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,

v.

WINDHOVER ASSOCIATION, INC.,

Respondent.

_____/

Fees Case No. 2012-03-8464
Rel. Case No. 2012-01-5922

FINAL ORDER ON MOTIONS FOR ATTORNEY'S FEES AND COSTS

Procedural History

On September 7, 2012, Windhover Association, Inc. (the Association) filed a motion to recover attorney's fees in the amount of $20,195.00 and $33.39 in costs. The condominium is located in Orange County, Florida. On September 14, 2012, the arbitrator entered an Order Permitting Response to the motion for attorney's fees and costs.

On September 14, 2012, Petitioners filed objections to the Association's motion for attorney's fees and costs and Petitioners' motion for prevailing party attorneys' fees and costs. Petitioners request recovery of attorney's fees in the amount of $11,227.50 and costs in the amount of $366.74.

On September 19, 2012, Petitioners filed a response to the Order Permitting Response. In their response, Petitioners argue that because the arbitrator found that the Association had violated its own election procedures, the Association was not

entitled to an award of attorney's fees and costs, and claim that *Petitioners* were, in fact, the prevailing parties in the case. On October 23, 2012, the Association filed a response to Petitioners' motion for attorney's fees and costs.

Relevant History of the Underlying Case

On March 26, 2012, Petitioners Maureen Short, Mark Mueller, and Pat Haas filed a petition for mandatory non-binding arbitration against the Association. The dispute at issue in the case involved whether the Association properly conducted the annual election on November 12, 2011. As relief, Petitioners sought an order requiring that the results of the 2011 election be discarded and Petitioners installed as a replacement board of directors, or in the alternative, that a new election be conducted under the supervision of the Division or another third party.

On July 26, 2012, the arbitrator entered a Summary Final Order determining that "Petitioners' claim that the election was improperly conducted is found to be meritorious." However, the arbitrator also determined that while not perfect, the Association's annual meeting and election was not so flawed with respect to adherence to the governing statutes and the governing documents as to require that the results be discarded and the relief sought by Petitioners be granted. Therefore, Petitioners' requested relief was denied. Petitioners filed a Motion for Rehearing on August 10, 2012, which was denied on August 15, 2012.

Prevailing Party

Pursuant to Section 718.1255(4)(k), Florida Statutes, the prevailing party in arbitration proceeding shall be awarded the costs of the arbitration and reasonable attorney's fees in an amount determined by the arbitrator. A party is a "prevailing party"

if it succeeds on a significant issue in the arbitration and achieves some of the benefit sought in bringing the action. *Moritz v. Hoyt Enterprises, Inc.,* 604 So. 2d 807 (Fla. 1992); *Harbor Villas at Dunedin Association, Inc., v. Brian Jarl,* Arb. Case No. 2007-05-9710, Final Order on Motion for Attorney's Fees and Costs (December 27, 2007). Rule 61B-45.048(7), Florida Administrative Code, states, in pertinent part: "A prevailing party is a party that obtained a benefit from the proceeding...."

The Association contends in its motion for attorney's fees and costs that because the arbitrator in the underlying case denied Petitioner's requested relief (replacement of the board or a new election), the Association is the prevailing party in this action. However, contrary to what the Association suggests, the prevailing party analysis is not so one-dimensional in the case under consideration. Prior arbitration cases have held that "a petitioner can be found to 'prevail' even when they do not obtain the relief that they request." *Ringler v. Tower Forty One Ass'n, Inc.*, Arb. Case No. 2006-01-0719, Final Order on Attorney's Fees and Costs (June 20, 2006).

In the Summary Final Order, the arbitrator found that the Association had committed violations of the election procedures of its By-laws by not holding its election on the day specified in the By-Laws, and by accepting a ballot from a former unit owner who had executed a deed in lieu of foreclosure on her unit 12 days before the election.

The arbitrator found that the Association also violated Rule 61B-23.0021(10), Florida Administrative Code, by having the community association manager verify signatures and unit identifications on the ballot envelopes prior to the meeting. The arbitrator found that the Association had failed to adequately communicate to the impartial election committee that during the verification process, certain ballots had

been found to be ineligible. As a result, ballots from two unit owners who were suspended for being more than 90 days delinquent in their payment of assessments were accepted.

However, even if all the challenged ballots had been presumed to have been cast for the winning candidates and subtracted from their totals, Petitioners would still have received at least 30 fewer votes each than the winning candidates. The arbitrator did *not* find, nor did the petitioners claim, that the outcome of the election would have been different had any of the violations not occurred, and therefore the specific relief requested by the petitioners was not granted. As relief, the Association was ordered to comply with the governing documents, the Florida Statutes, and the Florida Administrative Code when conducting future elections.

Even though Petitioners did not obtain a new election or replacement of the board of directors, the arbitrator does not find that the Association was the prevailing party in the underlying case. When an association is found to have committed a number of errors and irregularities in its conduct of an election, just because those errors do not rise to a level requiring that the election results be discarded does not mean that the association is the prevailing party. *See Visyak v. Fairway Cove Homeowners Association, Inc.*, Fee Case No. 2010-06-1227, Final Order Denying Attorney's Fees and Costs (February 10, 2011)(Neither party was the prevailing party because although Petitioners did not receive the relief they requested in the form of a new election, the Association was ordered to comply with its election procedures in the future, and both parties obtained some benefit from the arbitration.) Accordingly, the

Association is not the prevailing party in the instant case, and the Association's motion for attorney's fees and costs must be denied.

Petitioners prevailed on some issues in that the arbitrator found that the Association had committed violations of the election procedures contained in its By-laws and in Rule 61B-23, Florida Administrative Code.

However, Petitioners did *not* prevail on their claim that the Association violated Rule 61B-23.021(8), Florida Administrative Code, as a result of the community association manager sending out a letter endorsing certain candidates. Nor did Petitioners prevail on their claim that fraud and malfeasance permeated the election process.

Because the Association's violations were not substantial enough to warrant discarding the election results, Petitioners did not obtain the specific relief they requested. They did, however, achieve *some* benefit in that the Association was ordered to comply with its governing documents, the Florida Statutes, and the Florida Administrative Code when conducting future elections.

The Florida Supreme Court in *Folta v. Bolton*, 493 So.2d 440 (Fla. 1986) addressed the awarding of attorney's fees where the plaintiff did not prevail on all claims of a multi-claim medical malpractice complaint. In *Folta* the plaintiff brought five claims based upon separate injuries by different parties that occurred at different times. The court held:

> ...that in a multicount medical malpractice action, where each claim is separate and distinct and would support an independent action, as opposed to being an alternative theory of liability for the same wrong, the prevailing party on each distinct claim is entitled to an award of attorney's fees for those fees generated in connection with that claim.

Folta at 442.

The *Folta* rule is not applicable, however, when the litigation involves alternative theories of liability for the same wrong. *Consolidated Southern Security v. Geniac and Associates, Inc.,* 619 So. 2d 1027 (Fla. 2nd DCA 1993). In the instant case, Petitioners did *not* bring separate and distinct claims. Rather, they asserted alternative theories as to why the election was defective. In this case, *Folta* is not applicable, and since Petitioners prevailed on some of their theories, they are considered the prevailing party. The degree of success by Petitioners *is* relevant in determining the reasonableness of the amount of attorney's fees requested. *See Burnaman v. South Oaks Homeowners Association of Melbourne, Inc.,* Final Order on Motions for Attorney's Fees and Costs, Arb. Consolidated Case Nos. 2009-00-6528 & 2009-00-7258 (June 16, 2009)

Attorney's Fees

In *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145, 1150 (Fla. 1985), the Supreme Court adopted the federal lodestar approach as the foundation for setting reasonable fee awards. This approach requires the trial court to determine the "lodestar figure" by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate for the services of the prevailing party's attorney. *Fashion Tile & Marble v. Alpha One Construction*, 532 So. 2d 1306 (Fla. 2d DCA 1988). In undertaking this analysis, the reasonableness of the hourly rate and the number of hours reasonably expended must be separately considered. *See Rowe*, 472 So. 2d at 1150-51. In determining the reasonableness of the attorney's fees, the criteria set forth in Rule 4-1.5, Rules Regulating the Florida Bar, Rules of Professional Conduct [then Disciplinary Rule 2-106(b) of the Florida Bar Code of Professional Responsibility] should

be applied. *Id.* At 1150. The factors for determining a reasonable attorney's fee set forth in Rule 4.1.5 are basically the same as the factors set forth in rule 61B-45.048(7), Florida Administrative Code.

Hourly Rate

Petitioners have provided an affidavit of Petitioners' counsel that explains the amount of attorney's fees and costs sought. Petitioners seek compensation for the services of Harry W. Carls, Esq. at the rate of $250.00 per hour for 3.5 hours. Mr. Carls has been licensed to practice law in the State of Florida since November of 1972. The rate of $250.00 per hour is a reasonable rate for an attorney with 40 years of experience and falls within the range of fees charged in the locality for similar legal services.

Petitioners also seek compensation for the services of Rania A. Soliman, Esq., at the rate of $175.00 per hour for 45.6 hours. Ms. Soliman has been licensed to practice law in the State of Florida Since April of 1997. The rate of $175.00 per hour is a reasonable rate for an attorney with 15 years of experience, and falls within the range of fees charged in the locality for similar legal services.

Number of Hours

The total amount of time expended by Mr. Carls in pursuing the arbitration case to its conclusion, 3.5 hours, is excessive, however. It has always been held that with the exception of preparing the pre-arbitration demand letter required by Section 718.1255, Florida Statutes, for which one hour is typically awarded, attorney's fees incurred prior to the drafting of the petition for arbitration are not fees incurred "in the arbitration proceeding" and are therefore not awarded. *Desy v. River Key Condominium Association, Inc.*, Arb. Case No. 93-0082F, Final Order on Motion for Attorney's Fees

and Costs (May 20, 1993) (fees incurred prior to the drafting and filing of the petition are not recoverable in the arbitration proceeding). A review of the services rendered by Mr. Carls indicates that 2.3 hours were performed prior to the date the petition was drafted and filed herein. Of these 2.3 hours, 0.3 hours involved preparation of the pre-arbitration demand letter. However, that 0.3 hours is duplicative of time also spent by attorney Rania Soliman preparing the pre-arbitration demand letter, and the petition was not drafted by Mr. Carls. Therefore, Petitioners will not be awarded any of Mr. Carls' time for services performed prior to the filing of the petition.

Additionally, 0.2 hours spent reviewing options regarding the Division's final order on August 1, 2012 is duplicative of time spent by attorney Rania Soliman on the same day. Therefore, Petitioners will not be awarded fees for these services from Mr. Carls. Petitioners are awarded the sum of $250.00 for 1 hour of legal services from Mr. Carls at $250.00 per hour.

The total amount of attorney time expended by Ms. Soliman in pursuing the arbitration case to its conclusion, 45 hours, is excessive.[1] For organizational purposes, Ms. Soliman's hours will be addressed in three time periods: Hours expended before filing the petition for arbitration, hours expended after filing the petition through the date the Summary Final Order was entered, and hours expended after entry of the Summary Final Order.

As stated previously, with the exception of preparing the pre-arbitration demand letter required by Section 718.1255, Florida Statutes, for which one hour is typically awarded, attorney's fees incurred prior to the drafting of the petition for arbitration are

[1] Although the affidavit indicates a total of 45.6 hours for Ms. Soliman, this may be a typographical error, because when the entries on the billing sheets are added up, the total appears to be 45.0 hours.

not fees incurred "in the arbitration proceeding" and are therefore not awarded. A review of the services rendered indicates that 26.1 hours were performed prior to the date the petition was filed herein. Of these 26.1 hours, as many as 9.1 hours *may* have involved some aspect of preparation of the pre-arbitration demand letter and petition for arbitration, but references to drafting these documents are contained within multi-subject time entries involving numerous other tasks, making it impossible to determine exactly how much of these blocks of time were actually spent drafting the documents. Therefore, Petitioners will be awarded 3 hours for drafting the petition for arbitration and 1 hour for drafting the pre-arbitration demand letter.

For the time period in between the filing of the petition for arbitration on March 26, 2012, and the entry of the summary final order on July 26, 2012, billing records for attorney Soliman contain 17 multi-subject time entries reflecting a total of 14.3 hours expended on the case. Of these 17 entries, at least 10 included conferences and communications with the petitioners, either individually or as a group. Because most of these are multi-subject time entries, it is impossible to determine how much time was spent communicating with the petitioners and how much was spent on the other tasks referenced. While some communication with clients is necessary, legal work that is necessitated by the client's own behavior should more properly be paid by the client than by the opposing party. *Hillcrest East No. 25, Inc. v. Lewis,* Arb. Case No. 2011-03-4259, Final Order on Attorneys' Fees and Costs (December 1, 2011) (citing *Barratta v. Valley Oak Homeowners' Association at the Vineyards, Inc.*, 928 So. 2d 495, 499 (Fla. 2nd DCA 2006)); *See also Guthrie v. Guthrie*, 357 So. 2d 247, 248 (Fla. 4th DCA 1978) (Work done that is not reasonably necessary but performed to indulge the eccentricities

of the client should more properly be charged to the client rather than the opposing party). Two hours will be deducted from the 14.3 hours as a result of excessive client contact.

Entries for this time period also include 6.2 hours spent on May 11 & 14, 2012, reviewing a prior complaint filed with the Division regarding election issues, researching Division cases regarding separate endorsements of candidates that are not sent with election materials, telephoning the Division's investigator, and reviewing additional material provided by the petitioners regarding past election complaints. The fact that the association manager's endorsement of certain candidates was sent separately from the mail-out of election materials was not new information that became available to the petitioners only after the petition was filed. Petitioners should have informed their attorney of this pertinent fact prior to the filing of the petition, as well as of any previous election related complaints they knew had been filed with the Division involving their condominium. Fees for research that would normally take place prior to the filing of the arbitration petition are not fees incurred "in the arbitration proceeding" and are therefore not awarded. Accordingly, 6.2 hours will be deducted from the 14.3 hours.

Based on the above, the reasonable amount of time for Ms. Soliman's services after the filing of the petition for arbitration up to the entry of the Summary Final Order is 6.1 hours.

Subsequent to the entry of the Summary Final Order, time entries for attorney Soliman indicate 4.6 hours spent reviewing the Summary Final Order, emailing Petitioner Short about options for going forward, telephoning Petitioner Mueller about options for going forward, emailing Petitioner Short about the motion for

reconsideration, emailing Petitioner Short about the denial of the motion, emailing Petitioner Short about the Association's motion for attorney's fees and about "options for defamation by Association and R. Murphy," and "Discuss[ing] Association's budget issues with [Petitioner] M. Mueller." Petitioners will not be reimbursed for the time spent after entry of the final order, except for time spent preparing the motion for attorney's fees, for which 1 hour is reasonable. *Sunrise Landing Condo. Ass'n of Brevard, Inc. v. Wilson*, Arb. Case No. 2005-05-9040, Final Order on Attorney's Fees and Costs (May 9, 2006). Because the motion for attorney's fees was drafted by a paralegal and reviewed by Ms. Soliman, the reasonable amount of time for Ms. Soliman's services for reviewing the motion for attorney's fees is 0.5 hours, and her time is reduced by 4.1 hours accordingly.

The affidavits of Attorneys Soliman and Carls include an estimate that 7 additional hours will be expended in bringing the case to final disposition. Petitioners will not be awarded anticipated time sought to finalize the case. *See Applewood Village I Condo. Ass'n, Inc. v. Estate of Siegal*, Arb. Fee Case No. 2011-01-6707, Summary Final Order (May 5, 2011).

Based upon the analysis above, the arbitrator determines that 10.6 hours is the total number of hours reasonably expended by Ms. Soliman in this matter. Petitioners will be awarded the sum of $1,855.00 for 10.6 hours of legal services at $175.00 per hour for the services of Ms. Soliman.

Paralegal

Petitioners seek compensation for the services of Mary Christine Persampiere, a paralegal, at the rate of $75.00 per hour for 15.3 hours. The affidavit does not state Ms. Persampiere's number of years of paralegal experience. Petitioners failed to identify the paralegal's qualifications, therefore, no time will be awarded for paralegal efforts. *Seminole-on-the-Green, Cavalier Bldg. One Ass'n, Inc. v. Jackson,* Arb. Case No. 2006-05-0344, Final Order on Petitioner's Motion for Award of Costs and Attorney's Fees (Feb. 7, 2007); *Fennessy v. Coastal Estates, Inc.,* Arb. Fee Case No. 2010-04-9176, Summary Final Order (October 14, 2010). Irrespective of the failure to identify the paralegal's qualifications, the Association cannot recover for time expended by a paralegal on secretarial or clerical work, and the time log includes numerous entries for clerical and secretarial tasks such as scheduling conferences, telephone calls, and receiving and reviewing motions and orders. *Winfield Gardens South Condo. Ass'n, Inc. v. Brown,* Arb. Case No. 2005-00-5739, Final Order on Attorney's Fees and Costs (March 9, 2005); *Loveland v. Harbor Towers and Marina Condo Ass'n., Inc.,* Arb. Case No. 2004-05-0585, Final Order on Motion for Attorney's Fees and Costs (Jan. 28, 2005).

Costs

Additionally, Petitioners seek costs of $366.74 to cover costs for copies, postage, UPS overnight delivery fees, Westlaw research fees, and the filing fee for the petition for arbitration. The filing fee of $50.00 is reasonable and will be awarded.

Costs of copies of documents filed with the court, which are reasonably necessary to assist the court in reaching a conclusion, are awardable. However,

Petitioners have not identified the photocopies as being filed with the division and, therefore, will not be reimbursed for the photocopies. *See Statewide Uniform Guidelines for the Taxation of Costs in Civil Actions.* Furthermore, a charge of $64.00 for photocopying was incurred on July 31, 2012, according to the transaction detail filed by Petitioners. This was a week after the summary final order was entered. Petitioners filed nothing with the Division after entry of the summary final order except motions for rehearing and attorney's fees, which were not voluminous and could not have generated such extensive photocopying charges.

Additionally, postage is an unrecoverable overhead cost. Petitioners provided no explanation as to why it was necessary to send items by UPS overnight delivery rather than regular mail and, thus will not be reimbursed $19.35 UPS charges. Westlaw charges are also an unrecoverable overhead cost. *See Wooley v. Ocean Inlet Yacht Club Condominium Association, Inc.,* Arb. Fees Case No. 02-5174, Final Order on Motion for Attorney's Fees (November 13, 2002) and *Savoy Owners Association, Inc., v. Candan,* Arb. Fees Case No. 2009-01-1795, Final Order on Motions for Attorney's Fees and Costs (April 21, 2010).

Therefore, Petitioners will be awarded a total of $50.00 in costs for the filing fee.

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

1. The Association's motion for attorney's fees and costs is DENIED.
2. The Petitioners' motion for attorney's fees and costs is granted, in part. The Association shall, within 30 days, pay to Petitioners the total amount of $2,155.00: $2,105.00 for reimbursement of attorney's fees, and $50.00 for costs.

DONE AND ORDERED this 24th day of October, 2012, at Tallahassee, Leon County, Florida.

Leslie O. Anderson-Adams

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Trial de novo

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.

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 24th day of October, 2012:

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