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

IN RE: PETITION FOR ARBITRATION

Shaul Ringler, et al.,

Petitioners,

v. Case No. 2005-04-1867

Tower Forty One Association, Inc.,

Respondent.

_____/

SUMMARY FINAL ORDER

This final order is entered pursuant to rule 61B-45.030, Florida Administrative Code, which permits the arbitrator to enter a summary final order where there are no disputed issues of material fact.

PROCEDURAL HISTORY

On August 4, 2005, a petition for arbitration was filed naming the petitioners as Tower Forty One Association, Inc. (association) and board members Robert Stein, Shaul Ringler and Arnold Meyer and naming Harvey Heino, Alex Berger and Henry Goelman as the respondents. The petition was accompanied by a motion to stay the arbitration proceeding and a motion for expedited determination of jurisdiction. In response thereto, the arbitrator issued an order on August 18, 2005, denying the motion to stay the arbitration proceeding and dismissing certain disputes as non-jurisdictional and further issued an order allowing answer relating to the only dispute which was eligible for arbitration, that is, the attempted recall of board member Shaul Ringler. The

respondents filed a motion to dismiss on August 31, 2005, and the petitioners filed a response thereto on September 19, 2005.

Based upon pleadings submitted by both parties, a status conference was scheduled for September 30, 2005, wherein party realignment and other pertinent issues were discussed. It was determined that the recall proceeding would go forward as a "reverse" recall which is a proceeding whereby the board member whose recall was certified initiates the proceeding, including with any other unit owners who wish to join as petitioners, arguing that the recall effort was certified in error, and naming the association as the responding party. As Mr. Ringler is the only board member subject to the recall attempt, he is properly named as a petitioner in his individual capacity and was instructed to file an amended petition naming any other unit owners as the petitioning parties and to present arguments as to why his recall should not be certified. Specifically, the arbitrator's order following status conference issued on October 3, 2005, advised Mr. Ringler that arguments contained in the amended petition could include allegations against the association for its actions or inactions relating to the recall process and allegations as to the validity of the recall ballots, if any, and further advised Mr. Ringler that any reasons for rejecting the recall not presented in the amended petition would not be addressed by the arbitrator. An amended petition was submitted on October 7, 2005, and the association submitted an answer to the amended petition on November 21, 2005, with supplemental information submitted on November 22, 2005. This order is entered after full consideration of the pleadings submitted in this matter.

FACTS

In their amended petition, the petitioners argue that board member Shaul Ringler received a letter, via facsimile, on July 20, 2005, stating that written recall agreements for the recall of Mr. Ringler had been served on the board on July 12, 2005, and because the board failed to hold a board meeting within five business days of receipt of the recall agreements, his recall was deemed effective. However, prior to receiving this correspondence, Mr. Ringler had not received any type of notice of the attempted recall. According to the petition, the association's property manager, Jackie Moraga, was served with the recall package and informed the board's secretary, Harvey Heino, of the recall, but failed to inform Mr. Ringler of the recall. The petition further alleges that Mr. Heino instructed Ms. Moraga to place the recall package in the association's vault. Because Mr. Ringler, as a board member, was never properly served with or notified of the attempted recall, the petitioners argue that a meeting, in compliance with section 718.112(2)(j)2., Florida Statutes, could not have been noticed within five days of the property manager's receipt of the recall agreements. The petitioners further argue that the aforementioned unauthorized actions of Mr. Heino and Ms. Moraga constitute a violation of the Florida Condominium Act and the governing documents of the association and, as a result, the recall of Mr. Ringler should not be certified. In addition, the petitioners do not raise any allegations challenging the validity of the merits of any of the written recall agreements in their amended petition.

In its answer to the petition for arbitration, the association admits that Ms. Moraga was served with written recall agreements for the recall of Mr. Ringler and admits that Mr. Heino was made aware of the recall agreements. However, an affidavit executed by Ms. Moraga disputes the allegation that the other board members,

including Mr. Ringler, were not informed of the service of the recall agreements. Notwithstanding which board members were in fact notified of the recall attempt, counsel for the association argues that because the petitioners have not challenged the legality of any of the recall ballots, the notice issue is the only argument that can be addressed. As service was accomplished in accordance with section 718.112(2)(j), Florida Statutes, and rule 61B-23.0028(1)(g), Florida Administrative Code, and the association failed to conduct a meeting to review the recall in compliance with section 718.112(2)(j)2., Florida Statutes, and rule 61B-23.0028(3), Florida Administrative Code, the association argues that the recall of Mr. Ringler is automatically deemed effective and requests an order certifying the recall.

CONCLUSIONS OF LAW

Pursuant to rule 61B-23.0028(1)(g), Florida Administrative Code, "[s]ervice of the written recall agreement on an officer, association manager, board member or the association's registered agent will be deemed effective service on the association." The rule does not require the service of the written recall agreements on all of the members of the board of directors. Furthermore, rule 61B-23.0028(2), Florida Administrative Code, only requires substantial compliance with the rules governing recall arbitration for the effective recall of a board member. Numerous prior arbitration cases have ruled in the same manner, acknowledging that serving all members of the board of directors is not required to effectuate a valid recall. See International Park Condominium Association, Inc. v. Unit Owners Voting for Recall, Arb. Case Nos. 99-1884 & 99-1614 (consolidated), Summary Final Order in Case No. 99-1884 (December 9, 1999)(admission by the board president that she received the written recall agreements

establishes that service on the board was accomplished for purposes of satisfying rule 61B-23.0028(1), Florida Administrative Code; there is no requirement that all members of the board be served); Gulf Island Beach and Tennis Club Condominium Association I, Inc. v. Unit Owners Voting for Recall, Arb. Case No. 98-4198, Summary Final Order Certifying Recall (August 18, 1998)(service of written recall agreement on corporate president was acceptable); Everidge v. Board of Directors of Seaview Villas Condominium Association, Inc., Arb. Case No. 93-0098, Order Denying Petition for Recall Arbitration (April 21, 1993)(service is proper where recall agreements were only served on the board member not subject to the recall effort; service on any board member is service on the board). Here, the association's property manager, Jackie Moraga, was served with the recall agreements on July 12, 2005. The petitioners have not challenged the date or method of service of the recall agreements upon Ms. Moraga. Furthermore, the parties agree that Ms. Moraga informed at least one board member, Harvey Heino, that she had been served with written recall agreements for the recall of Mr. Ringler. As service of the recall agreements on the association's property manager falls squarely within the parameters of rule 61B-23.0028(1)(g), Florida Administrative Code, the arbitrator finds that service was effectuated properly. Additionally, at least one board member had knowledge of the attempted recall. Because the rules governing recall proceedings do not require service of recall agreements on all board members, the petitioners' arguments challenging service in this case are rejected.

Under rule 61B-23.0028(3), Florida Administrative Code, "[t]he board shall hold a duly noticed meeting of the board to determine whether to certify (to validate or accept)

the recall by written agreement within five full business days after service of the written agreement upon the board." Both parties in this matter agree that the association's property manager was served with written agreements for the recall of board member Shaul Ringler on July 12, 2005, and that the board failed to hold a meeting to review the recall within five days of such service. Accordingly, the arbitrator finds that association failed to comply with rule 61B-23.0028(3), Florida Administrative Code, for failing to conduct a meeting to review the recall in this matter. Furthermore, rule 61B-23.0028(7), Florida Administrative Code, states that if the board fails to hold a meeting to determine whether the recall should be certified, the recall is deemed effective upon expiration of the fifth business day after service of the recall agreements. In the case at hand, when the petitioners were provided the opportunity to review the recall agreements and present challenges to the validity of the recall itself, the petitioners did not challenge the validity of any of the recall ballots, unit owner signatures or any other issues relating to the merits of the recall. The petitioners' arguments against certification of the recall rest solely with service of the recall agreements and the alleged actions, or inactions, of the association's property manager and one board

member.[1] Based on the lack of challenges to the recall itself, one can only assume that if the board had conducted a timely recall meeting, the recall would have been certified because the board would have not have found any deficiencies with the recall agreements and would have determined that the recall substantially complied with rule 61B-23.0028, Florida Administrative Code.

Accordingly, the arbitrator finds that service of the written agreements for the recall of board member Shaul Ringler was effectuated in accordance with rule 61B-23.0028(1)(g), Florida Administrative Code. The arbitrator further finds that the association failed to comply with rule 61B-23.0028(3), Florida Administrative Code, which requires the board of directors to duly notice and conduct a meeting to review a recall that is served upon the board. Notwithstanding this ruling, because there are no allegations that any of the ballots used in this recall attempt were improperly accepted and because the ballots are facially valid, the recall of Mr. Ringler must be certified.

It is therefore ORDERED:

The recall of board member Shaul Ringler is hereby certified. Mr. Ringler shall immediately step down from the board of directors and shall deliver any

[1] In contrast, the arbitrator in Scariati v. The Villages at Emerald Lakes One Condominium Association, Inc., Arb. Case Number 2005-02-1485, Summary Final Order (September 2, 2005), a reverse recall case, failed to certify the recall of the petitioner. The petitioner had alleged that she was not permitted to examine the written recall agreements at the board's recall meeting. When given the opportunity to review the review ballots, the petitioner alleged that since a majority of unit owners had not signed the recall agreements, the recall could be certified. The arbitrator confirmed the petitioner's allegation and ruled that a majority of the owners had not signed the recall agreements, which rendered the recall void *ab initio*. Based on the improper behavior of the board in not permitting the petitioner access to the recall agreements and on the recall not being supported by a majority of the owners, the recall was not certified.

records and/or property belonging to the association to the remaining board members within five days of this order. As a minority of the board has been recalled, the remaining board members may appoint a replacement board member in accordance with rule 61B-23.0028(3)(a)2., Florida Administrative Code.

DONE AND ORDERED this 12th day of December 2005, at Tallahassee, Leon County, Florida.

_____
Melissa Mnookin, Arbitrator
Department of Business and
Professional Regulation
Arbitration Section
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-1029

Certificate of Service

I hereby certify that a true and correct copy of the foregoing summary final order has been sent by U.S. Mail and by facsimile to the following persons on this 12th day of December 2005:

Joseph H. Ganguzza, Esq.
Hyman, Kaplan, Ganguzza,
Spector & Mars, P.A.
Museum Tower
150 West Flagler Street
Suite 2701
Miami, Florida 33130
Fax: (305) 371-5930

Michael C. Gongora, Esq.
Becker & Poliakoff, P.A.
121 Alhambra Plaza
Suite 1000 (10th Floor)
Coral Gables, Florida 33134
Fax: (305) 442-2232

_____
Melissa Mnookin, Arbitrator

Attorney's Fees

As provided by s. 718.1255, F.S., the prevailing party in this proceeding is entitled to have the other party pay its reasonable costs and attorney's fees. Rule 61B-45.048, F.A.C. requires that a party seeking an award of costs and attorney's fees must file a motion seeking the award not later than 45 days after rendition of this final order. The motion must be actually received by the Division within this 45 day period and must conform to the requirements of rule 61B-45.048, F.A.C. The filing of an appeal by trial de novo of this final order tolls the time for the filing of a motion seeking prevailing party costs and attorney's fees until 45 days following the conclusion of the de novo appeal proceeding and any subsequent appeal.