

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR BREVARD COUNTY, FLORIDA

CASE NO.: 05-2022-SC-026729-XXXX-XX

KATHRYN FAVATA,

Plaintiff,

vs.

TENNIS VILLAGE HOMEOWNERS
ASSOCIATION, INC.,

Defendant.

ORIGINAL

HEARING BEFORE: HONORABLE KENNETH FRIEDLAND
DATE TAKEN: Monday, November 21, 2022
TIME: 3:30 p.m.
PLACE: Remote via Microsoft Teams
REPORTED BY: LISA A. BRADSHAW
Court Reporter and Notary Public

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8 APPEARING ON BEHALF OF THE PLAINTIFF

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16 APPEARING ON BEHALF OF THE DEFENDANT

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P R O C E E D I N G S

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THE COURT: All right.

Mr. McLaughlin, can you hear me?

MR. MCLAUGHLIN: I can, Your Honor.

Can you hear me? Sorry about that.

THE COURT: Yes, I can.

All right. Very good.

So I have Mr. Gingo and his client here and
Ms. Favata. We have Madam Court Reporter.

And it looks like this is the defendant's
motion to dismiss.

MR. MCLAUGHLIN: Yes, Your Honor.

THE COURT: All right. Is everybody ready?

MR. GINGO: Yes.

THE COURT: All right. Go ahead,
Mr. McLaughlin.

MR. MCLAUGHLIN: Good afternoon, Your Honor.
Thank you for your time.

This is Tennis Village Homeowners
Association's motion to dismiss. The complaint
brings a claim for -- essentially, they're asking
for damages under 720.303 and then a declaration as
well regarding a request for audio recording of a
board meeting in October 2021. The motion to

1 dismiss asks the Court to dismiss the complaint,
2 Your Honor.

3 Frankly, the audio is not an official record
4 that the association is required to keep. So the
5 association is under a duty to retain certain
6 official records, which are defined in Section
7 720.303, Subparagraph 4. I think the plaintiff is
8 trying to argue that the audio recording is
9 potentially an official record under three of those
10 subparagraphs. The first one being minutes of the
11 association; the second somehow being financial and
12 accounting records of the association; and then the
13 last one is, sort of, a catch-all that says all
14 other written records of the association not
15 specifically included in this subsection which are
16 related to the operation of the association.

17 So as a matter of law, Your Honor, based on
18 the four corners of the complaint the audio
19 recordings are not official records of the
20 association that are required to be retained. They
21 are not the minutes of the board meeting. After
22 the board meeting, minutes were actually drafted,
23 given to the plaintiff, and then to be -- to be
24 finalized at the next board meeting in February, I
25 think, of 2022.

1 Plaintiff had those written draft minutes and
2 then has since been given the final board minutes
3 when they were finalized at the next board meeting.
4 The audio recording is not those -- those meeting
5 minutes. Those meeting minutes were drafted
6 thereafter and is not an official record of the
7 association required to be given or even
8 maintained.

9 The second, he's trying to argue that there's
10 somehow financial or accounting records of the
11 association. And I think he specifically in his
12 response, cites sub sub paragraph (j)4, which says
13 any other records that identify, measure, record,
14 or communicate financial information. This audio
15 recording of the meeting is not financial or
16 accounting records of the association that are
17 needed to be, you know, in any way used to
18 administer the administration. All of those
19 financial records, receipts, invoices, whatever
20 else is needed to be done, contracts, you know,
21 ledgers. That's all in writing. That's all been
22 produced to the plaintiff pursuant to their
23 request. The audio recording of a board meeting
24 does not fall under that.

25 And then lastly, all other written records of

1 an association not specifically included in this
2 subsection which are related to the operation of
3 the association. On its face, the audio is not a
4 written record of the association so that does not
5 apply.

6 In addition, they're not related to the
7 operation of the association. They need the
8 minutes. They've got the minutes. That's what the
9 statute requires them to produce to maintain, that
10 has been maintained. So as a matter of law,
11 Your Honor, this -- this complaint should be
12 dismissed.

13 In addition, they've made, inside their
14 complaint, an allegation of spoliation of evidence.
15 I believe that's also improper, Your Honor.

16 I cite Martino versus Walmart Stores that
17 spoliation of evidence cannot be the basis of a
18 cause of action. And in that, that claim must also
19 be dismissed to the extent they tried to bring a
20 separate allegation or portion of the claim based
21 on spoliation of evidence argument, Your Honor.

22 THE COURT: All right.

23 Mr. Gingo?

24 MR. GINGO: Yes, Your Honor.

25 I believe this is a case of first impression.

1 I've done my Westlaw legal research and I don't
2 think there was any case in this state that
3 addressed the issues that I'm addressing. I don't
4 think there is any cases that say that the tape
5 recording is not a record of the association.

6 In this particular case, my client did receive
7 a prior tape recording from the association back in
8 August -- August 27th of 2021. She made a record's
9 request and she received the tape. That is in the
10 complaint to establish that this is a policy and
11 procedure of the association to create tape
12 recordings of their director's meetings.

13 There was another director's meeting that was
14 held October 11th, 2021. My client requested the
15 tape recording of that on October 28th. And on
16 November 8th, 2021, that request was denied. And
17 the reason for it being denied was the statement
18 from the association that it was not a written
19 record. On November 15th of '21, the association
20 produced a document and it had written across the
21 face of it "unofficial draft" of 10/11/21
22 director's meeting. They had not approved the
23 records at that time.

24 On November 16th my client requested the
25 approved minutes from the October 11th, 2021,

1 director's meeting and on November 22, the response
2 came from the association saying those minutes have
3 not been approved. That's in Exhibit G.

4 They said -- the association said those
5 records should be approved in February of the
6 following year, February 1 of 2022.

7 I retained an expert witness from -- a NASA
8 engineer. His name is Matt Flavell. He's in
9 Exhibit H. Mr. Flavell looked at the very first
10 tape recording that was provided to my client. He
11 analyzed that and in his expert opinion, he
12 determined that the data in the tape recording is a
13 written language. Because that was the contention
14 the association said, it was not a not a -- not a
15 written -- excuse me -- not a written record.
16 Well, Mr. Flavell said it is a written record.

17 And, Your Honor, we've have written records
18 for 6,000 years. The Sumerians were the first
19 people to have a written record. They used clay
20 tablets. They marked down their meanings and they
21 baked the clay tablet and it turned it into a
22 written record. It wasn't until the Rosetta Stone
23 was found that we're able to interpret those.

24 Well, Mr. Flavell, with his computer
25 engineering experience was able to interpret that

1 the data in the MP3 format is in fact a written
2 language.

3 So as far as the statute is concerned, it is a
4 written form of language. And specifically
5 720.303, Subsection 3 says that -- that the
6 documents must -- minutes for all meetings must be
7 maintained in a written form or in another form
8 that can be converted into written form within a
9 reasonable time.

10 So it's clear that what is on the recording is
11 a written language although we may not understand
12 it, because it's a different language.

13 Mr. Ryan Poliakoff wrote an article and I
14 cited to this in both the complaint and in the
15 opposition. And it's important -- what he says
16 important. If I can read it. It says, the
17 legal -- this is what he wrote in his article for
18 Florida Today.

19 The legal debate here concerns whether a video
20 or audio recording is a "written" record. It is
21 true that digital data is effectively "written" to
22 a hard drive or other permanent storage method, and
23 you could not, for example, argue that digital
24 copies of records are not inspectable because they
25 are not written. And, clearly, the Division of

1 Condominiums, Timeshares, and Mobile Homes has
2 taken a position the recordings are, quote, written
3 records, end quote. Still, the Division does not
4 govern HOAs, and so this issue will remain a bit of
5 a gray area until or unless a Court chimes in.

6 And that's why we're here is to point out to
7 the Court that, both, this is a written record
8 which should have been turned over; and also for
9 the extension or modification of existing law.

10 I cite to the Florida Administrative Code
11 regarding Condominiums, Timeshares, and Mobile
12 Homes. That's at 61B-23.002. And specifically, in
13 that statute, Subsection 3 says, Audio and video
14 recordings made by the board or committee or at
15 their direction. Except, however, recordings of
16 board of directors, unit owners, or committee
17 meetings shall be maintained as official records at
18 least until the minutes of the meeting which was a
19 subject of a recording are approved by the body
20 authorized to approve said minutes.

21 I'll stop right there because the legislature
22 said -- and they made a policy saying, hey, look.
23 The tape recording is an official record until you
24 approve the minutes. They didn't get around to
25 approving these minutes for four months. So she

1 asked for these minutes timely. They gave her an
2 unofficial draft which is clearly not official.
3 The tape recording was clearly the best evidence,
4 the written record and they sat on that for four
5 months.

6 So my argument would be this. If an
7 association wants to not share the tape recording,
8 then they need to promptly put the minutes
9 together. They need to listen to the tape
10 recording and transcribe it into the minutes
11 immediately. They should have the availability of
12 doing it the next month. They waited until -- it
13 looks like -- February to approve these minutes.

14 So the position is clear. It's a written
15 record. They sat on the written record for four
16 months until they finally approved the full written
17 document. I even asked them on November 24th of
18 2021 not to destroy the document, but they did.
19 I'm not asking for damages for spoliation. I put
20 that in my complaint to show the Court that they
21 destroyed that record after I asked them not to.
22 There's something in there they didn't want to
23 share.

24 And that's what my client wants to do. She
25 wants to get that tape recording because there's

1 something in there that relates to her. That's why
2 we are here.

3 So clearly it's a written record. She's
4 entitled to it. They sat on it. And -- and beyond
5 that, public policy should say that this law that
6 is in the condominiums' law that says that the tape
7 recording is a record, shouldn't be applied to the
8 law of the state of Florida regarding homeowners'
9 associations. The legislature hasn't gotten around
10 to it but it seems to me it's clear that public
11 policy would say, that tape recording is an
12 official record until they transcribe it into
13 official minutes.

14 That's my argument.

15 THE COURT: All right.

16 Mr. McLaughlin?

17 MR. MCLAUGHLIN: Response, Your Honor.

18 The condo association, Florida Administrative
19 Code definitely does not apply to this HOA at all.
20 The minutes were transcribed and they were given to
21 the plaintiff. And that's just not finalized until
22 the next board meeting. That's what happened. The
23 next board meeting they finalized them and the
24 plaintiff had them all along. Just, you know, with
25 a draft stamp on top of them as opposed to a

1 finalized -- this boils down to, though, however
2 this audio recording. Per the statute is not
3 required to be maintained by the association and is
4 not a written record of the association that's
5 required to be maintained or turned over as an
6 official record per the statute. Thus the
7 complaint that requires -- request damages based on
8 violation of the statute just as a matter of law
9 has not been violated, Your Honor.

10 THE COURT: Well, you know, in 720.303,
11 Subsection 3 with regard to minutes -- and you've
12 all read this a bunch of times. I'm reading it
13 myself over and over. It says minutes of all
14 meetings of the members of an association and of
15 the board of directors of an association must be
16 maintained in written form or in another form that
17 can be converted into written form within a
18 reasonable time.

19 So the way I read that, I would think, that
20 whatever the alternative form is before it's been
21 converted into written form, would be the minutes.
22 Right? I mean, obviously, yes, they're going to
23 convert it to a written document that's going to be
24 voted on and approved as the minutes at some point
25 in the future. But it seems to me that up until

1 they do that, that other form is considered the
2 minutes.

3 Now, once they have converted that to written
4 minutes and it's been approved, I would agree with
5 you that perhaps at that point, it does not any
6 longer constitute the minutes. The written
7 approved minutes would then constitute that.

8 So as I understand it and maybe I'm missing
9 something, Mr. Gingo was, I think, arguing that
10 these were -- that this audio was requested before
11 the minutes were in writing approved by the board.

12 MR. GINGO: That's correct.

13 THE COURT: And it seems to me, then, until
14 that point under that statute, that may stand in
15 place as the minutes. It says they must be
16 maintained in written form or in another form that
17 can be converted into written form within a
18 reasonable time.

19 So how was that not the minutes until the
20 minutes are written and approved?

21 MR. MCLAUGHLIN: Well, the written -- the
22 meetings in this -- in this case, the minutes were
23 written. They just aren't able to be approved
24 until the next board meeting. However, the -- the
25 audio is, you know, no longer the minutes. The

1 minutes have been written.

2 THE COURT: But if they requested the audio
3 before there were any minutes reduced to writing,
4 wouldn't that still be the only source of the
5 minutes at that point?

6 MR. MCLAUGHLIN: The minutes are the written
7 form. And that's what were -- were produced.

8 I don't think the audio of the entire board
9 meeting is a official record that's required to be
10 maintained especially after the minutes are
11 written. That's our argument, Your Honor.

12 THE COURT: I mean, I can see, you know, that,
13 you know, there used to be a time where somebody
14 you may have taken down the minutes in shorthand.
15 There used to be a time when, you know, somebody
16 would just make their own notes. They maybe had a
17 court reporter take down the minutes in a form that
18 you and I can't read, only a court reporter can
19 read.

20 And so -- I mean, but up until -- you know, up
21 until the point that that's reduced to a legible --
22 a legible form of the minutes in writing, it seems
23 to me that that would constitute the minutes. And
24 if they're requested before that's done, I can't
25 say that at this point without any case law telling

1 me otherwise, that that's grounds to just outright
2 dismiss the lawsuit.

3 So I'm going to deny the motion to dismiss at
4 this time.

5 And, Mr. McLaughlin, since this was your
6 motion, if you'll get me an order. How long do you
7 need to file a response to the lawsuit, an answer?

8 MR. MCLAUGHLIN: And just for clarity,
9 Your Honor, regarding the allegations of the
10 spoliation of allegations as part of the claim --

11 THE COURT: He's not -- he -- Mr. Gingo, as I
12 understand it, is not suing for any monetary damage
13 as a result of that. Right?

14 MR. GINGO: Right.

15 THE COURT: He put that in there for some
16 other purpose. It's not a separate claim for
17 damage.

18 MR. MCLAUGHLIN: I think, though, in the
19 wherefore clause he asks for relief that Defendant
20 is guilty of spoliation of evidence. That's right
21 in the wherefore clause.

22 THE COURT: Maybe that needs to be cleaned up,
23 then.

24 MR. GINGO: The only monetary damages I'm
25 asking for is the \$50 a day for ten days, I

1 believe, is what the statute says.

2 THE COURT: Okay. For failure to turn over
3 the --

4 MR. GINGO: Yes.

5 THE COURT: -- in this case, the audio?

6 MR. GINGO: Yes.

7 THE COURT: All right.

8 So somehow it can be cleaned up. I mean, if
9 you want to, you know, I'm assuming you don't want
10 to have to amend the complaint just for that. But
11 you know, you could enter into a stipulation.

12 I mean, he's basically stipulating right now
13 that that's not a separate claim for damages. The
14 only thing they're suing for is the \$50 a day for
15 ten days for failure to turn over the audio.

16 MR. MCLAUGHLIN: Yeah.

17 I guess, Your Honor, however the request is,
18 let plaintiff's counsel and I see if we can agree
19 on the words to some stipulation --

20 THE COURT: Yeah, that's fine.

21 MR. MCLAUGHLIN: -- clear.

22 Otherwise, if we can't, then require him to
23 file an amended pleading --

24 THE COURT: Yeah.

25 Or I'll be happy to enter an order that says

1 that.

2 MR. MCLAUGHLIN: However you would like,
3 Your Honor.

4 THE COURT: Yeah.

5 MR. GINGO: Yeah. That would be fine with us.

6 THE COURT: Okay. All right. Very good.

7 And I'm sorry -- so how long do you need to
8 file an answer with that understanding? And you
9 could put in your answer that based upon the
10 stipulation in open court that the spoliation is
11 not a separate claim, if you want to.

12 MR. MCLAUGHLIN: With the holiday, Your Honor,
13 I would ask 15 to 20 days.

14 THE COURT: Yeah. Yeah.

15 20 days from the order. How about that?

16 MR. MCLAUGHLIN: Okay.

17 THE COURT: Okay. All right. Very good.
18 Anything else?

19 MR. GINGO: Not from us.

20 THE COURT: All right. Thank you all very
21 much. Have a good Thanksgiving everybody.

22 MR. MCLAUGHLIN: Thank you, Your Honor.

23 (This hearing was concluded at 3:45 p.m.)

24

25

C E R T I F I C A T E .

STATE OF FLORIDA:
COUNTY OF BREVARD:

I, LISA A. BRADSHAW, Court Reporter, DO HEREBY
CERTIFY that I was authorized to and did
stenographically report the foregoing proceedings and
that the transcript is a true and complete record of my
stenographic notes.

I further certify that I am neither attorney
or counsel for, not related to or employed by, any of
the parties to the action in which this statement is
taken; and further that I am not a relative or employee
of any attorney or counsel employed by the parties
hereto, or financially interested in the action.

DATED this 2nd day of December, 2022.

Lisa A. Bradshaw

LISA A. BRADSHAW
COURT REPORTER