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

IN RE: PETITION FOR ARBITRATION

Villas at Bonaventure Tract 37 North Condominium Association, Inc.,
Petitioner,

v. **Case No. 2003-07-3127**

Michael Grant and Cheryl Cammarano,
Respondents.
_____/

FINAL ORDER

Pursuant to notice, the undersigned arbitrator of the Division of Florida Land Sales, Condominiums, and Mobile Homes convened a formal hearing in this case on January 14, 2004. During the hearing, the parties presented the testimony of witnesses, tendered documents into evidence and cross-examined the other party's witnesses. This order is entered after consideration of the complete record in this matter.

APPEARANCES

For Petitioner: Stuart J. Zoberg, Esq.
Becker and Poliakoff, P.A.
3111 Stirling Road
Ft. Lauderdale, Florida 33312

For Respondent: Michael Grant and Cheryl Cammarano, pro se
16037 Fairway Circle
Weston, Florida 33326

STATEMENT OF ISSUE

Whether the respondents maintain a dog in their unit that does not weigh less than twenty-two (22) pounds in violation of section 4(m) of article XVIII of the association's by-laws and paragraph II(A) of the association's rules and regulations and whether any defense precludes the association from enforcing these provisions.

PRELIMINARY STATEMENT

On July 22, 2003, Villas at Bonaventure Tract 37 North Condominium Association, Inc. (association/petitioner) filed a petition for arbitration alleging that the respondents are maintaining a dog which weighs more than 22 pounds in violation of section 4(m) of article XVIII of the association's by-laws and paragraph II(A) of the association's rules. In their answer, the respondents do not deny they are keeping a dog in excess of 22 pounds in their unit. However, they claim that prior to purchasing their unit, during their interview with the association, they were provided a copy of the association's governing documents and rules and regulations that did not contain a maximum pet weight restriction.

A final hearing was held on January 14, 2004, at the law offices of Becker and Poliakoff in Ft. Lauderdale, Florida. The arbitrator appeared by telephone. The parties were given until January 26, 2004, to file proposed orders. Both parties timely filed proposed orders which the arbitrator has considered.

FINDINGS OF FACT

1. Michael Grant and Cheryl Cammarano, are the record title owners of property located at 16037 Fairway Circle, Weston, Florida, 33326 ("respondent's

unit") which is located in the Villas at Bonaventure Tract 37 North Condominium. The respondents' obtained title to their unit on September 23, 2002.

2. Villas at Bonaventure Tract 37 North Condominium is a condominium within the meaning of § 718.103, Florida Statutes. Villas at Bonaventure Tract 37 North Condominium Association, Inc. (the association) is the entity responsible for the administration and operation of Villas at Bonaventure Tract 37 North Condominium.

3. Respondents are the owners of a dog that weighs more than twenty-two (22) pounds which they have maintained in their unit at all times relevant to this matter.

4. On February 10, 1998, Section 4(m) of Article XVIII of the association's by-laws was amended to read, in pertinent part,:

> An owner may keep a household pet on the property so long as such pet does not constitute a nuisance or interfere with quite enjoyment of the property by other owners. Each unit owner is allowed one pet and said pet must weigh less than twenty-two pounds.

The amendment was recorded in the public records on March 10, 1998.

5. On March 10, 1998, Paragraph II(A) of the association's rules was amended to read, in pertinent part.

> An owner may keep a household pet on the property so long as such pet does not constitute a nuisance or interfere with the quiet enjoyment of the property by other owners. Each unit owner is allowed one pet and said pet must weight less than twenty-two pounds.

6. Prior to the 1998 amendments, neither the by-laws nor the rules and regulations prohibited maintaining pets that do not weigh less than twenty-two (22) pounds.

7. Prior to the purchase of their unit, the respondents completed and submitted to the association a screening application (the application)(respondents' exhibit 6).

8. The petitioner presented the testimony of Ed O'Mara. Mr. O'Mara is the president of the association and lives in the condominium.

9. Mr. O'Mara testified that he is familiar with respondents' dog, describing it as a boxer breed.

10. Mr. O'Mara indicated that potential purchasers of a unit at the condominium attend a pre-purchase interview (the "interview") with representatives of the association. Mr. O'Mara stated that during the interview it is standard practice to emphasize the pet restrictions, including weight limitations.

11. The petitioner also presented the testimony of Richard Strauss. Mr. Strauss is the vice president of the association and lives at the condominium.

12. Mr. Strauss testified he met with the respondents during their interview. He recalled discussing their dog with them and specifically recalled discussing the pet weight restrictions with them. He also indicated that the most important thing discussed during the interviews is the pet restriction. Mr. Strauss did not know who provided the respondents with their copy of the condominium documents. However, he noted that typically, if someone comes to the interview without a rulebook, he provides a copy.

13. Mr. Strauss also testified that he received the respondents' application indicating that they had dog that weighed more than twenty-two (22) pounds with the understanding that the dog would not be kept at their unit.

14. The petitioner presented the testimony of Robert Goldsmith. Mr. Goldsmith is a member of the association's board of directors and resides at the condominium.

15. Mr. Goldsmith testified that he also met with the respondents during their interview. Mr. Goldsmith recalled that Mr. Grant told him that he had a boxer, and in response Mr. Goldsmith told Mr. Grant that he could not keep it if it exceeded the pet weight restrictions. He also testified that as part of the interview process, the purchasers are routinely asked if they had read the book of rules and regulations and understood it. Mr. Grant stated that during the interview process they always address truck parking restrictions and pet restrictions, emphasizing pet weight restrictions. He does not know if the respondents had a copy of the rules and regulations at the interview and does not know from whom they received their copy of the rules and regulations. Mr. Goldsmith testified that any approval of the purchase was with the understanding that the dog weighing more than twenty-two (22) pounds would not be kept in the unit.

16. The respondents testified on their own behalf. The respondents acknowledge that they keep a dog in their unit which exceeds twenty-two pounds.

17. Ms. Cammarano indicated that they did not receive a set of up-to-date documents that included the pet weight restriction. The documents were provided to them by their realtor and she does not know from where the realtor received the

documents. They were also provided a set of the rules and regulations (respondents' exhibit 2) that did not contain a date indicating when it was published and did not contain the pet weight restrictions.

18. Mr. Grant testified that they received the condominium documents including the by-laws from their real estate agent. However, he indicated that they received the rules and regulations pamphlet (respondents' exhibit 2) during the interview.

19. The respondents indicated that prior to their purchase, they thoroughly reviewed the documents provided them and found no pet weight restriction. According to their testimony, if they had found such a restriction, they would not have purchased the unit.

CONCLUSIONS OF LAW

The Division of Florida Land Sales, Condominiums and Mobile Homes of the Department of Business and Professional Regulation has jurisdiction over the parties of subject matter of this dispute, pursuant to section 718.1255, Florida Statutes.

The respondents admit that they are maintaining a dog in their unit which weighs more than twenty-two (22) pounds. Therefore, the arbitrator finds that the respondents have violated the pet weight restriction of the association's by-laws and rules and regulations.

Having determined that the respondents violated the pet weight restrictions, it must next be determined if the affirmative defenses they have raised preclude the association from enforcing the restriction. The respondents have raised defenses that may be characterized as estoppel, waiver, laches and selective

enforcement. The respondents bear the burden of proving their affirmative defenses. Sea Breeze South Apartments Condo., Inc. v. Beck, Arb. Case No. 00-1734, Final Order (May 17, 2002); White Egret Condominium, Inc. v. Franklin, 379 So.2d 346 (Fla. 1979); Killearn Acres Homeowners Association, Inc. v. Keever, 595 So.2d 1019, 1021 (Fla. 1st DCA 1992).

The respondents' estoppel defense is based upon their receiving outdated condominium documents and an outdated pamphlet containing the association's rules and regulations. In order to establish estoppel, the respondents must demonstrate the following: (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 their position to their detriment by the representation and reliance. The respondents' reliance must be reasonable. Energren v. Marathon Country Club Condo. Assoc., Inc., 5252 So2d 488 (Fla. 3d DCA 1988). Estoppel will not lie unless the party asserting it is ignorant of the truth. Where a provision is contained in the condominium documents, which are recorded in the public records, a unit owner is on constructive notice of the documents. See Centre Court I. Condo Assoc., Inc. v. Kish, Arb. Case No. 00-1752, Partial Summary Final Order and Order Requiring Supplemental Information (June 26, 2001)(Unit owner's assertion that association should be estopped from enforcing the pet ban because the condominium documents that she received at the time she purchased her unit were incomplete and did not contain the relevant provision was rejected because the owner was on constructive notice of the recorded documents). In the instant case, it is not disputed that the respondents received an copy of the association's

by-laws from their realtor which did not contain the 1998 amendment prohibiting pets weighing more than twenty-two (22) pounds. However, an accurate copy of the by-laws and the 1998 amendment were recorded in the public records, prior to the time the respondents purchased their unit. Therefore, the respondents were on constructive notice of the pet weight limitation and cannot assert that they are ignorant of the restriction.

The respondents contend that at their interview with the association, the association provided them a pamphlet of the association's rules and regulations that did not contain the pet weight restriction and that they relied upon such documents. However, the respondents have failed to establish that such reliance was reasonable. Mr. O'Mara, Straus and Goldsmith testified that it is standard procedure during the interview to discuss the pet restrictions, especially the weight limitations. This is consistent with the application completed by the respondents that contains a paragraph acknowledging that the purchaser understands that the rules and regulations of the condominium have restrictions regarding pets and also asks about the purchaser's pet's weight.[1] Furthermore, Mr. Strauss and Goldsmith specifically recalled discussing the pet restrictions with the respondents, informing the respondents that if their dog exceeded the weight restriction it could not be kept in their unit.[2]

[1] Finding no pet weight restrictions in their set of documents and upon being presented with an application requesting that they disclose the weight of their pet, it would be reasonable to expect the respondents to inquire as to why such information is needed.

[2] In Siesta Breakers Condo. Association, Inc. v. Lehnhert, Arb. Case No. 98-3475, Final Order (February 26, 1999), the respondents claimed that the association provided them an outdated copy of the declaration that did not reflect a subsequent amendment prohibiting pets. The arbitrator concluded that when such records are provided to the selling unit owner's broker, and then to a prospective purchaser, as required by statute, the prospective purchaser should be able to rely on such records; however, the arbitrator found reliance by the respondents would not be reasonable, as

Based upon the foregoing, regardless of the source of the condominium documents and rules and regulations pamphlet provided to them, reliance upon such documents is unreasonable. Therefore, the respondents' estoppel defense fails.[3]

The respondents also raised the defense of waiver at the final hearing arguing that the association should be prohibited from enforcing the pet weight limitation because they disclosed on their application that their dog's weight exceeds the pet weight restriction and the association approved their application. In order to establish the defense of waiver the respondents must demonstrate that a right of the association existed at the time of waiver, that the board had knowledge of it, and the board intended to relinquish that right. Savoy East Assoc., Inc. v. Janssen, Arb. Case No. 92-0133, Final Order (January 4, 1994). Mr. Strauss and Goldsmith testified that any approval of the respondents' application was with the understanding that respondents' overweight dog would not be allowed, which demonstrates that the board did not intend to relinquish its right to enforce the maximum pet weight restrictions. Furthermore, the respondents have not provided any evidence proving the association intended to

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they had been provided conflicting information during their interview. The respondents in the present case testified that they received an outdated copy of the by-laws from their realtor, but were unable to establish who gave the realtor the documents. The respondents in the instant case have failed to prove that the association provided them outdated by-laws and, therefore, did not show that they relied upon any representation by the association regarding the by-laws.

[3] The petitioner relies upon Woodside Village Condominium Assoc. v. Jahren, 806 So.2d 452 (Fla. 2002), to support its argument that, even if it were assumed the respondents' facts were true, the respondents' estoppel defense must fail. Petitioner's reliance on Woodside is misplaced, as the unit owners in Woodside did not allege reliance on a misrepresentation by the association as the respondents have alleged in the instant case. Acceptance of the petitioner's argument would extend the holding of Woodside to abolish the defense of estoppel in such instances, which the Supreme Court did not intend to do.

relinquish its right to enforce the weight restriction. Therefore, the respondents' defense of waiver is rejected.

The respondents also raised the defense of laches, arguing that the association did not object to their dog until months after they had purchased their unit. Laches involves an unreasonable delay in asserting a known right, which delay causes undue prejudice to the party claiming laches. Sea Breeze South Apartments Condo., Inc. v. Beck, Arb. Case No. 00-1734, Final Order (May 17, 2002), citing Appalachian, Inc. v. Olson, 468 So. 2d 266 (Fla. 2d DCA 1985). The respondents purchased their unit in September 2002. On February 11, 2003, the association issued the respondents a violation letter informing them that they were maintaining a dog in violation of the pet weight restrictions. On March 25, 2003, the association, through its legal counsel, again informed the respondents of the violation indicating that if the non-compliant dog is not removed the association would take further action. The association filed its petition for arbitration in this matter on July 22, 2003. By asserting its rights within seven months of the respondents' purchase of their unit, the association did not unreasonably delay enforcing the restriction against the respondents. Therefore, the defense of laches fails.

The respondents briefly alluded to a defense of selective enforcement during the final hearing, indicating that other unit owners were maintaining overweight pets. However, the respondents failed to establish the selective enforcement defense in that they did not provide any evidence regarding other incidents of unit owners maintaining overweight dogs or that the association had knowledge of the incidents.

Based on the testimony of the witnesses and documents tendered into evidence, the arbitrator finds that the respondents are maintaining a dog which does not weigh less than twenty-two (22) pounds. Section 4(m) of Article XVIII of the association's by-laws and paragraph II(A) of the association's rules, specifically prohibit maintaining pets which do not weigh less than twenty-two (22) pounds. The respondents have failed to prove any of the affirmative defenses they raised. Therefore, the arbitrator finds that the respondents have violated the pet weight restrictions of section 4(m) of Article XVIII of the association's by-laws and paragraph II(A) of the association's rules.

RELIEF AND REMEDY

The respondents have violated the pet weight restrictions of section 4(m) of Article XVIII of the association's by-laws and paragraph II(A) of the association's rules. The respondents shall permanently remove their dog from their unit within thirty (30) days of the date this order and shall at all times in the future comply with pet weight restrictions of the association's by-laws and rules.

Wherefore the respondent shall comply with the terms set forth above.

DONE AND ORDERED this 12th day of February 2004, at Tallahassee, Leon County, Florida.

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James W. Earl, Arbitrator
Department of Business and
Professional Regulation
Arbitration Section
1940 North Monroe Street
Tallahassee, Florida 32399-1029

RIGHT TO TRIAL DE NOVO

PURSUANT TO SECTION 718.1255, FLORIDA STATUTES, THIS DECISION SHALL BE BINDING ON THE PARTIES UNLESS A COMPLAINT FOR TRIAL *DE NOVO* IS FILED BY AN ADVERSELY AFFECTED PARTY IN A COURT OF COMPETENT JURISDICTION IN THE CIRCUIT IN WHICH THE CONDOMINIUM IS LOCATED WITHIN 30 DAYS OF THE DATE OF MAILING OF THIS ORDER. THIS FINAL ORDER DOES NOT CONSTITUTE FINAL AGENCY ACTION AND IS NOT APPEALABLE TO THE DISTRICT COURTS OF APPEAL.

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 of this order does not toll the time for the filing of a motion seeking prevailing party costs and attorney's fees.

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 12th day of February 2004:

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