

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

IN RE: PETITION FOR ARBITRATION

**Ruth V. Bennett and
Benjamin S. Bennett,**

Petitioners,

v.

Case No. 01-2207

**Solamar Condominium
Association, Inc.,**

Respondent.

_____ /

FINAL ORDER

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

The petitioners, Ruth and Benjamin Bennett, commenced this action on December 29, 2001, through the filing of their petition for arbitration. The Bennetts sought entry of a final order permitting them to install outer boundary hurricane shutters on the balcony of unit 1406. Petitioners alleged that the association's decision to disallow permission to install the shutters closing their balcony was based upon purely aesthetic reasons and was otherwise inconsistent with the statute and the declaration. At the time of the filing of their petition, petitioners desired to install the accordion hurricane shutters atop the knee wall surrounding the outer perimeter of their balcony. The shutters as installed would extend from the knee wall upwards to the outer edge of the ceiling of the balcony which becomes the floor to the balcony above, and would cover all exterior openings on the balcony thus sealing off the balcony from any wind or other weather components.

The association filed its answer on February 1, 2001. The association stated that the installation sought by petitioners was inconsistent with the hurricane shutter specifications adopted by the board. The association also raised a number of other defenses including estoppel, laches and waiver. The board also relies on its business judgement.¹ The issue presented is whether the decision of the board to disallow accordion shutters on the petitioners' balcony may be shown to be arbitrary or unreasonable.

The hurricane shutter specifications adopted by the board contemplate as to the balconies, that electric roll down hurricane shutters be affixed to all doors and windows that open out onto the limited common element balconies. The owners are not *required* to install the roll downs on their balconies, but if they choose to install hurricane shutters on their balconies, they are required to install roll downs. The pre-trial pleadings filed by the association suggest that the installation of accordion shutters on the knee wall would be impracticable, impossible, and would require substantial modifications to the common elements in order to anchor the devices.

The final hearing was originally set for September 24, 2001 to be conducted via telephone conference but was later continued and reset at the request of the parties. The hearing occurred live and in person at the condominium on November 29, 2001. The arbitrator conducted a tour of the property that lasted approximately 40 minutes, during which the arbitrator examined petitioners' unit and balcony, another unit and balcony with roll down shutters installed, and an open

¹ There is a suggestion by the association in its supplemental statement to the answer that the only reason petitioners desire accordion shutters enclosing the entire balcony is that petitioners are physically unable to carry their outside furniture indoors when a storm is threatening. Petitioners have not asserted in this proceeding that they are disabled. Nor have they demanded an accommodation under the fair housing laws.

atrium area on the common elements where the association had installed accordion shutters in an effort to regulate the airflow into the atrium from the outside.

The following findings of fact are based on the testimony and documentary evidence submitted and accepted into evidence in the course of the final hearing in this matter. Petitioners desire to install accordion hurricane shutters² to protect their balcony areas. They cannot efficiently move their furniture from the patio to the internal unit when a storm comes up. They want an envelope of protection to include their entire patio area rather than just the exterior openings to the actual unit as offered by the association. There have been instances in the past when petitioners' patio furniture in the course of a thunderstorm and high winds has been blown against the sliding glass doors and caused damage. Petitioners desire to protect their belongings that they choose to put out on the porch. The association is aware that in the past, items have blown off the various porches during storms and have dropped to the area below the building, thereby jeopardizing people and property on the ground.

Contrary to the assertions of the association, there is no reason from an engineering standpoint that accordion shutters cannot be installed either on the knee wall or in the position ultimately advocated by the petitioners. The knee wall is cinderblock construction and adequate fasteners and anchors could be installed to safely hold the shutters in place. The petitioners propose to run a track upon which the shutters would be pulled on the floor of the

² Accordion style shutters unlike roll down shutters, are able to be installed on curved surfaces such as petitioners' balcony, while roll down shutters must be installed on a straight surface.

patio as close as possible to the outside knee wall. The shutters themselves when not in use are gathered, or “stacked” where the tracks meet the exterior wall of the building. The track comprises only a slight tripping hazard extending as it does a short distance above the horizontal plane of the balcony slab floor. The track may be modified to permit water from rain to be drained from the area interior to the track to the drain scuppers exterior to the track. The drainage of rainwater is not a problem that cannot be satisfactorily addressed in the design and construction of the hurricane shutter system. It is also unconvincing that the association indicated that it was concerned about drilling into the interior portions of the slab in order to adequately anchor the shutters. First, the area may be prepped and caulked and any remaining risk to the building might be addressed by insurance policies or an indemnification agreements. There is no reason to suspect that the installation of accordion shutters will pose any greater risk to the structural integrity of the building than installation of the roll downs adopted by the association.

There was no demonstrated basis for concluding that the board’s choice of roll down hurricane shutters on the balconies was anything but reasonable. Roll down shutters are an acceptable form of hurricane protection not shown to be inferior to any other type of shutter. The only shortcoming of these shutters concerns their placement. By their nature, they are installed up against the building (and not directly on the slider or window glass as suggested by petitioners but separated from the glass surfaces by a storm bar) and do not therefore offer protection to the balcony area which would be afforded by the accordion shutters encapsulating the balconies. The roll downs do not offer any protection to persons or property occupying the

balcony areas. In this sense the roll downs operate to deprive the patio areas of hurricane protection.

Although the association has adopted sliding shutter specifications for the openings to the unit on the limited common element balconies, (and by thus adopting such specs has prohibited all other styles), the association itself has installed roll down hurricane shutters on the side of the building open to the air facing the waterway. The condominium building is an example of high rise open atrium architecture, and each floor of the 20 story building has an opening on the east side that is open to the air and elements. The openings in the common elements abut a common element walkway that joins all the units on a particular floor and eventually leads to the central inner atrium of the building featuring a glass or plexiglass roof in the core of the building. In 1994 a nearby waterspout caused a wind tunnel effect that funneled air into the atrium openings on the one side of the building, until sufficient pressure was created lifting off the atrium roof and depositing it some distance away. Thereafter, the association installed roll down shutters over the atrium openings on each floor.

The main thrust of the evidence or arguments presented by the petitioners was that the board acted unreasonably in failing to approve³ roll downs on the patios when it had already itself installed roll downs on the atrium openings. Petitioners felt that the condominium building already had a “hodge-podge”⁴ appearance, that the appearance of the property had already been compromised, and that any effort at this

³ The board on one level failed to approve petitioners' request because the accordions were inconsistent with the specifications adopted by the association.

⁴ See, Vinik v. Taylor, 270 So. 2d 413 (Fla. 4th DCA 1972); Mallory v. Ballantrae Condominium Association, Inc., Arb. Case No. 93-0265, Final Order (January 23, 1994).

point by the association to impose its sense of aesthetics on the property was an effort undertaken too late. After presentation of the petitioners' case the arbitrator granted the association's motion for a directed verdict. The arbitrator ruled that the association had not been shown to be unreasonable, discriminatory, or otherwise inappropriate in failing to approve petitioners' application for permission to install the accordion shutters⁵. The arbitrator, having viewed the property, is of the opinion that since all balconies that had installed shutters had installed roll downs shutters, and since all atrium openings had uniformly been equipped with accordion shutters, there was still a sense of uniformity throughout the property.⁶ While this perception is challenged when some of the atrium openings are shuttered while others are not, overall there is a sense of consistency when viewing the external frame of the building. Within each component of the building there exists uniformity, although the different components or systems are not uniform compared to other components or systems. The different building components consist of common elements on the one hand and limited common elements on the other. There is a distinction in the law and in the appearance or location within the building structure of these different components that supports the association's differential treatment of these components.

⁵ While aesthetics was the primary factor prompting the board to adopt roll downs and not accordions for the balcony specs, it was not shown that this use of aesthetics was arbitrary or unreasonable.

⁶ This having been said, since most existing buildings in Florida were not designed to accommodate retrofitted hurricane shutters, the addition of shutters rarely does anything to enhance the outward appearance of the building, and it cannot be said that from an appearance standpoint, the addition of either shutter design contributes to the intended features of the building.

WHEREFORE, the relief requested by petitioners is not granted. Petitioners have not demonstrated that the refusal by the association to approve the installation of accordion hurricane shutters on their limited common element balcony was discriminatory, arbitrary, or unreasonable. In addition, petitioners have not otherwise identified any basis upon which to conclude that they are entitled to hurricane protection on their limited common element balcony.

DONE AND ORDERED this 2nd day of January, 2002, at Tallahassee, Leon County, Florida.

Karl M. Scheuerman, 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 final order has been sent by U.S. Mail to the following persons on this 2nd day of January, 2002 to the following persons:

Henry Paul Johnson, Esquire
6640 Willow Park Drive
Naples, Florida 34104

Carl Joseph Coleman, Esquire
P.O. Box 1567
Ft. Myers, Florida 33902

Karl M. Scheuerman, Arbitrator

Right to Appeal

As provided by s. 718.1255, F.S., this final order may be appealed by filing a petition for trial de novo with a court of competent jurisdiction in the circuit in which the condominium is located, within 30 days of the entry and mailing of this order. This 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 an arbitration proceeding is entitled to have the other side pay its reasonable costs and attorney's fees. As provided by rule 61B-45.048, F.A.C., a motion seeking an award of attorney's fees and costs, which motion must conform to the requirements of the administrative rule, must be filed with the Division within 45 days of the date of the entry and mailing of this final order.