2015 WL 5027299 (Fla.DBPR Arb.)

STATE OF FLORIDA

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION

DIVISION OF FLORIDA LAND SALES, CONDOMINIUMS, AND MOBILE HOMES

IN RE: PETITION FOR ARBITRATION - COOP
PATRICK **JANDEBEUR**, Petitioner,
v.
MARINE TERRACE ASSOCIATION, INC., Respondent.

**FINAL ORDER**

Case No. 14-03-5716
July 16, 2015

**Case Type: Real Estate**
**Award Amount: $0.00**
**Award Date: July 16, 2015**
**Arbitrator: Terri Leigh Jones, Arbitrator**

**Appearances**
For Petitioner: Patrick **Jandebeur**, pro se
For Respondent: Gerard S. Collins, Esq.
Jeffrey Greene, Esq.

**FINAL ORDER**

***1** Pursuant to notice, the undersigned arbitrator of the Division of Florida Condominiums, Timeshares and Mobile Homes conducted a telephonic final hearing in this case on April 28, 2015. During the hearing, the parties presented the testimony of witnesses, entered documents into evidence and cross-examined witnesses. The parties have filed post-hearing memoranda. This order is entered after consideration of the complete record.

**Statement of the Issues**

1. Whether Marine Terrace Association, Inc. (hereinafter the Association) materially altered, without shareowner approval, Petitioner's milk box and hurricane shutters by installing a decorative foam medallion over the milk box opening.

2. Whether the Association improperly withheld access to legal invoice records.

**Relevant Procedural History**

On August 25, 2014, Petitioner filed a petition alleging that the Association, without shareowner approval, had materially altered his milk box opening and hurricane shutters by placing a decorative foam medallion over the milk box opening. Additionally, he alleged he was denied access to cooperative records. On October 31, 2014, the Association filed its answer and affirmative defenses. Among its defenses, the Association alleged that the alterations were authorized by the

  

shareowners and the milk boxes have been non-functioning and obsolete for over ten years. The Association also alleged that the records requested were attorney work product. On November 25, 2014, Petitioner filed a reply.

On April 28, 2015, a final hearing was held on the Association's affirmative defenses. On June 1, 2015, the Association filed a legal brief and proposed final order. On June 2, 2015, Petitioner filed a brief.

## Findings of Fact

1. Marine Terrace Association, Inc. is the corporate entity responsible for the operation of Marine Terrace, a cooperative.

2. Patrick **Jandebeur** owns a unit in the cooperative and therefore, is a member of the Association.

3. On April 28, 2015, a hearing was held on the Association's affirmative defenses. Four witnesses testified at the hearing: Tom Decker, Property Manager; Albert Cipollina, Director; Richard D'Amico, President; and Fred Collins, a contractor. Petitioner declined to testify.

### Milk Box Opening Medallions

4. On September 17, 2013, at a special meeting of the shareowners, a new color scheme for the cooperative building was approved. The notice authorizing the new color scheme included the following language, "The Board shall be authorized to make slight modifications to the description specified to address field conditions, as determined necessary by the Board in its sole and absolute discretion."

5. The building was built in the 1950s. When constructed, each unit had a milk box opening so a delivery person could directly deliver milk from outside the unit to the kitchen by placing the milk bottle into the box. The Association provided testimony that the milk boxes had been painted shut for over ten years. Petitioner did not provide any contradictory evidence.

***2** 6. The Board was advised by their contractor that a uniform color look could not be obtained even if the board plastered over the openings. The Board decided to install decorative foam medallions over the openings. The medallions are glued on the building and then caulked. The medallions are consistent with the new color scheme and the overall aesthetics of the building.

7. For three units, including Petitioner's unit, the medallions covered the screw anchor holes that secure the units' hurricane shutters. In April of 2015, the Association relocated the medallions so the screw anchor holes were accessible.

### Attorney Invoice Records

8. On June 24, 2014, Petitioner submitted a request to inspect records which included 11 items. All items were timely made available except for legal invoices from Randall K. Rodgers and Associates for the period of January 2014 through June 17, 2014.

9. On September 22, 2014, Petitioner submitted the same request as the June 24, 2014 request with four additional items. All items were timely made available except for legal invoices from Randall K. Rodgers and Associates for the periods of January 2014 through June 17, 2014.

10. On September 30, 2014, Petitioner submitted a letter to the Association that stated he was seeking access to "work product related to Randall Rogers invoices 40118D, 39982A, and 39116."

  

11. Tom Decker stated he contacted Mr. Rodgers about Petitioner's request. He stated that he relied on Mr. Rodgers's advice not to provide access to the legal invoices. The Association claims that Petitioner is not entitled to access to the legal invoices because they contain attorney-client privileged communications and attorney work product.

**Conclusions of Law**

The undersigned has jurisdiction of the parties and this dispute pursuant to Sections 719.1255 and 718.1255, Florida Statutes.

Milk Box Opening Medallions

Section 719.1055, Florida Statutes provides:
(1) Unless otherwise provided in the original cooperative documents, no amendment thereto may change the configuration or size of any cooperative unit in any material fashion, materially alter or modify the appurtenances of the unit, or change the proportion or percentage by which the owner of the parcel shares the common expenses and owns the common surplus, unless the record owner of the unit and all record owners of liens on it join in the execution of the amendment and unless the record owners of all other units approve the amendment. Cooperative documents in cooperatives created after July 1, 1994, may not require less than a majority of total voting interests for amendments under this section, unless required by any governmental entity.

(emphasis supplied.) Petitioner alleges that the Association has materially altered his milk box and hurricane shutters which are appurtenant to his unit.

***3** In *Sterling Village Condo., Inc. v. Breitenbach*, 251 So. 2d 685 (Fla. 4th DCA 1971), the court stated:
(A)s applied to buildings the term "material alteration or addition" means to palpably or perceptively vary or change the form, shape, elements or specifications of a building from its original design or plan, or existing condition, in such a manner as to appreciably affect or influence its function, use, or appearance.

It is undisputed that the changes to the building color scheme were approved by the shareholders. The Board was also authorized to make "slight modifications" to the appearance of the building if field conditions required. The Association's contractor advised that a uniform color could not be achieved over the milk boxes. The Association is entitled to rely on the recommendations of an expert to make necessary changes to restore and maintain common elements. *Krebs v. Dunes Club Ass'n, Inc.*, Arb. Case No. 2013-02-2515, Summary Final Order (August 28, 2013). The installation of these decorative foam medallions was an authorized alteration to the building's appearance.

However, Petitioner alleges that the medallions not only changed the appearance of the outer wall of the cooperative but changed the function and use of his milk box and hurricane shutters, which are appurtenant to his unit. The only testimony presented at the hearing was that all of the milk boxes had been painted shut for over ten years. Petitioner declined to testify, so the undersigned must conclude that his milk box has not functioned in ten years as well. The installation of the medallions had nothing to do with the loss of the function and use of Petitioner's milk box. The unauthorized material alteration occurred over ten years ago when the Association first painted it shut.

In considering the defense of the statute of limitations, the period begins to run when the action may be brought. *See Sheoah Highlands, Inc. v. Daugherty*, 837 So. 2d 579 (Fla. 5th DCA 2003)(Unit owner alleged condominium association failed to enforce the declaration against five unit owners who erected screen enclosures in violation of the documents. Trial court required removal of two of the five enclosures based upon the five year statute of limitations. Appellate court found either one year or five year limitation period could apply, but court applied longer five year period concluding that when there is a reasonable question as to which limitation period should apply, resolution should be in favor of

longer limitation period.). Therefore, the applicable limitations period is five years. Petitioner should have brought his case when his milk box was first painted shut and was no longer functional which occurred more than five years before filing the petition. Petitioner's claim that the loss of the function and use of his milk box was an unauthorized material alteration is barred by the statute of limitations.

***4** However, witnesses for the Association admitted that until April of 2015, the medallion covered Petitioner's screw anchor holes which prevented Petitioner from securing his hurricane shutters. By limiting the function and use of the hurricane shutters, the Association materially altered an appurtenance to Petitioner's unit without proper authorization. However, Petitioner provided no testimony or evidence that the function and use of the hurricane shutters have not been restored to its original condition. The issue that the installation of the medallions was an unauthorized material alteration is now moot.

Attorney Invoice Records

Section 719.104(2)(c), Florida Statutes provides in pertinent part:
The official records of the association are open to inspection by any association member or the authorized representative of such member at all reasonable times. The right to inspect the records includes the right to make or obtain copies, at the reasonable expense, if any, of the association member. The association may adopt reasonable rules regarding the frequency, time, location, notice, and manner of record inspections and copying. The failure of an association to provide the records within 10 working days after receipt of a written request creates a rebuttable presumption that the association willfully failed to comply with this paragraph. A unit owner who is denied access to official records is entitled to the actual damages or minimum damages for the association's willful failure to comply. The minimum damages are $50 per calendar day for up to 10 days, beginning on the 11th working day after receipt of the written request. The failure to permit inspection entitles any person prevailing in an enforcement action to recover reasonable attorney fees from the person in control of the records who, directly or indirectly, knowingly denied access to the records .... Notwithstanding this paragraph, the following records shall not be accessible to unit owners:

1. Any record protected by the lawyer-client privilege as described in s. 90.502 and any record protected by the work-product privilege, including any record prepared by an association attorney or prepared at the attorney's express direction which reflects a mental impression, conclusion, litigation strategy, or legal theory of the attorney or the association, and which was prepared exclusively for civil or criminal litigation or for adversarial administrative proceedings, or which was prepared in anticipation of such litigation or proceedings until the conclusion of the litigation or proceedings.

Section 90.502, Florida Statutes, provides in pertinent part:
(1) For purposes of this section:

(a)...

(b)...

(c) A communication between a lawyer and client is “confidential” if it is not intended to be disclosed to third persons other than:

***5** 1. Those to whom disclosure is in furtherance of the rendition of legal services to the client.

2. Those reasonably necessary for the transmission of the communication.

  

(2) A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, the contents of confidential communications when such other person learned of the communications because they were made in the rendition of legal services to the client.

The Association claims it does not have to allow access to the legal invoices because they are protected by the attorney-client privilege and work product provision of Section 719.104(2)(c) 1, Florida Statutes.

An attorney invoice for services is not a communication that is meant to be confidential as it is meant to be enforced through a third party. *Kussoy v. The Sterling Villages of Palm Beach Lakes Condo. Ass'n, Inc.* Arb. Case No. 2011-04-9845, Summary Final Order (December 13, 2011). Additionally, attorney billing and payment records do not fall within the definition of work product. *Id.* If attorney work product is contained in an invoice, e.g. a description of work performed reveals the attorney's thoughts regarding litigation, that information may be redacted.

Next, the Association alleges that Petitioner specifically requested "work product", and therefore, it was not necessary to respond. The arbitrator does not need to reach the issue of whether the non-lawyer Petitioner knew what """""""work product" means in a legal setting. This was his third request for access to these records. The Association should have provided access to these records in response to his first request on June 24, 2014.

Finally, the Association argues that the failure to provide access was not willful. The statute provides that failure to comply with the request within 10 days of the request creates a rebuttable presumption that the failure was willful. The Association alleges that it relied on prior counsel's advice, and therefore, the failure was not willful.

The Association cites to *Blass v. Mini Ass'n, Inc.*, Arb. Case No. 2009-04-3047, Summary Final Order (June 15, 2010). In *Blass*, the arbitrator concluded that the Association's reliance on its attorney's advice regarding complicated facts as to whether a written opinion was protected by attorney-client privilege was enough to overcome the presumption. The instant case relates to only to the issue of legal invoices which is not complicated at all and the well-developed case law is inapposite of the Association's position. Reliance on an attorney's advice does not provide absolute immunity to an Association. In the instant case, the Association has not overcome the presumption that the failure to provide access was willful.

***6** Based upon the above, it is ORDERED:

1. Petitioner's request for a shareowner vote regarding the installation of medallions to cover milk box openings is DENIED as moot.

2. No later than July 24, 2015, the Association shall provide Petitioner access to the legal invoices from Randall K. Rogers & Associates for the periods of January 2014 through June 17, 2014.

3. No later than July 30, 2015, the Association shall pay Petitioner $500.00 in statutory damages.

4. All pending motions are DENIED as moot.

DONE AND ORDERED this 16th day of July, 2015, at Tallahassee, Leon County, Florida.

**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 section 718.1255, Florida Statutes. As provided by section 718.1255, Florida Statutes, 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 Rule 61B-45.048, Florida Administrative Code.

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