

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

IN RE: PETITION FOR RECALL ARBITRATION

Filed with
Arbitration Section

**HERON AT THE HAMMOCKS
CONDOMINIUM ASSOCIATION, INC.,**

SEP -4 2014

Petitioner,

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

v.

Case No. 2014-03-1415

UNIT OWNERS VOTING FOR RECALL,

Respondent.

_____ /

SUMMARY FINAL ORDER

Statement of the Issue

The issue in this case is whether Heron at the Hammocks Condominium Association, Inc. (the Association) properly rejected the recall by written agreement of all members of a five-member board of directors.

Relevant Procedural History

On July 25, 2014, the Association filed a Recall Arbitration Petition. On July 30, 2014, the arbitrator entered an order requiring filing and an order requiring answer. On August 15, 2012, Respondent filed an Answer. On August 27, 2012, the Association filed a reply and a response to the order requiring filing.

Findings of Fact

1. Heron at the Hammocks Condominium Association, Inc. is the legal entity responsible for the operation of Heron at the Hammocks Condominium.

2. The total number of units in the Association is 264. The Declaration of Condominium provides that each unit has an equal voting share. The Association owns two units, therefore the maximum number of voting interests is 262.

3. There were five seats on the Association's board of directors at the time the recall was served.

4. On July 15, 2014, the Association received a written recall agreement containing 152 purported recall votes. The directors sought to be recalled and the corresponding number of ballots as to each are:

Ida Suarez	151
Carlos A. Avila	152
Sal Fallavollita	152
Roberta Winokur	151
Lourdez Rodriguez	151

5. The written recall agreement ballots served on the board utilized the standard form available from the Division.

6. The replacement candidates are Maria Alonso, Pedro N. Raya, Maria del C. Acosta, Rajandra Prakash, Ines Carreno.

7. The date of the next regularly scheduled election for the seats of the board members subject to recall is in November 2014.

8. The Board of Directors of the Association held a properly-noticed meeting on July 21, 2014, at which it did not certify the recall.

9. The minutes of the board meeting of July 21, 2014 document the meeting at which the board voted not to certify the recall. According to the minutes of the meeting, the reasons the board rejected the recall are as follows:

a. The owners of 35 units voting for recall have had their voting rights suspended.

b. The signature on the ballots for units 3-106, 6-202, 6-205, 8-104, 8-104, 8-106, 9-105, 16-14, 17-13, 22-13 and 25-11 do not match known exemplars of the signatures of the record title holders.

c. Seven ballots (units 3-103, 7-106, 9-104, 11-11, 13-14, 16-13, 21-13) were rejected because the person who signed the ballot had no authority to vote for the unit.

d. Two ballots were rejected because the Association suspected that the ballots were altered from a previous recall attempt.

10. According to the minutes of the recall meeting, a total of 54 ballots were rejected. Therefore, the board determined that there were only 98 valid recall ballots for two members of the board and 97 valid recall ballots for the remaining three members of the board. Consequently, it concluded there was an insufficient number for a successful recall.

11. The Association claims the voting rights of 60 unit owners were automatically suspended on the date of service of the recall pursuant to Article V, Section 7 of its By-Laws which provides:

Right to Vote. At any meeting of the members, every member having the right to vote shall be entitled to vote in person or by proxy, provided however, if such Voting Member represents a Unit whose owners are at least thirty (30) days delinquent in the payment of any assessments then that Voting Member shall not be entitled to vote.

12. The Association alleges that its governing documents do not contain the operative language which incorporates subsequent amendments to Chapter 718, Florida Statutes into its governing documents.

13. Respondent alleges that the Association's by-laws conflict with the Section 718.303, Florida Statutes, and the Association has not complied with the statute, therefore no owner's voting rights have been properly suspended.

14. The owners of units 3-106, 6-202, 6-205, 8-104, 8-106, 9-105, 16-14, 17-13, and 22-13 have submitted notarized affidavits that the signatures on their respective ballots are authentic.

Conclusions of Law

The arbitrator has jurisdiction of the parties and the subject matter of this dispute pursuant to Sections 718.112(2)(j) and 718.1255, Florida Statutes. A Summary Final Order is appropriate in this case pursuant to Rule 61B-50.119(3), Florida Administrative Code.

Signatures Do Not Match Exemplars On File

The Association rejected ballots for ten units because the signatures on the ballots did not match exemplars on file with the Association. Rejection of ballots because the signatures do not match exemplars on file with the Association is one of the weakest allegations presented in recall cases. *Windhover Ass'n, Inc. v. Unit Owners Voting for Recall*, Arb. Case No. 2010-03-4052, Summary Final Order (August 10, 2010). It will not be found to create a disputed issue of fact without supporting affidavits from the individual unit owners or expert testimony from a qualified document examiner who has had the opportunity to inspect known original signatures. See *Lake and Tennis*

Villas Condominium Ass'n., Inc. v. Unit Owners Voting for Recall, Arb. Case No. 2008-02-8195, Recall Final Order (September 4, 2008).

The owners of nine units filed affidavits affirming their signatures on the ballots. Testimony from a handwriting expert is legally insufficient to overcome the testimony of an attesting witness. *Id.* Therefore, these nine ballots were improperly rejected. Consequently when the ballots are added back, there are at least 107 valid recall ballots for two members of the board and 106 valid recall ballots for the remaining three members of the board.

Suspension of Voting Rights

The Association rejected the recall ballots of 35 unit owners because it claims it properly suspended the voting rights of these owners, along with 25 other owners who did not participate in the recall, pursuant to its by-laws. Respondent alleges that the Association failed to follow the proper procedures set forth in Section 718.303(5), Florida Statutes, and therefore, failed to properly suspend the voting rights of the 60 owners including the 35 who voted for the recall.

Section 718.303(5), Florida Statutes states:

(5) An association may suspend the voting rights of a unit or member due to nonpayment of any monetary obligation due to the association which is more than 90 days delinquent. A voting interest or consent right allocated to a unit or member which has been suspended by the association may not be counted towards the total number of voting interests necessary to constitute a quorum, the number of voting interests required to conduct an election, or the number of voting interests required to approve an action under this chapter or pursuant to the declaration, articles of incorporation, or bylaws. The suspension ends upon full payment of all obligations currently due or overdue the association. The notice and hearing requirements under subsection (3) do not apply to a suspension imposed under this subsection.

(Emphasis supplied).

It is unnecessary to determine whether the suspensions were valid.¹ Pursuant to Section 718.112(2)(j)(2), Florida Statutes, a recall is effective if a majority of voting interests approves the recall. If the suspensions were invalid, the number of valid recall votes would be 141 (three directors) or 142 (two directors) out of 262, which is a majority of the eligible voting interests.²

If the suspensions were valid then the number of eligible voting interests would not include the 60 suspended units. *Delray Grande Condo. Ass'n, Inc. v Unit Owners Voting Recall*, Arb. Case No. 2011-05-0905, Summary Final Order (March 23, 2011)

¹ As stated in *One Farrell Park Condo, Ass'n, Inc. v. Unit Owners Voting Recall*, Arb. Case No. 2013-02-6252, Summary Final Order (October 22, 2013):

If an owner was more than 90 days delinquent in the payment of his monetary obligations to an association, it was not until July 1, 2010, that the legislature gave an association the authority to suspend the delinquent owner's "use rights" and his "voting rights". See Laws, c. 2010-174 § 16, eff. July 1, 2010. [footnote omitted]

Prior to July 1, 2010, arbitration case law held that the Condominium Act, Chapter 718, et. seq., Florida Statutes, having derived entirely from statutory roots, outlines exclusively what authority associations can exercise over their membership. Suspensions of use and voting rights were two such actions an association could not take until section 718.303(3) was amended as described below [footnote omitted]. See, *Ludwig v Tudor Cay Condominium Association, Inc.*, Arb. Case No. 2003-06-5896, Final Order on Motion for Rehearing (February 17, 2004)(the statute (Chapter 718) does not provide that the association may disenfranchise an owner for failure to pay a fine or assessment.); *Lincolnwood Towers Condominium Association, Inc., v. Unit Owners Voting for Recall*, Arb. Case No. 99-2047, Summary Final Order (November 18, 1999) (condominiums are creatures of statute and are thus only permitted to exercise those powers provided by statute). Nowhere does the statute permit an association to deny an owner the right to vote or to hold office due to an alleged arrearage in the payment of assessments. *Alan v. Boca, Cove Home Condominium Association, Inc.*, Arb. Case No. 92-0263, Order Enlarging Previous Order dismissing Counterclaim for Libel, Slander and Conspiracy to Libel for Lack of Jurisdiction (March 1, 1993) The validity of that portion of the Declaration, which purports to permit the board to suspend the voting rights and use of the common elements for violations of board rules, is suspect; the Act specifies those remedies available to an association seeking to enforce its rules and regulations; other remedies not specified are not authorized by the Legislature, particularly where, as here, the association seeks to impair fundamental rights.) If the Association's authority is limited to that which existed in the Condominium Act as of 1989, the Association would still not have the authority to suspend any members' voting rights for any reason.

² This assumes that the Association properly rejected the remaining ten ballots. It is not necessary to actually determine if the Association properly rejected these ballots.

("On the issue of calculating the number of voting interests eligible to vote in the instant recall, Section 718.303(5), Florida Statutes, requires that the voting interests of those unit owners which had been suspended by the Association may not be counted towards the total number of voting interests necessary to approve the recall.") Therefore, the total number of eligible voting interests voting for recall would be 202 and 102 valid recall votes would constitute a majority. As determined above, at least 107 valid recall ballots to recall two directors and 106 valid recall ballots to recall the remaining directors were served on the Association irrespective of any ballots rejected for delinquent payment.

Conclusion

Regardless of whether the Association properly suspended the voting rights of 60 unit owners, the recall has been approved by a majority of the eligible voting interests. Therefore, the recall must be certified.

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

1. The recall of board members Ida Suarez, Carlos A. Avila, Sal Fallavollita, Roberta Winokur and Lourdez Rodriguez is hereby **CERTIFIED** and they are **REMOVED** as directors effective as of the date of the entry of this order.

2. Because a majority of the board has been recalled, Maria Alonso, Pedro N. Raya, Maria del C. Acosta, Rajandra Prakash, Ines Carreno shall take seats on the board effective immediately for the remainder of the term of the seat.

3. Within five (5) full business days from the date of this Order, Ida Suarez, Carlos A. Avila, Sal Fallavollita, Roberta Winokur and Lourdez Rodriguez shall deliver any and all records of the Association in their possession to the new board of directors.

DONE AND ORDERED this 4th day of September, 2014, at Tallahassee, Leon
County, Florida.



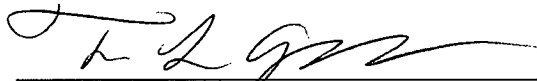
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Certificate of Service

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 4th day of September,
2014:

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