

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

IN RE: PETITION FOR ARBITRATION

**STACY ARONSON; PAUL NEESE; KEN
ALLEN, JR.; DON SEALY; MICHAEL KRATT;
DESTIN, INC.; and MANUK TOROSSIAN,**

Petitioners,

v.

Case No. 2006-01-2188

**LAKEVIEW CONDOMINIUM ASSOCIATION,
INC., GARY READ, and KEVIN KENNEDY,
Respondents.**

FINAL ORDER DISMISSING PETITION

On March 1, 2006, the petitioners listed above filed a "Recall Arbitration Petition" against Lakeview Condominium Owner's Association, Gary Read and Kevin Kennedy. The title of the petition is only one of the many errors asserted in this petition. The petition is not a petition for recall arbitration; it is not a petition for arbitration filed by the association pursuant to section 718.112(2)(j)3., Florida Statutes, after refusing to certify a recall agreement. It is not even a petition filed by the association.

The petitioners are the owners of condominium units at Lakeview Condominium in Walton County who signed an agreement to recall Gary Read and Kevin Kennedy, former board members, which was served on the board in July, 2005. This petition for arbitration follows a much earlier petition for recall arbitration filed by Lakeview Condominium Association. The earlier case, Case No. 2005-03-2327, involved a written recall agreement that was served on the board on June 2, 2005, and rejected by the board on June 8, 2005. The board refused to certify that written recall agreement

because separate votes were not cast for each individual board member. The petition for recall arbitration was filed by the association on June 15, 2005, in accordance with section 718.112(2)(j)3., Florida Statutes.

While the petition for arbitration was pending and before the respondent had even answered the petition, the association, through its attorney, filed a document with the arbitrator stating that a second recall agreement had been served on the board on July 5, 2005, and that it had been “accepted” by the Board of Directors, making the pending recall arbitration proceeding “moot.” (Ex.1-notice) The arbitrator thereupon issued a “Final Order of Dismissal” stating that “[t]he removal of the board members subject to the recall effort in the present matter renders this case moot.” The order cited to *Boca Pinar Condo. Ass’n v. Unit Owners Voting for Recall*, Case No. 02-5059, Final Order of Dismissal (July 5, 2002), for the proposition that “where unit owners secured a second recall by written agreement of the same board members during the pendency of the original recall proceedings, and where the board certified the recall, the original petition for recall arbitration was dismissed as moot.” (Ex. 2 – Final Order)

From the notice to the arbitrator in Case No. 2005-03-2327 and the final order entered by the arbitrator in that case, it is clear that the previous board, which at that time consisted of the two board members, Kevin Kennedy and Gary Read, either certified the recall agreement, although perhaps not properly, or recognized that the second recall was effective by operation of statute.

Although it would have been preferable for that board to notice and hold a board meeting in accordance with the rules and statutes to officially certify the recall, thus providing a smooth transition to the new board, the board’s failure to call and hold the

required board meeting does not prevent the new board consisting of the replacement board members elected in the recall agreement, A. Sheridan Lowrey, II, and Stacy Aronson, from rightfully assuming the board seats vacated by Kevin Kennedy and Gary Read. Indeed, the purpose of section 718.1255(2)(j)4,, Florida Statutes, is to ensure that a valid recall will “be deemed effective” if the board fails to properly hold a meeting within five business days of service of the recall agreement on the board.

The petitioners, which, in effect, include both of the replacement board members, almost seem to be upset with the former board for certifying or accepting certification of the recall agreement and vacating their positions. They assert that “Respondents failed to call the required Special Meeting to vote on the Written Recall/Ballot and failed to file a subsequent Petition for Recall Arbitration with the Division.” First, the board does not have to call a “special” meeting to act on the recall agreement. Second, the association was not supposed to file a petition for recall arbitration. The only time a petition for recall arbitration has to be filed by the association is when the board refuses to certify the recall agreement. Obviously, if the board certifies the agreement or accepts certification of the agreement by statute, there is no need for the association to file a petition for recall arbitration.

Petitioners also contend that “[p]ursuant to Florida Statutes 718.112(j)(5) [sic] the vacancies created by the Recall are to be filled by the remaining board members. The corporation has no Board of Directors and Petitioners have no authority to take control of the Board of Directors.”

First, section 718.112(2)(j)5., Florida Statutes, provides that “[i]f a vacancy occurs on the board as a result of a recall and less than a majority of the board

members are removed, the vacancy may be filled by the affirmative vote of a majority of the remaining directors.... If a vacancy occurs on the board as a result of a recall and a majority or more of the board members are removed, the vacancies shall be filled in accordance with the procedural rules to be adopted by the division.” (e.s.) Rule 61B-23.0028(1)(c), Florida Administrative Code, provides that a recall agreement shall “[I]ist, in the form of a ballot, at least as many eligible persons who are willing to be candidates for replacement board members as there are board members subject to recall, in those cases where a majority...of the board is sought to be recalled.” Rule 61B-23.0028(3)(a)3. states, “If a majority...of the board is recalled in a certified recall, those replacement board members elected by the written agreement pursuant to the procedure referenced in paragraph (1)(c) of this rule shall take office upon adjournment of the board meeting at which it was determined to certify the recall.” Rule 61B-23.0028(7) provides:

(7) Failure to Duly Notice and Hold a Board Meeting. If the board fails to duly notice and hold the board meeting to determine whether to certify the recall within five full business days of service of the written agreement, the following shall apply:

(a) The recall shall be deemed effective immediately upon expiration of the last day of five full business days after service of the written agreement on the board.

(b) If a majority of the board is recalled, replacement board members elected by the written agreement shall take office upon expiration of five full days after service of the written agreement on the board....

(c) If the entire board is recalled, each recalled board member shall immediately return to the replacement board all association records in his possession. If less than the entire board is recalled, each recalled board member shall immediately return to the board all association records in his possession.

Second, petitioners statement that the “corporation has no Board of Directors” is incorrect. Since the majority (2 out of 3) of the board was recalled, the replacement

board members were to take office on the day after the fifth business day after service of the written agreement, assuming, as alleged, that the board never officially held a meeting and certified the agreement. Therefore, the board is officially composed of the two replacement board members and an apparently still vacant seat that has not been filled by the replacement board members. Third, the petitioners' allegation that "Petitioners have no authority to take control of the Board of Directors" is correct. The petitioners are individual unit owners in the condominium. The composition of the board of directors is determined by rule and statute, and the board of directors now consists of the replacement board members named in the recalled agreement.

The petitioners contend that "[t]he Association had no authority to accept the recall of Respondents, Read and Kennedy, without a successor Director being appointed to replace [resigned board member] Chuck Dempsey." Petitioners also contend that "the Board of Directors consisted of only two (2) members and did not constitute a quorum for the conduct of business of the association." These statements are totally inaccurate, and the petitioners cite to no provision of the rules, statutes, or condominium documents to support such statements. First, two members of a three-member board constitute a majority, and a majority of the board constitutes a quorum pursuant to section 617.0824, Florida Statutes. Second, there is absolutely no authority for the proposition that a board has no authority to certify the recall of the two remaining board members when the board has failed to appoint a replacement board member for the third board seat. Obviously, it better serves the members of the association to have a full board. When a seat is vacant due to resignation or some other reason, other than recall, the remaining board members should act with due diligence to appoint a

replacement board member or hold an election to fill the vacancy in accordance with section 718,112(2)(d)8., Florida Statutes. However, the fact that a board seat is vacant does not mean that the board has no authority to take action on a recall agreement or conduct any other association business. Indeed, as occurred in this case, if a board does not take timely action after being served with a recall agreement, the recall deemed effective whether or not there is a vacancy on the board.

Finally, the petitioners contend that respondents Read and Kennedy, the former directors, “willfully abandoned the Board of Directors leaving the Association with no members of the Board of Directors.” Petitioners contend that the “Respondents failure to legally transfer power of the Board in accordance with Florida Statutes and the Association’s By-Laws has left the Association without a Board of Directors, thus creating unnecessary and detrimental harm and financial losses to the Association, its members and property.”

The only thing that the undersigned can tell is unnecessarily causing confusion is this petition. The former board members Gary Read and Kevin Kennedy are no longer on the board, which the petitioners admit in almost all of their allegations. Further, the petitioners do not allege that Gary Read and Kevin Kennedy are unlawfully claiming to still be on the board of directors. If the allegations in the petition are correct, the former board members did not hold an official board meeting after receipt of the recall agreement in July. Thereafter, they apparently recognized that the recall had taken effect by operation of statute and left the board, which is what the persons signing the recall agreement, i.e., the petitioners, were seeking. By operation of rule and statute the replacement board members took over the seats of Gary Read and Kevin Kennedy.

The recall agreement was served on the board on either July 5 or July 6, 2005. The attorney representing the association announced on July 22, 2005, in the earlier recall case, that this second recall had been accepted by the Board of Directors. The recall agreement sought to recall the only two present members of the three-member board.¹ Because the majority of the board was being recalled, the recall ballots properly contained a ballot for the election of replacement board members. The two candidates printed on the ballot, Sheridan Lowrey and Stacey Aronson, received all the votes, thus winning the election as the replacement board members. When the board certified the recall or the recall was deemed effective by statute and recognized by the association's attorney, which occurred no later than July 22, 2005, the replacement board members should have taken the place of the departing board members. That is why replacement board members are required to be elected when a recall is for the majority of the board members, so there will be replacement board members ready to take over when the recall is either certified or considered effective by operation of rule and statute.

In their petition, the petitioners request an order removing board members Gary Read and Kevin Kennedy and "ratifying the election of Stacy Aronson and Sheridan Lowrey as Directors, filling the vacancies of the removed directors." The board members Gary Read and Kevin Kennedy were recalled from the board in July by either the board's certification of the recall agreement, which the petitioners dispute, or by operation of statute. **Either way, they have been recalled and either way Stacy**

¹ The arbitrator takes official notice of the petition filed in Case No. 2005-03-2327, which alleged, and the respondent admitted, that the board of the association consisted of three seats.

Aronson and Sheridan Lowrey assumed their board seats at that time by operation of law.

This petition for arbitration does not present a “dispute” between the unit owners and the association. Indeed, one of the petitioners is a replacement board member and another petitioner is the corporation whose president is the other replacement board member. In other words, those petitioners are bringing the action against themselves for all practical purposes, which does not qualify as a “dispute.” Further, it appears that the even the property manager for the association and Kevin Kennedy, the former board member, recognize that the replacement candidates became the board members in July, since they noted in their petition for a special members meeting that the directors Aronson and Lowery have, since assuming the position of directors in July, 2005, “failed to engage in any of the duties required of an Association’s Board of Directors...” The petitioners contend that the statement is malicious, but it does not say any more than the petition does. Apparently, the replacement board members Aronson and Lowrey have not taken an active role as board members because they believed that the failure to announce certification of the recall at a duly noticed board meeting meant that the recall was never effective - despite the statute and rules stating that it was deemed certified, despite the former board members announcing their acceptance of the recall and removing themselves from the board, and despite Arbitrator Earl stating in the Final Order entered in Case No. 2005-03-2327 that the board members sought to be recalled had been removed from office as the result of a second recall. These all certainly should have provided sufficient clues to the replacement board members that they had now officially replaced Read and Kennedy on the board of directors.

The petition for arbitration in this case must be dismissed because it does not present a “dispute” cognizable in arbitration. Further, even if this case presented a legitimate “dispute” that could be heard in arbitration, Gary Read and Kevin Kennedy would have to be dismissed as respondents. An arbitration “dispute” filed pursuant to section 718.1255, Florida Statutes, can only be between unit owners and their condominium association. Although tenants and other unit owners having an interest in a dispute can be named as parties in certain types of cases, this is not such a case. Further, individual board members cannot be named as the respondents in an arbitration case because the only reason to name the board member individually is to allege that the board member breached his fiduciary duty (as is alleged in this petition), an action that must be brought in court.

Section 718.1255, Florida Statutes, provides for alternative dispute resolution. It requires a party to a “dispute” to petition for arbitration prior to the institution of court litigation. Section 718.1255(1), Florida Statutes, includes in the definition of a dispute “any disagreement between two or more parties that involves ... [t]he failure of a governing body, when required by this chapter or an association document, to ... [p]roperly conduct elections ... [g]ive adequate notice of meeting or other actions...[p]roperly conduct meetings ... [or] [a]llow inspection of books and records.”

The failure of a board to properly proceed after receipt of a written recall agreement may involve any or all of the above. However, even if the board fails to properly proceed after receiving a recall agreement, if the board either certifies the agreement or recognizes the certification of the agreement by statute, the board’s failure to properly proceed cannot be a “dispute” subject to arbitration unless the petition

is brought by the board member whose recall was certified alleging that the certification was not appropriate.² See, e.g. *Scariati v. The Villages at Emerald Lake One Condo. Ass'n, Inc.*, Arb. Case No. 2005-02-1485, Summary Final Order (September 2, 2005). However, it cannot be a “dispute” when the petitioners, who wanted the board removed from office, got what they asked for.

Therefore, based on the foregoing, it is

ORDERED:

The “Recall Arbitration Petition” filed March 1, 2006, is hereby DISMISSED. It is not an appropriate recall petition, and it does not define a “dispute” between the association and the unit owners that qualifies for arbitration pursuant to section 718.1255, Florida Statutes. The petition might qualify for arbitration as a “reverse recall” had the former board members not “accepted” certification of the recall and instead had continued to assert their authority to act on behalf of the association, thus violating section 718.112(2)(j)4., Florida Statutes, and rule 61B-23.0028(7)(a), Florida Administrative Code. However, it appears that the former board members removed themselves from the board in July, 2005, and from the petitioners’ own assertions have taken no actions on behalf of the association since then. Instead, the recall was deemed certified, and the replacement candidates automatically became the replacement board members. Finally, to the degree that the petition was brought against the individual former board members attempting to allege a breach of fiduciary duty, it is dismissed for lack of jurisdiction since only “disputes” between the association and unit owners as defined in section 718.1255(1), Florida Statutes, are appropriate for arbitration.

² Of course, other unit owners may join in such an action as petitioners.

DONE AND ORDERED this 16th day of March, 2006, at Tallahassee, Leon County, Florida.

Diane A. Grubbs, Arbitrator
Dep't of Business & Professional Regulation
Arbitration Section
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-1029
(850) 414-6867

Certificate of Service

I hereby certify that a true and correct copy of the foregoing final order has been sent by U.S. Mail and facsimile copy, where indicated, to the following persons on this 16th day of March, 2006:

Bruce A. Haught, Esquire
P.O. Box 5017
Destin, Florida 32540
Petitioner

Diane A. Grubbs, Arbitrator

Right to Appeal

As provided by section 718.1255, F.S., a party who is adversely affected by this final order may, within 30 days of the entry and mailing of this final order, file a complaint for a trial de novo in a court of competent jurisdiction in the circuit in which the condominium is located. This order does not constitute final agency action and cannot be appealed to a district court of appeal.