost prior to physical receipt by the Association." The arbitrator does not find this to be the case.

The evidence amply showed that the petition was not inadvertently lost. Rather, the clear facts are that the Association's vice president and registered agent, after having been served with the petition, flung it off of the third floor balcony. The arbitrator does not

find this behavior to be excusable neglect, mistake, surprise, or inadvertence. Instead, such behavior evidences a willful and intentional disregard of the entire arbitration process. Although the arbitrator is mindful of the strong preference for lawsuits to be determined on the merits, the undersigned finds that this case does not present the appropriate circumstances for relieving the Association of the consequences of its failure to timely defend itself. Thus, the Association's motion to set aside default is DENIED.

A defaulting party admits well-pleaded facts and acquiesces in the relief sought. *North American Acc. Ins. Co. v. Moreland*, 53 So. 635, 637 (Fla. 1910); *State Farm Mut. Ins. Co. v. Horkheimer*, 814 So. 2d 1069, 1072 (Fla. 4th DCA 2001) citing, *Days Inns Acquisition Corp. v. Hutchinson*, 707 So.2d 747, 749 (Fla. 4th DCA 1997); *Northgate Condominium Association, Inc. v. Samaniego*, Arb. Case No. 93-0111, Final Order on Default (August 16, 1993). There is competent substantial evidence in the uncontested petition and record to support the above findings of fact. Based upon the findings of fact, the Association is found to have improperly certified a recall against Petitioner, thereby causing his removal as a member of the board of directors as alleged in the petition. The Association is further found to have acquiesced in the relief requested by Petitioner.

Therefore it is ORDERED:

As of the date of the mailing of this order, Petitioner Stephen Smith is immediately seated on the board of directors of Water Bridge 2 Association, Inc. to serve the remainder of his term. As of the date of the mailing of this order, any replacement director for Petitioner Stephen Smith is REMOVED as director.

DONE AND ORDERED this 27<sup>th</sup> day of April, 2010, at Tallahassee, Leon County,  
Florida.



David R. Slaton, Arbitrator  
Department of Business and  
Professional Regulation  
Arbitration Section  
1940 North Monroe Street  
Tallahassee, Florida 32399-1029  
Telephone (850) 414-6867  
Facsimile (850) 487-0870

**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 § 718.1255, Fla. Stat. As provided § 718.1255, Fla. Stat., 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 Fla. Admin. Code R. 61B-45.048.

**Certificate of Service**

I hereby certify that a true and correct copy of the foregoing final order has been sent by U.S. Mail and facsimile to the following persons on this 27<sup>th</sup> day of April, 2010:

Stephen Smith  
5950 Del Lago Circle, #209  
Sunrise, FL 33313  
Fax: 954-345-1556  
Petitioner

Claire Cubbin, Esquire  
2101 N. Andrews Avenue  
Suite Nos. 401-402  
Fort Lauderdale, FL 33311-3940  
Fax: 954-566-5859  
Attorney for Respondent



David R. Slaton, Arbitrator