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

IN RE: PETITION FOR BINDING ARBITRATION - HOA

Larkenheath Villas Homeowners Association, Inc.,

Petitioner,

v. **Case No. 2009-05-6469**

Homeowners Voting for Recall,

Respondent.

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SUMMARY FINAL ORDER

Statement of Issue

The issue in this case is whether Larkenheath Villas Homeowners Association, Inc. (Association) properly chose not to certify the recall received by the board of directors on October 13, 2009.

Procedural History

On October 23, 2009, the Association filed a Petition for Binding Arbitration seeking an Order affirming the decision of the Association's five member board of directors (board) not to certify the recall of all five members of the board. Following an Order Requiring Answer, Respondent filed an answer to the petition on November 30, 2009. On December 8, 2009, a Notice of Communication was entered because there was no indication Respondent had provided to the Association a copy of the answer to the petition that Respondent had filed.

On December 18, 2009, the Association filed Petitioner's Memorandum of Law. On January 11, 2010, Respondent filed a Response to Petitioner's Memorandum of Law.

Findings of Fact

1. There are 209 voting interests in the Association. The recall of a board member requires a majority vote of the total voting interests - 105 valid votes. One hundred thirteen (113) recall ballots were filed with the petition.

2. The board consists of five members: Louis Galetta, Charles Light, Janet Wyett, Peter Caffyn and Sylvia Gentile.

3. The written agreement seeks to recall all five board members. The replacement candidates are Linda Brunscheen, Loreto Abogabir, Robert Sturm, Ronald Kiepke and Paul O'Bday.

4. It is undisputed that the written recall agreement consisting of 113 recall ballots was served on the board at approximately 1:00 p.m. on October 13, 2009, and the board held a meeting to address the recall on October 19, 2009. At the meeting, the board voted not to certify the recall rejecting various ballots for various reasons.

5. According to the minutes of the October 19, 2009 meeting of the board to consider the initial recall, a total of 21 ballots for the following addresses were rejected for the reasons stated:

> Recall ballots lapsed because 120 days had elapsed between signature date and service date:
>
> 1331 Amberidge
> 31955 Stillmeadow

Voted for more replacement candidates than were listed:

1123 Bensbrooke Drive

Rescission of ballot:

31925 Turkeyhill
31838 Turkeyhill
31835 Blythewood
1101 Bensbrooke
31822 Larkenheath

Ballot signed with initials only and initials did not match name of homeowner:

31913 Turkeyhill

Ballot signatory, Gregory Lisk, had no relationship with limited liability corporate owner:

31965 Stillmeadow

Ballot signatory did not own the property at the time of service of the agreement:

31912 Turkeyhill

Homeowners who signed the following ballots were more than 90 days past due in the payment of their assessments, and under Article IV(1)(c) of the Declaration, their voting rights were suspended on October 15, 2009:

1314 Ambridge Drive - Creutz
1318 Ambridge Drive - Creutz
1319 Ambridge Drive -Hyacinthe
1341 Ambridge Drive -Giffin
31814 Blythewood Way - Brown
31836 Stillmeadow Drive - Peck
31844 Stillmeadow Drive - Burgess
31827 Turkeyhill Drive - Overman
31837 Turkeyhill Drive - Bellamey
31839 Turkeyhill Drive - Neal

6. Although the minutes state the ballot for 1101 Bensbrooke was rescinded, there was no purported rescission filed with the petition.

7. A purported rescission by Paul R. Longchamps and Candace E. Longchamps for 31807 Blythewood was filed with the petition, but there was no ballot filed with the petition for this address.

8. There was a duplicate ballot for 31912 Turkeyhill.

9. There are 92 uncontested votes to recall each of the five board members.

Conclusions of Law

This final order is entered pursuant to section 720.311(1), Fla. Stat., which requires recall disputes filed with the Division to be conducted in accordance with the provisions of sections 718.112(2)(j) and 718.1255, Fla. Stat., and the rules adopted by the Division. Rule 61B-80.114, Fla. Admin. Code, provides for summary disposition of a petition for recall arbitration where there are no issues of material fact in dispute.

Rescission

The Association rejected five (5) ballots asserting that the homeowner rescinded his or her ballot voting in favor of recall of the five board members. As evidence of rescission of each ballot, except the ballot for 1101 Bensbrooke, the Association filed a copy of an email purportedly sent by the homeowner rescinding the ballot voting in favor of recall. Respondent argues that these homeowners may not rescind their ballots by email.

Rule 61B-81.003(1)(k), Fla. Admin. Code, provides, "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." The Association argues that based upon two provisions in the By-laws and *Daytona Beach Club Condo. Ass'n, Inc. v. Unit Owners Voting for Recall*, Arb. Case No. 06-03-

0665, Summary Final Order (July 17, 2006), a rescission by email is permitted. Section 2.4 of the Association's By-laws relates to special meetings and provides as follows:

> Section 2.4. Special Meetings. The President may call special meetings. In addition, it shall be the duty of the President to call a special meeting if so directed by resolution of the Board or upon a petition signed by the Members representing at least ten percent (10%) of the total votes of the Association. Signatures on any such petition may be filed by facsimile transmission or other electronic means provided the signature clearly acknowledges the substantive content or purpose of the petition.

If this provision allows members of the Association to petition for a special meeting and submit the petition by email, it is clear that whatever the method of transmission, the member's signature must be included. The purported rescission emails filed with the petition in the case at hand do not include any signature of the person purportedly rescinding the ballot.

Section 3.9 of the Association's By-laws relates to notice for board of director meetings and provides, in pertinent part:

> Section 3.9 Notice, Waiver of Notice.
> . . .
>
> (b) Notice of meetings of the Board shall be given to each director by (i) personal delivery, (ii) first class mail, postage prepaid, (iii) telephone communication, either directly to the director or to a person at the director's office or home who would reasonably be expected to communicate such notice promptly to the director, or (iv) telephone facsimile, computer, fiber optics or other electronic communication device, with confirmation of transmission.
>
> All such notices shall be given at the director's telephone number, fax number, electronic mail number, or sent to the director's address as shown on the records of the Association. Notices sent by first class mail shall be deposited into a United States mailbox at least four (4) business days before the time set for the meeting. Notices given by personal delivery, telephone or other device shall be delivered or transmitted at least seventy-two (72) hours before the time set for the meeting.

The Association argues that a homeowner's rescission of that homeowner's recall ballot is mere notice and is analogous to the above provision which arguably permits notice of a board meeting to be sent to a board member by email.

In *Daytona Beach Club* cited above, the arbitrator found that recall ballots, most of which were unsigned copies of emails or unsigned, typewritten letters, were recall ballots lacking the requisite signature and therefore were fatally flawed and rejected. The arbitrator in *Daytona Beach Club* followed *Gatsby Condo. Ass'n, Inc. v. Unit Owners Voting for Recall*, Arb. Case Nos. 2004-03-4272, 2004-03-3311, Summary Final Order (Aug. 19th, 2004). In *Gatsby* a recall ballot was rejected because the ballot was submitted in a letter format via email and failed to contain a signature, electronic or otherwise, as required by administrative rule. The arbitrator noted that email can be manipulated to appear falsely to be sent by a particular individual, therefore, some method of signature verification must be demonstrated. Additionally, the governing documents did not specifically permit the submission of recall ballots by email nor was it demonstrated that the Association had accepted or failed to reject email recall ballots in the past.

In the case at hand, the arbitrator finds that the rescission of a ballot by email is more analogous to a recall ballot which requires a signature than such rescission is to a notice of a board meeting which the By-laws of the Association appear to permit to be sent to a board member by email. Thus, the purported rescissions by email for 31925 Turkeyhill, 31838 Turkeyhill, 31835 Blythewood, and 31822 Larkenheath are defective, and these ballots will be counted.

Although the minutes of the meeting to address the recall and the petition state there was an email rescission of the ballot for 1101 Bensbrooke, there was no copy of a rescission, email or otherwise, filed with petition. Thus, the ballot for the ballot for 1101 Bensbrooke also will be counted.

Home Owner Delinquent in Assessment

The Association will be considered to have rejected ten recall ballots because the homeowner was delinquent more than 90 days in the payment of assessments.[1] Section 720.305(3), Fla. Stat., provides, "If the governing documents so provide, an association may suspend the voting rights of a member for the nonpayment of regular annual assessments that are delinquent in excess of 90 days." Article IV(1)(c) of the

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[1] It is not entirely clear that the Association specifically rejected these ballots on this basis. The minutes of the meeting at which the recall was considered state, in pertinent part:

> The Board discussed the agreements to be disqualified.
> . . .
>
> h) Discussion by the Board continued with regard to ten (10) owners who signed recall agreements but who are 90 days past due on their assessments. Under Article IV, Section (1) (c) of the Dedaration, their voting rights were suspended by the Board at a Board meeting on October 15, 2009. Mr. DeFurio presented his legal opinion on the disqualification of these agreements and how the Board should proceed. He discussed Article IV, Section (1) (c) of the Declaration. Discussion continued regarding 90 day status of assessments and arbitration. Mr. DeFurio requested that the parcel number, name, and address of the ten (10) units 90 days delinquent in their assessment be added to the record. Mr. Galetta read into the record the following information.
>
> [list of 10 addresses and names omitted]
>
> Mr. De Furio advised that for the reasons set forth above for disqualification of the voting agreements (including items b and d above that had been set aside for further discussion) the Board could entertain a motion to not certify the recall. It was discussed that even if some, but not all of the questionable recall agreements were counted by the arbitrator, a sufficient number of recall agreements might still be disqualified to support a case not to certify the recall.

This portion of the minutes does not actually state that the board is disqualifying these ballots. It is clear that with respect to other ballots, the minutes reflect that the board was capable of doing so. For example, with respect to other ballots, the minutes state: "Mr. DeFurio stated this [ballot] needed to be listed on the disqualified name list" and "Mr. DeFurio stated this [ballot] should be disqualified." The better practice is for the minutes to state specifically and unequivocally exactly which ballots the board is rejecting.

Declaration of Covenants, Conditions and Restrictions for Larkenheath (Declaration) provides every owner has a right of enjoyment of the common area subject to:

> (c) The right of the Association to suspend the voting rights and right to use of the Common Area by an Owner for any period during which any regular annual assessment levied under this Declaration against his Lot remains unpaid for a period in excess of ninety (90) days, and for a period not to exceed sixty (60) days for any infraction of its published rules and regulations;

The October 19, 2009 minutes of the board meeting to consider the recall state that at a Board meeting on October 15, 2009 the voting rights of the ten homeowners were suspended.

In the Answer, Respondent asserts that before the October 15, 2009 meeting suspending the voting rights of the ten homeowners, no homeowner had ever been denied their voting rights, even if they were delinquent for the requisite period of time in the payment of the regular annual assessment. The Association's memorandum of law filed in response to the Answer does not dispute Respondent's assertion with respect to lack of any prior suspension. Rather, the Association argues the case cited by Respondent in support of its position is inapposite.

Respondent cites to *Sandpointe Townhouses Owner's Ass'n, Inc. v. Homeowners Voting for Recall*, Arb. Case No. 2006-00-7925, Summary Final Order (March 24, 2006). In *Sandpointe* the arbitrator found the Association improperly rejected recall ballots based on 90-day delinquency in the member's account. The arbitrator found that the "detail sheets" filed included charges for "late fee" and as such were not regular annual assessments for which voting rights could be suspended under the governing documents and were not an "assessment" as defined in Section 720.301(1), Fla. Stat. The arbitrator also noted that in the interim between the first

recall attempt involving the same parties for which an arbitration case was filed and the board's decision not to certify the recall was affirmed and the second recall attempt addressed in arbitration case no. 2006-00-7925, the board held a meeting and announced by way of "resolution" that it would enforce the provision permitting the suspension of voting rights for a 90-day delinquency in assessment payment. Based upon the circumstances surrounding the adoption of the "resolution," the arbitrator found that "[b]ecause the board had not previously enforced this voting suspension provision, the board cannot, in the face of a recall effort, rely on its authority to suspend voting rights to disenfranchise otherwise eligible voters participating in the recall."

In the case at hand, the Association argues that the arbitrator's second reason in *Sandpointe* noted above for finding the Association improperly rejected recall ballots based on 90-day delinquency is mere dicta. To the contrary, the arbitrator's conclusion that the board's attempt in *Sandpointe* to enforce a voting suspension provision in the face of a recall effort is a completely independent reason for the arbitrator's finding in that case that the board improperly rejected ballots based upon suspension of voting rights. The reasoning of the arbitrator in *Sandpointe* is applicable to the case at hand, and the board has attempted to implement suspension of voting rights for the first time only in the face of a recall.

The reasoning in *Sandpointe* also negates the Association's argument that under the terms of the voting rights suspension provision in the Declaration, "[t]he Association may suspend the voting rights for a short period or a long period, for a particular election, or for numerous elections." This is exactly the scenario the arbitrator in *Sandpointe* found improper, and it will not be permitted in the case at hand.

The Association also argues that because the *Sandpointe* case is not noted on the Division's online Final Order Index or in counsel's Lexis-Nexus search engine, it should not be considered. Just because a case is not on the Division's online Final Order Index or in counsel's search engine does not mean the case does not exist and cannot be used in argument. The same is true with respect unreported state and federal cases.

It also should be noted that the Association in the case at hand did not file anything indicating that after the board's vote on October 15, 2009 to suspend the voting rights of the ten homeowners, these homeowners were given some form of notice of the suspension. Under Section 720.305(3), Fla. Stat., and the Association's Declaration, basic due process requires the board to provide written notice of the suspension to the homeowner before a recall ballot can be rejected on this basis.

Irrespective of the arguments of the parties, the Association's rejection of these ten ballots for delinquency in the payment of assessments must be denied for another reason. The recall ballots were served on the Association on October 13, 2009. According to the minutes of the board meeting to address the recall, the board suspended the voting rights of these ten homeowners at a board meeting on October 15, 2009, i.e., two days after the recall ballots were served. The members voting in favor of the recall are deemed to have cast their votes when the written recall agreement is served on the Association. However, the Association did not take any action to suspend their voting rights until after their ballots were cast. Because their voting rights were not suspended at the time they cast their ballots, the Association improperly rejected these ten ballots. *See Holley by the Sea Improvement Ass'n, Inc. v.*

Homeowners Voting for Recall, Arb. Case No. 2007-00-7012, Final Order (May 10, 2007).

Replacement Candidates Not Properly Elected

The Association rejected the recall ballot for 1123 Bensbrooke Drive asserting the homeowner voted for more replacement candidates than were listed. The vote for recall of board members is treated separately from the vote for replacement candidates, and the Association cannot reject recall ballots based on replacement candidate issues. *Lee's Crossing Homeowners Ass'n, Inc. v. Homeowners Voting for Recall*, Arb. Case No. 2008-01-9894, Summary Final Order (Aug. 11, 2008); *Three Lakes Village Condo. Ass'n., Inc. v. Unit Owners Voting for Recall*, Arb. Case No. 2004-01-1930, Summary Final Order (April 7, 2007). Thus, this ballot was improperly rejected.

When the 16 ballots which were improperly rejected are added to the uncontested recall ballots, there are more than enough valid recall ballots to sustain the recall, and it is not necessary to consider the other recall ballots rejected by the Association.

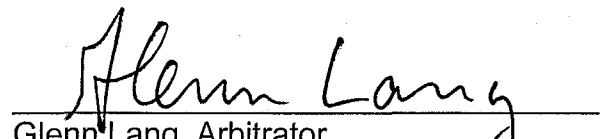
Based upon the foregoing, it is **ORDERED**:

1. The recall of board members Louis Galetta, Charles Light, Janet Wyett, Peter Caffyn and Sylvia Gentile is hereby CERTIFIED and they are REMOVED as directors effective as of the date of the mailing of this order.

2. As the entire five member board has been recalled, the replacement candidates Linda Brunscheen, Loreto Abogabir, Robert Sturm, Ronald Kiepke and Paul O'Bday shall take office upon the mailing of this order for the unexpired terms of the recalled directors.

3. Within five (5) full business days from the effective date of this recall, Louis Galetta, Charles Light, Janet Wyett, Peter Caffyn and Sylvia Gentile shall deliver any and all records of the Association in their possession to the new board of directors.

DONE AND ORDERED this 27th day of January, 2010 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 to the following persons on this 27th day of January 2010:

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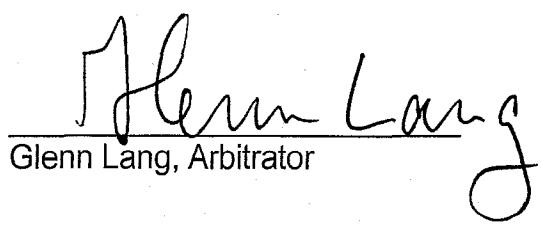

Glenn Lang, Arbitrator