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

IN RE: PETITION FOR ARBITRATION

Bermuda Bay Beach
Condominium Association, Inc.,

Petitioner,

v.

Case No. 02-5258;
02-5177; 02-5178;
02-5173

Jeffrey M. Solomon, Philip De Campos and
Maria L. De Campos, Michael Dayton and
Nazare Da Conceicao Luis,

Respondents.

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PARTIAL SUMMARY FINAL ORDER

Comes now, the undersigned arbitrator, and issues this partial summary final order as follows:

In these consolidated cases, the association's petitions for arbitration allege that the respondents/unit owners are leasing their condominium units for less than thirty (30) days, in violation of the leasing restrictions contained in the condominium's governing documents. A status conference was held, via telephone, on April 18, 2003, where the parties were ordered to submit legal memorandum regarding the following five defenses asserted by the respondents: statute of limitations, laches, unclean hands, estoppel and waiver. Respondents'

legal memorandum, filed on May 6, 2003, withdrew the statute of limitations defense. The arbitrator considers each of the remaining defenses below.

Regarding the unit owners' defense of laches, the elements of laches are: conduct on the part of the unit owner that gives rise to the association's claim; association's delay in bringing the suit where he has knowledge of the claim and an opportunity to bring it; the unit owner's lack of knowledge that the association would assert the right; and injury or prejudice to the unit owner if the association is granted relief. Corona Properties of Florida, Inc., v. Monroe County, 485 So. 2d 1314, 1318 (Fla. 3rd DCA 1986). The unit owners allege that since the association has delayed enforcement of the declaration restriction on leasing for twenty years and has operated an on-site rental program initiated by the condominium manager, a finding of laches is warranted. However, by virtue of their condominium ownership, the unit owners are charged with notice of all provisions contained in the association's governing documents, even those not currently enforced. This includes article 19, section 19.13 of the declaration of condominium which only permits a unit to be leased for a minimum of thirty days. Because the condominium documents clearly contain restrictions on leasing, of which the unit owners are charged with notice, they should have known that the association could assert its right to enforce these restrictions. In fact, the unit owners were informed of the association's intent to enforce the leasing restrictions on at least two occasions, but, instead, chose to continue leasing in a manner prohibited by the condominium documents. Considering the leasing restriction contained in the condominium documents and the association's

notification of pending enforcement of the restriction, the unit owners cannot claim to be without knowledge that the association would assert its right to enforce the leasing restriction. As such, the unit owners have failed to establish the third element of laches. Accordingly, the defense of laches is rejected.

The respondents also assert the defense of unclean hands due to the association's alleged wrongful actions which violated the leasing restrictions. In MacIntosh v. Hough, 601 So. 2d 1170 (Fla. 1992), the court ruled that conduct demonstrating unclean hands is "entirely irrelevant in those cases where the party asserting unclean hands has taken no action in reliance on that conduct . . ." Here, the unit owners have not specifically alleged that they relied on any of the alleged actions of the association when they rented their units in violation of the leasing restrictions. In fact, it is clear that the unit owners purchased their units with the intent of leasing for less than the minimum time-period allowed by the declaration and continued to do so, even after notification of the association's intent to enforce the restriction, regardless of any actions undertaken by the association. Accordingly, the defense of unclean hands is stricken.

Respondents' next defense is estoppel. The elements of estoppel are: (1) a representation as to a material fact that is contrary to a later-asserted position; (2) reasonable reliance on that representation; and (3) a change in position to his detriment by the party claiming the estoppel caused by the representation and reliance. Enegren v. Marathon Country Club Condominium Association, Inc., 525 So. 2d 488, 489 (Fla. 3rd DCA 1988). The referenced leasing restriction was included in

the condominium documents when each of the respondents purchased their respective units. In Woodside Village Condominium Association, Inc. v Jahren, 806 So. 2d 452 (Fla. 2002), the court permitted the association to enforce leasing restrictions against pre-existing residents, even where the residents purchased their units in reliance on the *lack of such leasing restrictions*. Where courts have not permitted unit owners to rely on condominium documents that lack certain restrictions, due to the ability to amend the documents, unit owners will similarly not be permitted to rely on the non-enforcement of restrictions which are already contained in the condominium documents when they purchase their units. The respondents' reliance on the non-enforcement of the leasing restriction is not reasonable; they should have realized that the association could enforce the restriction in the future. When the association in fact decided to enforce the restriction, it properly notified all residents of the upcoming enforcement and provided a reasonable grandfather clause for existing rental agreements. However, the respondents continued to lease their units in violation of the restrictions. Since it has not been demonstrated that the respondents' reliance on any representations made by the association was reasonable, the defense of estoppel is rejected.

The respondents' also assert waiver as a defense. Waiver is the "intentional or voluntary relinquishment of a known right, or conduct which implies the relinquishment of a known right." Mizell v. Deal, 654 So. 2d 659, 663 (Fla. 5th DCA 1995). The elements of waiver are: (1) the existence at the time of the waiver of a right, privilege, advantage, or benefit which may be waived; (2) the actual or

constructive knowledge of the right; and (3) the intention to relinquish the right. Id. As discussed earlier, the association gave ample notice of their intent to enforce the leasing restrictions. Given this notice, the respondents cannot demonstrate that the association intended to relinquish its right to enforce the leasing restrictions contained in the declaration. Accordingly, the defense of waiver is also rejected.

The respondents' final defense of selective enforcement will be addressed in a final hearing. An order setting this hearing, including rulings on the respondents' motion to conduct discovery, will follow.

DONE AND ORDERED this 26th day of June 2003, at Tallahassee, Leon County, Florida.

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