

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

IN RE: PETITION FOR ARBITRATION

SUNCOAST RESORT RENTALS, INC.,

Petitioner,

v.

Case No. 01-4143

SEA OATS OF REDINGTON SHORES
CONDOMINIUM ASSOCIATION, INC.,

Respondent.

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FINAL ORDER

On December 12, 2001, a petition seeking non-binding arbitration was filed which alleged a failure to allow inspection of association documents after a written request was made under chapter 718.111(12) Florida Statutes. Several attempts were made to settle the issue short of a final hearing. A final hearing was scheduled for September 20, 2002. That hearing was canceled on September 19, 2002, when the Arbitrator was informed that a settlement agreement had been reached. When the parties proved unable to finalize the settlement agreement, a second final hearing was scheduled for November 3, 2002, and was held on that date.

Jim Parker, an officer of Suncoast Resort Rentals, Inc., which owns Unit 104 of Sea Oats Condominium, made a written request for the inspection of association records. A letter of request was sent to the association on September 9, 2001, by

the Petitioner's attorney, C. Scott Brainard, Esq. The letter requested accounting records of the association, all minute books for the association and all records in which the association was acting as a rental agent. Petitioner was informed that some the records were in the apartment of the association president and were unavailable due to the president being in France. The association said it could not immediately provide the letters located in the president's apartment, but the association contacted the association's accountant to provide the requested financial records. There was an initial inspection of the records provided to the Petitioner on September 19, 2001. A second written request was then sent, which specifically requested to review tax and/or petty cash accounts. A second inspection of records was conducted on October 5, 2001. At that time a number of boxes of records were presented. However, the Petitioner presented testimony that the records were not clearly indexed and that he was not given enough time to review and copy the files before the office closed for the day.

This led to a third effort to inspect the records. In that inspection, further documents relating to the operation of the rental program were requested. The specific information sought by the Petitioner, as to the identity of the renters/tenants of specific units, was not located.

Testimony was presented was taken from Ms. Linda Hatch, president of the association. Ms. Hatch testified that Sea Oats is a small association and that the program was not an official activity of the association, but an ad hoc volunteer effort to assist fellow owners who were renting out their units. She also testified

that part of the delay in responding to the initial request for records was due to difficulty she experienced in returning to the United States after the disruption of air travel following the terrorist attack of September 11, 2001. She testified that the funds from the program were placed in an account using the tax id number of the association. She also testified that the Petitioner had made complaints to the Florida Department of Revenue about the rental activities of some unit owners, resulting in inquiries by that department along with possible fines and taxes. Ms. Hatch testified that she had been advised that as long as she used the association's tax number, which had been used as a convenient device for paying tax obligations, the records were available to anyone who requested them. Subsequently, to clarify that the program was not an association function, Ms. Hatch stated that another account was opened to establish the separate identity of the rental program.

Ms. Hatch testified that the record keeping was minimal. Once the money was deposited, the supporting documents were discarded. Documents were, according Ms. Hatch, kept in "zip-loc" bags with the keys to the units.

Two documents entered into evidence undercut the proposition that this was a mere informal service on a unit owner to unit owner level. Exhibit 9 is an open letter "To All Owners" on the letterhead of the association, which is dated January 30, 2000, and signed "Sea Oats Association." The three page letter details "Guidelines for running a smooth organization." The letter states, inter alia, the program is open to "all owners" and stated that the owners availing themselves of

the program were required to:

provide necessary information to the office of your guest/family or friend: the name number of occupants, date and time of arrival and departure, arrangements for picking up keys, parking and guest book, \$ amount if the office is to collect for the owner.....

A second letter, Exhibit 8, appears on association letterhead and was signed by Ms. Hatch and states:

The office is not involved in rental services per se; instead, the office provides services including matching owners with renters, for the unit owner and the renter of the unit. (emphasis in the original)

The second letter also outlines the fee structure and taxes that are collected and then paid to the "appropriate governmental agencies thereby eliminating unnecessary paperwork."

Under Florida law Chapter 509 associations are allowed to operate a rental program. That chapter does not expressly require the association to maintain records as to the names of those who were renting the units from the participating unit owners. From the testimony presented the individual heading the program appears to have sincerely believed that that this enterprise was separate and apart from the association, despite her position as president of the association and the fact that the association received a processing fee. The Petitioner argues that under these facts the rental program is an association program or at the very least has an agency relationship with the association.

Based on the foregoing, the Petitioner has not sustained its burden of showing any obligation by the association to maintain the specific information sought by the Petitioner.

Assuming, arguendo, that an obligation to maintain particular records existed, the result would be the same. An important issue in such cases is the willfulness of the failure to provide documents. The failure to keep records as required by Section 718.111(12), Florida Statutes, does not in and of itself constitute a willful violation of that section. In Brown v. Wellington L Condominium Association, Inc., Arb. Case No. 94-0363, Final Order (February 20, 1995), the arbitrator noted that where an association fails to maintain records, the precise violation of the statute involved is the failure to maintain a specific record, rather than the failure to allow inspection of the record. The arbitrator further notes that in the ordinary case the failure to maintain a certain record would not give rise to a claim of money damages for failure to grant access to the non-existent record. See also Greenlee v. Oceanside Terrace Condominium Association, Inc., Arb. Case No. 95-0497, Final Order (March 26, 1997) (The association's failure to copy certain letters that petitioner believed existed but could not find did not result in a violation where the petitioner did not prove that the letters existed); Brown-Myrttil v. Oakland Forest Club Condominium Association, Inc., Arb. Case No. 00-1039, Summary Final Order (October 23, 2000) ("[Where] the undisputed fact is that the association does not have the current insurance policy within its possession, and there has been no allegation or indication that the association is intentionally or deceptively withholding the insurance policy...the association has not willfully denied access to the petitioner within the meaning of the statute.")

The right protected by the association records inspection statute is a right to see existing records, not specific information desired by the inquiring party in a requested format. See Bazak v. Windernere Condo Assn., Inc., Arb. Case No. 96-0019 (December 4, 1996) This is consistent with the policy that prevails in the application of Chapter 119 F.S., Florida's public records law. See Seigle v. Barry, 422 So.2d 1075 (Fla. 4th DCA 1982)

In the present case we have an admission from the association that, in response to actions by the petitioner, a new account with a new tax number was created by the association so as to shield the privacy of the unit owners and renters. However, the association never maintained these records and was under the belief that it was not required to do so.

Based on the forgoing, it is held that the failure to provide certain documents that were not maintained was not willful as required by 718.111(12)(c) for the imposition of fines and that there was no duty to maintain the records requested by the Petitioner.

DONE AND ORDERED this 25th day of March 2003, at Tallahassee, Leon County, Florida.

Peter Gioia, Arbitrator
Arbitration Section
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399
Fax#: (850) 487-0870

RIGHT OF APPEAL

In accordance with Section 718.1255, Florida Statutes, a party adversely affected by this final order may appeal from the order by filing, within 30 days of entry and mailing of the order, a complaint for trial de novo with a court of competent jurisdiction within the circuit in which the condominium is located. This order does not constitute final agency action and is not appealable to the district courts of appeal.

ATTORNEY'S FEES

As provided by Section 718.1255, Florida Statutes, 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 C. Scott Brainard, 5999 Central Avenue, St. Petersburg, Florida, 33720 and Robert L. Tankel, Tankel, Vallar & Weaver, 1022 Main Street , Suite D, Dunedin, FL, 34698 this the 25th day of March 2003.

Peter Grant Gioia, Arbitrator

Copies furnished to:

C. Scott Brainard
5999 Central Avenue
St. Petersburg, Florida 33720

Attorney for petitioner

Robert L. Tankel
Tankel, Vallar & Weaver
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Dunedin, FL 34698

Attorney for the Respondent