

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

IN RE: PETITION FOR ARBITRATION

SEA RANCH VILLAS ASSOCIATION, INC.,

Petitioner,

v.

Case No. 00-1830

FRANCIS J. REINHARDT, JR.,

Respondent.

_____ /

FINAL ORDER

On October 30, 2000, Sea Ranch Villas Association, Inc. (petitioner or association) filed a petition for arbitration naming Francis J. Reinhardt, Jr., as respondent.¹ The petition alleges that the respondent has replaced the front and rear windows of his unit with non-conforming, non-identical windows, in violation of Article 3.3(f)(1) of the declaration of condominium. As relief, the petitioner requests an order requiring the respondent to return the front and rear windows of the unit to their original condition and to comply with the relevant provision of the declaration of condominium in the future.

On December 18, 2000, the respondent filed an answer to the petition. The respondent denied that conforming windows were available and maintained that he had received verbal approval to replace the windows. The respondent further asserts the defenses of no irreparable harm, selective enforcement, impracticability, necessity, unclean hands/estoppel and incorrect declaration citation.

Pursuant to notice, a formal hearing was held in this matter, commencing at

¹ Maureen A. Reinhardt was also listed as a respondent; however, she is deceased.

approximately 9:00 a.m. on October 9, 2001. Joann Nesta Burnett, Esquire, represented the petitioner. Mark S. Mucci, Esquire, represented the respondent. The parties appeared from the law offices of Becker & Poliakoff, P.A. The arbitrator appeared from Tallahassee, Florida, via telephone. The parties presented the testimony of witnesses and tendered documents into evidence. This order is entered upon consideration of the complete record in this matter, including post hearing closing statements.

The issues in dispute are whether the respondent has violated Article 3.3(f)(1) of the declaration of condominium by replacing the front and rear windows of his unit with the windows that are currently installed and, if so, whether the association's enforcement action should be barred by any of the defenses raised by the respondent.

Article 3.3(f)(1) of the declaration of condominium provides in part:

(f) Alteration and Improvement.

(1) After the construction of an apartment building and common services to the exclusion of other buildings, there shall be no alteration of such building nor further improvement of the parcel upon which the building is located without prior approval in writing, of the majority of the owners thereof and two-thirds of the board of directors of the Association; provided, however, that an apartment owner may make repairs to preserve the apartment from weather elements if he pays for the cost thereof, but such repairs may not alter in any way the exterior or appearance of the building. (Emphasis added.)

The respondent admits that the windows he has installed differ from the ones replaced. Some of the differences are as follows: the new windows are single-hung (open by sliding up and down) while the previous windows were colonial style awning (open by tilting outward and up), the new windows have horizontal and vertical metal bars that the original windows did not have and the new windows have screens on the outside of the windows while the originals did not. The characteristics listed above and the photographs submitted into evidence show that the newly installed windows have altered the appearance of the

exterior of the building. Because Article 3.3(f)(1) of the declaration of condominium requires unit owners to obtain written approval from a majority of the unit owners and two-thirds of the board prior to altering the appearance of the exterior of the building, the respondent was required to obtain written approval prior to installing the new windows.

The respondent asserts that the declaration provision cited by the association is inapplicable because the provision applies to common elements and the alterations were made to a limited common element. Article 2.8 identifies the areas that are included within the common elements. Paragraphs (2) and (3) of Article 2.8 provide:

.8 Common elements includes within its meaning the following items:

* * *

(2) All parts of an apartment building not included within the apartments.

(3) All improvements not included within an apartment building.

Limited common elements are not a part of the apartment; therefore, they are a part of the common elements. As there is no separate provision governing alterations to limited common elements, alteration to these areas are governed by the general rule that governs alterations to all other common elements, which is Article 3.3(f) of the declaration of condominium. Therefore, the provision cited by the association governs the violation in the current case.

The respondent contends, and the petitioner denies, that the respondent received advance verbal approval from the board of directors to make these changes. Numerous arbitration cases have held that where the declaration requires written approval, verbal approval by one individual, even a member of the board, will not suffice. See Cypress Bend IV Condominium Association, Inc. v. Pepper and Frisbie, Arb. Case No. 00-0417, Summary Final Order (June 26, 2000)(citing Venetian Condominium, Inc. v. Cohen, Arb.

Case No. 97-0037, Summary Final Order (December 3, 1997). (Where documents specifically require written permission, it is not reasonable for a respondent to rely on the verbal representation of the manager.) Since the documents in the present case require written permission, the respondents could not have reasonably relied on any verbal permission. The respondent was also required to receive approval from two-thirds of the unit owners, which he did not receive. Based upon the foregoing, the respondent did not receive written approval to install the new windows, in accordance with Article 3.3(f)(1) of the declaration of condominium.

The respondent contends that the association is not suffering irreparable harm because other alterations exist on the condominium property. Where a violation of a covenant contained in the declaration of condominium is shown, no independent showing of irreparable harm is required in order to obtain injunctive type relief. See Yacht Harbour Condominium Association, Inc. v. Seikman, Arb. Case No. 94-0167, Summary Final Order (November 2, 1994)(citing Europco Management Company v. Smith, 572 So. 2d 963 (Fla. 1st DCA 1990)). Irreparable harm is presumed. Therefore, this defense is rejected.

In the petition, the respondent argues that he was unable to replace the windows with the original windows because they are no longer manufactured. During the final hearing the association entered into evidence a list of other unit owners at Sea Ranch Villas that have replaced their windows with conforming windows within the last two to three years. Mr. Martino Petreccia testified that the original window is currently on the market. Jan Peterson, the respondent's expert, did not deny the availability of the original window. Based on the foregoing, it is found that conforming windows are available.

In the answer, the respondent asserts necessity as a defense. The respondent's sister Peggy Reinhardt has occupied the unit for approximately 10 years. The respondent

lives in New Jersey and had not visited the property for 4 years prior to the final hearing. The respondent testified that his sister informed him that the windows needed replacing because the windows were old, leaking and deteriorated. The association has not argued that the respondent was not allowed to remove the old windows; therefore, the fact that the respondent found it necessary to replace his windows is not in dispute. The respondent further contends that because awning windows are not impact resistant he was required to install a different type of window to protect his property. Section 718.113(5), Florida Statutes, provides that “[n]otwithstanding any provision to the contrary in the condominium documents, if approval is required by the documents, a board shall not refuse to approve the installation or replacement of hurricane shutters conforming to the specifications adopted by the board.” The respondent, consequently, has the right to install hurricane shutters for the protection of his unit. The petitioner concedes the existence of that right. Therefore, the respondent’s assertion that impact resistant windows are the only mean by which he could have protected his unit is rejected.

The respondent also argues that it would have been impracticable to replace the new windows with 36-year-old windows. The respondent did not prove that installation of the original style windows would have violated the Broward County Code. The crux of the respondent’s argument is that he should be allowed to install a better, more efficient product and that to require the removal of his current windows and installation of compliant windows would be costly. “In a community living setting such as a condominium, the association, elected by the other unit owners, has the right to maintain uniformity of exterior appearance as stated in the condominium rules and regulations.” Inverness at Golfview Condominium Association, Inc. v. Dunlop, Arb. Case No. 96-0247, Summary Final Order (November 13, 1996). “The provision in the declaration and rules,

requiring prior written approval of the board before altering exterior limited common elements, is the method a unit owner could use to avoid the uncertainty and expense associated with the board requiring them to subsequently remove improvements that were made unilaterally by the unit owner.” Id. Colonial style awning windows were available at the time that the respondent installed the new windows and the local building code does not prohibit the installation of the original windows; thus, the respondent’s impracticality defense is rejected.

Arguably, the respondent has installed better windows, yet there is no such exception in the condominium documents that allows unit owners to alter the appearance of the building where the product used by the unit owner is superior to the original.

The respondent asserts that the physical appearance of the condominium property fails to establish uniform and consistent guidelines; that the association has no written guidelines for improvements; that the letter from the association to the unit owners dated March 25, 1996 (Petitioner’s Exhibit I) does not inform the unit owners of what type of changes would be acceptable nor does it indicate that existing violations would be grandfathered; and that the board has failed to outline guidelines for improvements. The respondent relies on Young v. Tortoise Island Homeowners Association, Inc., 511 So. 2d 381 (Fla. 5th DCA 1987), for the proposition that in the absence of an existing pattern which could put one on notice of the architectural requirements, an architectural board does not have the power to impose standards based upon an aesthetic concept.

In Young v. Tortoise Island, the Youngs drove around the Tortoise Island subdivision and observed that there was no common architectural style employed by the owners. The Youngs then purchased a lot in the subdivision and submitted plans for their house to build to the architectural control board of the Tortoise Island Homeowner’s Association.

Construction could not commence without board approval. The Youngs' plan included a flat roof. Neither the recorded restrictions nor the Guidelines and Checklist contained a prohibition against flat roofs. The architectural board rejected the Youngs' plan; the architect serving on the board testified that in his judgment flat roofs were not compatible with the development. The Youngs agreed to modify their plan. After the plans were approved and the injunction lifted, the Youngs built their house with a flat roof. The trial court found that the prohibition was within the board's power.

The Fifth District Court of Appeal reversed the trial court. The court wrote, "In the absence of an existing pattern or scheme of type of architecture which puts a prospective purchaser on notice that only one kind of style will be allowed, either in the recorder restrictions or de facto from the unified building scheme built on the subdivision, such a board does not have the power or discretion to impose only one style over another, base purely on "aesthetic concepts." Young is distinguishable from the present case.

First, in the present case, the respondent was on notice of the acceptable style of windows because he had them installed in his unit prior to making the changes. Second, in Young the unit owners' actions did not violate a recorded provision, as there were no recorded provision that outlined what types of roofs were permissible. To the contrary, the respondent in the present case violated a recorded provision, Article 3.3(f)(1), which specifically prohibits changes to the exterior appearance of the building without permission. Third, the Youngs sought approval; Mr. Reinhardt did not. Fourth and foremost, the court in Young plainly states in footnote 1 that "We do not think the cases dealing with the power of condominium associations to regulate use of common elements are relevant."

It is not unusual for an association that has not enforced a restriction for a lengthy period of time to set a point in time and declare its intention to enforce the restriction prospectively. It is also common for associations making this decision to determine not to act against then-existing violations. Chattel Shipping and Investment, Inc. v. Brickell Place Condominium Association, Inc., 481 So. 2d 29 (Fla. 3rd DCA 1985) involved a declaration of condominium that prohibited enclosing balconies without association approval. Despite that prohibition, several unit owners enclosed their balconies before the association announced that it thereafter would “prohibit future balcony constructions and enforce the prohibition.” After the association announced its intention to enforce the provision, Chattel Shipping and Investment, Inc. enclosed a balcony. The association demanded the removal of the enclosure. Chattel argued that in light of the association's toleration of the many existing enclosures, the demand to remove Chattel's enclosure constituted “unequal and arbitrary enforcement of the restriction” in violation of the principle of selective enforcement set forth in White Egret Condominium, Inc. v. Franklin, 379 So. 2d 346 (Fla. 1979). The court rejected Chattel's argument, holding that the adoption of a uniform policy under which a given building restriction will be enforced only prospectively can not be deemed 'selective and arbitrary'. The court noted that the enclosures built before the association announced its intent to begin enforcement were protected because they had been built “in justified reliance” on the status quo, as opposed to the appellant, which erected its forbidden structure after being placed on specific notice that any subsequent violation would not be permitted. 481 So. 2d at 30, 31.

In the present case, the association's letter dated March 27, 1996, placed all unit owners on notice that it would enforce the requirement that unit owners obtain prior approval before taking action or making changes that affect their apartment internal

structure or any common element or exterior of units. The letter mentioned that “what has happened in the past does not set a precedent for the present.” This letter complies with the requirements outlined in Chattel Shipping. Based on the foregoing, the respondent has failed to establish that he was permitted to change his windows because the building does not have a uniform appearance.

The respondent asserts that the association’s enforcement effort should be barred by the affirmative defense of unclean hands. “Equity will stay its hand where a party is guilty of conduct condemned by honest and reasonable men. Unscrupulous practices, overreaching, concealment, trickery or other unconscientious conduct are sufficient to bar relief.” Hensel v. Aurilio, 417 So. 2d 1035, 1038 (Fla. 4th DCA 1982)(*quoting* 22 Fla. Jur. 2d, Equity, § 50). The respondent appears to argue that the association’s failure to enforce the relevant provision in the past constitutes unclean hands. The board’s failure to enforce the declaration in the past might indicate that the board has been less than vigilant in performing its duties, but it does not support a finding that the board has engaged in dishonest activity. Thus, this defense is rejected.

In order for estoppel to apply, it must be shown that a representation was made to the respondent by the association, which representation is contrary to the condition of affairs later asserted by the association; that it was reasonable for the respondent to rely on the representation; and that the respondent changed his position to his detriment. See Enegren v. Marathon Country Club Condo. West Association, Inc., 525 So. 2d 488 (Fla. 3rd DCA 1988). Jim Carlton, the maintenance manager at the condominium, testified that he discussed windows with Peggy Reinhardt, that he told her what could be installed, and that when she described the windows as impact, single-hung that he told her that the windows did not conform. Mr. Carlton also testified that he was on sight when the truck

arrived with the windows, that he followed the truck to the unit and that he told the installation crew to wait until he found a board member. They agreed to wait, yet they installed the windows. The respondent admits that he did not receive approval from the board. Based upon the foregoing, the respondent has failed to show that the association represented to him that he could install the current windows.

The respondent testified that Robert Porgess made it clear that he should “not worry about the back.” Assuming that Mr. Porgess made the purported statement, the respondent did not install the windows in reliance on this statement, as he admits that he did not seek approval prior to installation of the windows.

Where documents specifically require written permission, it is not reasonable for a respondent to rely on a verbal representation to the contrary. Venetian Condominium, Inc. v. Cohen, Arb. Case No. 97-0037, Summary Final Order (December 3, 1997). Because the documents in the present case require unit owners obtain written permission from the board and a majority of the unit owners prior to altering the exterior of the building, the respondent could not have reasonably relied on Mr. Porgess’s or any other individual’s oral permission. The respondent’s estoppel defense, therefore, is rejected.

To establish the affirmative defense of waiver the respondent must show that a right of the board existed at the time of the waiver, that the board had knowledge of it, and that the board intended to relinquish that right. Savoy East Association, Inc. v. Jansson, Arb. Case No. 92-0133, Final Order (January 4, 1994). Assuming arguendo that the respondent’s version of the facts are true and that Mr. Porgess, on behalf of the board, approved the respondent’s changes to the rear of the building, the defense of waiver must still fail. Article 3.3(f)(1) requires approval by a majority of the unit owners as well, which the respondent does not claim to have received. Thus, the respondent has failed to prove

that the board had the right to waive the requirement of obtaining written approval from the unit owners prior to installing the current windows.

An association may not enforce restrictions in a selective or arbitrary manner. White Egret Condominium, Inc. v. Franklin, 379 So. 2d 346 (Fla. 1979). Selective enforcement involves the failure of an association to enforce the condominium documents in other instances bearing sufficient similarity to the instant case to warrant the conclusion that it is discriminatory, unfair, or unequal to permit the association to enforce the restriction in the present case. See Oceanside Plaza Condominium Assn., Inc. v. Salussolia, Arb. Case No. 96-0384, Order Striking Certain Defenses (September 4, 1996). The respondent contends that there are multiple nonconforming windows. Yet, the testimony supports that there have only been three violations since 1996, when the association issued its notice of intent to enforce the relevant provision. The owner of Villa #20 installed new windows. When the association notified him of the violation, he corrected it. Mr. Biagi, the owner of Villa #8, installed new windows in his unit; the side window was not in conformity. Mr. Biagi sought approval from the association and received it. The respondent, who has the duty of proving his affirmative defense, did not prove that the association took no action when it learned of another unit owner violating Article 3.3(f)(1) of the declaration after March 27, 1996.

The association's history of initiating enforcement actions indicates that the association has actively enforced Article 3.3(f)(1) of the declaration since March 1996. Therefore, the respondent has failed to prove that the association has engaged in selective enforcement.

Wherefore, the respondent has violated Article 3.3(f)(1) of the declaration and has asserted no viable defense, the relief requested shall be granted. Yet, the issue of what is

the appropriate relief regarding the rear windows requires additional discussion. Board member Jack Scott testified that the board allows colonial windows in the back and that single-hung windows are not allowed. The board seeks uniformity in the front with no deviation, while the back has never been uniformed since the beginning. The unit owners customized the backs of their unit at the time of purchase. However, the association is attempting to get to some uniformity in the back. Because the association's standards for installation of windows on the side and rear of the unit are less stringent than the front, the appropriate relief with regard to the rear windows differs from the relief for the front windows.

Based on the foregoing, it is ORDERED:

1. Within 45 days from the date of this order, the respondent shall remove the non-conforming front windows and replace them with colonial awning windows that match the original windows.

3. Within 15 days from the date of this order, the respondent may request approval from two-third of the board and a majority of the unit owners for approval to leave in the current rear windows. If approval is denied or is not sought, within 45 days from the date of this order the respondent shall replace the rear windows with colonial awning windows that match the original windows.

4. In the future, the respondent shall comply with Article 3.3(f)(1) of the declaration of condominium.

DONE AND ORDERED this 8th day of May 2002, at Tallahassee, Leon County,
Florida.

Cassandra Pasley, Arbitrator
Arbitration Section
Department of Business and
Professional Regulation
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 MAILING

I hereby certify that a true and correct copy of the foregoing was mailed by U.S. mail, postage prepaid, to: JoAnn Nesta Burnett, Esquire, Becker & Poliakoff, P.A., P.O. Box 9057, Fort Lauderdale, FL 33310-9057 and Mark S. Mucci, Esquire, Benson, Moyle & Mucci, LLP, One Financial Plaza, Suite 1600, Fort Lauderdale, FL 33394-1697, this 8th day of May 2002.

Cassandra Pasley, Arbitrator