

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

IN RE: PETITION FOR ARBITRATION

**MAUREEN SHORT, MARK MUELLER
and PAT HAAS,**

Petitioners,

Filed with
Arbitration Section

v.

JUL 26 2012

Case No. 2012-01-5922

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

Respondent.

SUMMARY FINAL ORDER

Statement of the Issues

The issue presented in the petition is whether the Association properly conducted an annual election held on November 12, 2011.

Relevant Procedural History

On March 26, 2012, Petitioners Maureen Short, Mark Mueller, and Pat Haas filed a petition for mandatory non-binding arbitration against Windhover Association, Inc. (the Association) which alleged that the Association had improperly conducted the annual election on November 12, 2011. On April 2, 2012, an Order Requiring Answer was entered.

On April 18, 2012, the Association filed a motion for extension of time to file its answer, which was granted. On May 7, 2012, the Association filed an Answer. On May

9, 2012, the arbitrator entered an Order Requiring a Reply to the Answer. On June 1, 2012, Petitioners filed a Reply to the Association's Answer.

On July 2, 2012, the arbitrator conducted a case management conference. On July 3, 2012, the arbitrator entered an Order After Case Management Conference which required the parties to file certain documentation concerning the election. On July 13, 2012, the parties filed the last of the documents in response to the Order after Case Management Conference.

Findings of Fact

1. Petitioners are the owners of units governed by the Association and its governing documents.
2. The Association is the entity responsible for implementing the governing documents.
3. Section 3.1 of the Association's By-laws states, in pertinent part:

Annual Meeting. The annual members' meeting shall be held at the office of the Association at 10:00 a.m. Eastern Standard Time, on the third Saturday of November of each year for the purpose of electing Directors and of transacting any other business authorized to be transacted by the members; provided, however, if that day is a legal holiday, the meeting shall be held at the same hour on the next day.
4. The third Saturday in November, 2011, was November 17, 2011. That date was not a legal holiday in the State of Florida.
5. The total number of voting interests in the Association is 340.
6. As of November 12, 2011 (the date the 2011 annual meeting/election was held) 59 voting interests had been suspended by the Association. Therefore, there were 281 active voting interests at the time of the meeting.

7. There are five members on the Association's board of directors. Pursuant to the section 4.3 of the By-laws, all board members serve for a term of one year.

8. When the votes for candidates for the board of directors were tallied at the 2011 annual meeting/election, the results were as follows:

Candidate's name:	Number of votes received:
Kathleen Fiske	103
Parker Perry	101
Fran Pucci	102
Pete Pucci	102
Steve Smith	100
Pat Haas	54
Lisa Matarrese	58
Mark Mueller	57
Maureen Short	57
Paul Simon	60

9. At the meeting, some members of the impartial election committee appointed by the board opened, or started to open,¹ both the inner and outer envelopes of a small number of ballots at the same time, but ceased doing so upon being instructed by the community association manager, Richard D. Murphy, that this was not the correct way to open the ballots.

¹ The issue of whether any envelopes were actually opened may be subject to dispute, but Petitioners have not claimed that their own ballots were improperly opened or that the Association's failure use the

10. At the meeting, two ballots cast by unit owners Edward D. Scaturro and Anne Shellard, both of whom were more than 90 days delinquent in their assessments, were counted.

11. At the meeting, one ballot was counted that had been cast by a former unit owner, Susan Johnson, who had executed a deed in lieu of foreclosure for her unit 12 days prior to the election.

12. At the meeting, one ballot from a parcel owner, Melissa R. Ward, who had changed her surname to Hensler to reflect a change in her marital status, was accepted under her former surname of Ward and counted. Orange County property records indicate that the owner of the unit is Melissa R. Hensler.

13. Petitioners submitted affidavits from six unit owners, executed in January of 2012, who stated that they did not submit ballots for the November 2011 annual meeting/election, did not sign the outer envelopes for their ballots, and did not authorize anyone to vote on their behalf at the meeting. Ballots purporting to be from these six unit owners were received and counted.

14. Prior to the election, Petitioner Maureen Short and another unit owner named Jean Carpenter requested a total of six extra voting ballots and envelopes from Robert Clark Wilson, the Association's on-site maintenance man.

15. Sometime prior to the annual meeting/election, Richard D. Murphy, the community association manager employed by the Association, examined and verified signatures and unit identifications on the outer envelopes on all ballots that were received prior to the meeting. Mr. Murphy also verified the signatures and unit

correct outer envelope procedure *actually* compromised the secrecy of the election or impacted the outcome of the vote in a material manner.

identifications of those parcel owners who attended the meeting and handed in their ballots upon arrival.

16. Mr. Murphy sent a letter to unit owners endorsing five of the ten candidates who were seeking membership on the board of directors. The letter was mailed separately from election materials provided by the Association. The candidates endorsed by Mr. Murphy received the highest number of votes and won the election.

Conclusions of Law

The Division has jurisdiction over the parties and the subject matter pursuant to Section 718.1255, Florida Statutes. For the alleged violations in the conduct of the election, Petitioners seek an Order removing the existing board of directors and appointing Maureen Short, Mark Mueller, Pat Haas, Lisa Materrese and Paul Simon (all of whom were losing candidates in the November 2011 election) as a replacement board. Rule 61B-45.030, Florida Administrative Code, provides that at any time after the filing of the petition, if no disputed issues of material fact exist, the arbitrator shall summarily enter a final order. This Order is entered after the arbitrator has considered all the pleadings and documents filed by the parties.

Failure to Hold 2011 Annual Membership Meeting on Date Specified in By-Laws

Petitioner contends that the Association violated the By-laws by holding its annual membership meeting on November 12, 2011. Section 3.1 of the Association's By-laws, quoted above, requires the Association to hold its annual membership meeting on the third Thursday in November. The exception set forth in Section 3.1 to holding the annual membership meeting on the third Thursday in November applies only if that date is a legal holiday. The third Thursday in November of 2011 was November 17.

That date was not a legal holiday in the State of Florida. Therefore, the exception did not apply.

Prior arbitration case law has held that it is improper for an association to hold its annual meeting on a date other than the date specified in its By-laws. See *Terzis et al. v. Ocean Dunes of Hutchinson Island Condominium Association, Inc.*, Arb. Case No. 94-0385, Summary Final Order (January 31, 1995); see also *McTaggart et al. v. Burgundy Unit Two Condominium Association, Inc.*, Arb. Case No. 02-5879, Final Order (July 18, 2003)(association ordered to comply with its bylaws and hold its annual meeting on the date set forth in the By-laws, unless the documents are amended to provide for a different date); *Gosselin v. Sand Castle Condominium Association, Inc.*, Arb. Case No. 02-5465, Amended Final Order (February 19, 2003)(association violated its bylaws by holding its annual meeting on a date other than the date set forth in the By-laws). Furthermore, as pointed out by the arbitrator in *Terzis*: "In the case of a condominium association, where by statute the election of directors is held at the annual meeting, there is an additional justification for requiring the meeting to be held on the stipulated date: to do otherwise would allow the directors to extend their term of office."

Accordingly, the arbitrator concludes that the Association improperly held its annual membership meeting on November 12, 2011.

Failure to Properly Check Signatures and Unit Identifications
On Outer Ballot Envelopes Against a List of Qualified Voters

Petitioners argue in the petition that the Association failed to have its appointed impartial election committee check the signatures and unit identifications on the outer envelopes against a list of qualified voters, according to the procedures set forth in Rule 61B-23.0021(10)(a) and (b), Florida Administrative Code. Instead, the Association's

community association manager, Richard D. Murphy, verified the signatures on the ballot envelopes that were received prior to the meeting at the time they were received. Petitioners further argue that the Association failed to *adequately* check the signatures and unit identifications against a list of qualified voters, resulting in the acceptance of a ballot from Melissa R. Ward, when the Orange County property records indicate that the owner of the property is Melissa R. Hensler.

Rule 61B-23.0021(10)(b), Florida Administrative Code, states:

(b) Any association desiring to verify outer envelope information in advance of the meeting may do so as provided herein. An impartial committee designated by the board may, at a meeting noticed in the manner required for the noticing of board meetings, which shall be open to all unit owners and which shall be held on the date of the election, proceed as follows. For purposes of this rule, "impartial" shall mean a committee whose members do not include any of the following or their spouses:

1. Current board members;
2. Officers; and
3. Candidates for the board.

At the committee meeting, the signature and unit identification on the outer envelope shall be checked against the list of qualified voters. The voters shall be checked off on the list as having voted. Any exterior envelope not signed by the eligible voter shall be marked "Disregarded" or with words of similar import, and any ballots contained therein shall not be counted.

The Association does not dispute that Richard D. Murphy verified the signatures on the ballots in advance of the election meeting and that he was not a member of an impartial election committee designated by the board.

Accordingly, the arbitrator concludes that the Association violated Rule 61B-23.0021(10)(b), Florida Administrative Code by having signatures and unit identifications on the ballot envelopes verified by the community association manager in advance of the election meeting without holding a special meeting of an impartial committee appointed by the board for this purpose, and without re-verifying the

signatures and unit identifications at the annual meeting/election. However, it is undisputed that Melissa R. Hensler and Melissa R. Ward are one and the same person, and the arbitrator declines to find that the ballot of Melissa R. Hensler, *nee* Melissa R. Ward (or vice versa) was improperly counted.

Failure to Handle Ballots in a Manner Ensuring Their Secrecy

Petitioners argue in the petition that the Association failed to handle ballots in a manner ensuring their secrecy, as required by Rule 61B-23.0021(10), Florida Administrative Code. Members of the impartial committee opened, or started to open, some of the inner envelopes immediately after the outer envelopes were opened, without first having opened all the outer envelopes and placed them in the receptacles. At the Case Management Conference of July 2, 2012, based on statements of the parties, it became clear that only a few ballots, if any, were opened in this manner, and that the committee members immediately ceased opening the inner envelopes upon being instructed that this was not the correct way to open ballots.

In the absence of evidence that the failure of the Association to use the correct outer envelope procedure actually or likely compromised the secrecy of the election or otherwise impacted the outcome of the vote in a material manner, the error committed was not fundamental *per se* requiring the conduct of a new election. *M.J. Genbry v. Casa del Sol (Winter Haven)* Arb. Case No. 02-5687, Summary Final Order (February 6, 2003).

While there may be a factual uncertainty in the instant case as to whether some ballot inner envelopes were actually opened, or whether committee members were in the process of opening them when they were instructed to stop, the arbitrator finds that

this is not an issue of *material* fact. In that the committee's actions were quickly corrected, and the incident involved only a small number of ballots, the arbitrator declines to find that there was a substantial violation of Rule 61B-23.0021(10), Florida Administrative Code.

Failure to Exclude Ballots of Delinquent and Ineligible Owners and Former Owners

Petitioners assert that the Association failed to exclude ballots of delinquent and ineligible owners who were not entitled to vote, in violation of Section 4.2(a) of the Bylaws. Specifically, ballots for Edward D. Scaturro and Anne Shellard were counted, when both owners were more than 90 days delinquent on their obligation to pay assessments, even though these ballots were identified with a mark indicating they should not be counted. Petitioners also assert that the community association manager, Richard D. Murphy, had marked these 2 ballot envelopes indicating that they should not be counted, but did not instruct the impartial committee at the meeting on the meaning of the marks he placed on the envelopes, resulting in the committee opening and counting the ballots contained therein.

Further, Petitioners assert that a ballot cast by Susan Johnson was counted, when in fact Ms. Johnson had executed a deed in lieu of foreclosure to her unit 12 days before the election.

The Association does not dispute that the votes of Edward D. Scaturro and Anne Shellard were erroneously counted. Since there is no dispute, it is unnecessary to determine if the requirements of Sections 718.303 (5) & (6), Florida Statutes, were met. The arbitrator therefore finds that these ballots should have been excluded.

However, the Association claims that it would have been almost impossible to determine that a former unit owner had transferred title to her unit 12 days prior to the election, rendering her ballot ineligible.

Technical difficulties notwithstanding, it is clear that non-owners cannot be allowed to vote in elections. Section 2.3 of the By-Laws of Windhover Association, Inc., states, in pertinent part:

Voting Rights. The owner of each unit shall be entitled to one (1) vote as a member of the Association, and the manner of exercising such voting rights will be determined by these By-Laws.

Prior arbitration cases have consistently held that where the governing documents limit voting rights to unit owners, ballots cast by non-unit-owners should be excluded from elections and recalls. See, e.g., *Greenwich Association, Inc. v. Unit Owners Seeking Recall*, Summary Final Order (May 28, 1999)(Where the bylaws limited voting rights to owners, even though non-owners had been designated on the voting certificates to cast the votes, such designation would be in violation of the bylaws and, therefore, of no effect.)

Therefore, the arbitrator finds that the ballot of Susan Johnson should have been excluded.

Failure to Conduct Impartial Election Because Community Association Manager Sent Letter to Unit Owners Endorsing Certain Candidates

Petitioners argue in the petition that the Association failed to conduct an impartial election because the Association's community association manager sent a letter to unit owners endorsing certain candidates who ultimately won the election. Petitioners assert that the community association manager was acting on behalf of the board and that his actions persuaded unit owners to vote for the incumbent board members.

The copy of the letter sent by the community association manager states in the heading: "Richard D. Murphy, Windhover Association Manager" with Mr. Murphy's telephone number and email address. The email address and associated website is that of Leland Management, a company offering property management services to multiple community associations.

Rule 61B-23.0021(8), Florida Administrative Code, states, in pertinent part:

...The association shall mail or deliver the second notice no less than 14 days and no more than 34 days prior to the election. The second notice and accompanying documents shall not contain any communication by the board that endorses, disapproves, or otherwise comments on any candidate...

It is undisputed that Mr. Murphy sent the letter separately from the notice and election materials that were sent out on behalf of the Association. The contents of the letter speak for themselves. The arbitrator sees no basis on which to conclude that the letter violated Rule 61B-23.0021, Florida Administrative Code.

Failure to Conduct Election in Such Manner as to
Prevent Any Fraud or Intentional Wrongdoing

Petitioners argue in the petition that the Association failed to conduct the election in such a manner as to prevent any fraud or intentional wrongdoing. In support of this allegation, Petitioners provided copies of six affidavits from unit owners, executed approximately two months after the election, stating that someone forged their signatures on the outer ballot envelopes without their knowledge or consent, and that they did not authorize anyone to vote at the November 2011 election on their behalf.

While any allegations of election fraud are disturbing, six affidavits alleging forged ballots are not a sufficient basis on which to conclude that "fraud or intentional wrongdoing permeated the entire election process," as Petitioners suggest. If it were,

anyone wishing to interfere with an election could simply obtain a few extra ballots and envelopes, forge another unit owner's name and signature on them, slip them into the ballot box and then ask that the election results be thrown out. Petitioners cite *Bolden v. Potter*, 452 So. 2d 564 (Fla. 1984) in support of their contention that the results of the election should be overturned. However in *Bolden*, it was determined that over 30% of the absentee ballots could be said to be tainted by a massive vote-buying scheme.² In the instant case, approximately 4% of the 150 unit owners who apparently cast ballots in the election later alleged that their ballots had been forged. This is not sufficient evidence from which to conclude that the entire voting process was so pervasively corrupt that the election results should be thrown out.

Petitioners are not entitled to expect a *perfect* election process – only an election process that is not so flawed with respect to adherence to the governing statutes and the governing documents as to require that the results be discarded. See *Visyak v. Fairway Cove Homeowners Ass'n, Inc.*, Arb. Case No. 2010-02-8255, Summary Final Order (November 16, 2010) If perfection were the required standard, few elections would ever hold up under scrutiny.³

² All absentee ballots voted in a school board election were required to be invalidated, even though the specific number of invalid votes could not be established with mathematical certainty sufficient to change result of the election, where there was clear fraud and intentional wrongdoing via extensive absentee vote buying, to the extent that over 30% of the absentee ballots could be said to be tainted, and over 10% of the absentee voters *admitted* that their votes had been bought. The Court concluded that the vote-buying scheme adversely affected the sanctity of the ballot and public's perception of the integrity of the election, since the conduct was so conspicuously corrupt and pervasive that it tainted the entire absentee voting procedure. *Bolden v. Potter*, 452 So. 2d 564 (Fla.1984)

³ *The Board of Directors of Boca Cove Condominium Association, Inc., v. Catherine Martin, et al.*, Arb. Case No. 93-0261, Summary Final Order Certifying the Recall (November 30, 1993)(The arbitrator therein found that none of the board's stated reasons for its refusal to certify a recall agreement had any merit, stating: "A board cannot refuse to certify a recall agreement signed by the majority of the unit

Requested Relief

Petitioners request that the arbitrator remove the existing board of directors and appoint Maureen Short, Mark Mueller, Pat Haas, Lisa Matarrese and Paul Simon (all of whom were losing candidates in the November 2011 election) as a replacement board. However, Petitioners have not alleged that the results of the election would have been different if the election had been held on the day specified in the bylaws, or if the 10 ballots challenged by Petitioners had not been counted, or if the election committee had checked signatures personally rather than having the association manager check them, or if a few of the inner ballot envelopes had not been opened immediately after the opening of the outer envelopes. When a petitioner has not alleged that a different outcome would have resulted, a request for a new election will be denied. *Maroff Partnership v. Maracay Ass'n Inc.*, Arb. Case No. 00-0461, Summary Final Order (June 28, 2000); see also *Visyak v. Fairway Cove Homeowners Ass'n, Inc.*, Arb. Case No. 2010-02-8255, Summary Final Order (November 16, 2010)(An election was not so flawed with respect to adherence to the governing statutes and the governing documents as to require a new election.)

In summary, Petitioners have not shown *any* material factual dispute as to whether Kathleen Fiske, Parker Perry, Fran Pucci, Pete Pucci, or Steve Smith received more votes than Pat Haas, Lisa Matarrese, Mark Mueller, Maureen Short, or Paul Simon. Further, Petitioners have no standing to assert the rights of Lisa Matarrese or Paul Simon, who are not parties to this action. See *Miller v. Crescent Lake Club*

owners on the grounds that the unit owners were told untruths. Indeed, if that were sufficient legal grounds to invalidate an election, we would have had few, if any, valid elections in this country.")

Homeowners' Association, Inc., Arb. Case No. 2011-03-0323, Summary Final Order (December 20, 2011); and *Greenlee v. Oceanside Terrace Condominium Association, Inc.*, Arb. Case No. 95-0497 (May 10, 1996). Based on the pleadings and the documents submitted to the arbitrator, the Association correctly decided that candidates Kathleen Fiske, Parker Perry, Fran Pucci, Pete Pucci, and Steve Smith had been elected to the board, having received the most votes. While not perfect, the Association's November 12, 2011 annual meeting and election was not so flawed with respect to adherence to the governing statutes and the governing documents as to require the relief Petitioners have asked for, that being removal of the current board of directors and installation of the losing candidates as a replacement board. However, in the future, the Association shall conduct its future annual meetings and elections on the date specified in the By-laws and in accordance with the governing documents, the Florida Statutes, and the Florida Administrative Code.

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

1. Petitioner's claim that the election was improperly conducted is found to be meritorious. However, the relief requested by Petitioners, an Order replacing the board of directors is DENIED.

2. In the future, the Association shall conduct its annual meetings and elections on the date specified in the By-laws, and in accordance with the governing documents, the Florida Statutes, and the Florida Administrative Code.

DONE AND ORDERED this 26th day of July, 2012, at Tallahassee, Leon County,

Florida.



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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.

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 26th day of July, 2012:

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