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

IN RE: PETITION FOR ARBITRATION

Richard Huseby, Jerry McManamon, Larry Dutton, Judy Madie and Marilyn Wilson, et al.,

Petitioners,

v. **Fees Case No. 2004-04-8540**
Rel. Case No. 2004-03-0200

Seven Springs Villas Association, Inc.,

Respondent.
_____/

FINAL ORDER ON MOTION FOR COSTS AND ATTORNEY'S FEES

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

The respondent association filed its motion for award of costs and attorney's fees on October 1, 2004. The association seeks an award of $2,604.00, which represents 12.6 hours of attorney time billed at $190.00 per hour, plus 2.80 hours of paralegal time billed at $75.00 per hour. Petitioners have filed a response to the motion in which petitioners argue that in the absence of a determination on the merits, there can be no prevailing party.

In the proceeding below, petitioners filed their petition seeking entry of a final order declaring that an agreement entered into between the association and a country club violated section 718.110(4), Florida Statutes, by disturbing the appurtenances to the petitioners' units. The association filed a motion to dismiss which the arbitrator granted. The arbitrator found that the proceeding would implicate the material interests of the country club, which, being neither a unit owner nor an association, would potentially disengage the jurisdiction of the arbitrator

pursuant to s. 718.1255, Florida Statutes. Also, the arbitrator found that in a prior declaratory statement proceeding filed pursuant to s. 120.565, Florida Statutes, involving the same parties and issues, the Division had concluded that the same issues were being litigated at the same time in the circuit court. The petition for declaratory statement was denied because the issue was being considered by a court. The arbitrator in the underlying case dismissed the petition with prejudice on motion of the association because the relief sought by the petitioners would undermine the validity of a settlement agreement approved by the court in the companion court action.

Section 718.1255, Florida Statutes, provides that the prevailing party in an arbitration proceeding is entitled to an award of reasonable costs and attorney's fees. A party is a prevailing party if it succeeds on a significant issue in the arbitration and achieves some of the benefit sought in bringing the action. Moritz v. Hoyt Enterprises, Inc., 604 So. 2d 807 (Fla. 1992). A party may also be a prevailing party even if the action is not resolved on the merits. Hall v. Dept. of Health & Rehabilitative Services, 409 So. 2d 193 (Fla. 3rd DCA 1982). This applies when a case becomes moot because the opposing party voluntarily provided the relief sought in the action. Prevailing party status may thus be found if the filing of the petition for arbitration was the catalyst motivating the opposing party to provide the relief sought, so long as the opposing party's actions were required by law. 51 Island Way Condominium Association, Inc. v. Williams, 458 So. 2d 364 (Fla. 2nd DCA 1984); Hoffmeister v. Coler, 544 So. 2d 1067 (Fla. 4th DCA 1989). A determination of prevailing party status depends on the particular facts of the case and on the timing of the act that caused the arbitration proceeding to be dismissed. The Laurels at Margate Condominium Association, Inc. v. Sloneecky, Arb. Case No. 93-0039F, Final Order on Motion for Attorney's Fees (July 28, 1994); West Wind Condominium Association,

Inc. v. Becker, Arb. Case No. 94-0301F, Order on Motion for Attorney's Fees (August 15, 1995).

Certain other arbitration cases must also be examined. In Fairway Park Condominium Association, Inc. v. Dilloff, Arb. Case No. 97-0267F, Final Order on Attorney's Fees (August 6, 1997), the owners sought prevailing party attorney's fees where the arbitrator dismissed the petition for arbitration filed by the association seeking removal of a nuisance dog. The petition was dismissed because the owners, subsequent to the commencement of the arbitration case, had filed a fair housing complaint with HUD. The arbitrator noted:

> To qualify as a "prevailing party" the respondent must have succeeded on a significant issue in the arbitration. See Moritz, above. In this case, no determination was made on any significant issue. Therefore, the respondents could not have prevailed. The arbitrator dismissed the petition for arbitration because the issue was pending before another administrative tribunal. This action did not demonstrate that the arbitrator agreed that the petitioner's actions might be discriminatory and would be most efficiently resolved under federal law and federal authorities, as claimed by the respondents. [emphasis added].

In Oaks v. Vera Cruz Condominium Association, Inc., Arb. Case No. 00-1461, Final Order on Attorney's Fees (November 30, 2000), the arbitrator considered whether the association was the prevailing party when the petitioning unit owner dismissed his petition for arbitration seeking an award of punitive damages for alleged fair housing violations. The owner dismissed his arbitration case in order to pursue a claim for punitive damages in federal court. The arbitrator noted:

> In general, when a petitioner voluntarily dismisses an action, the respondent is the prevailing party. See Stuart Plaza, Ltd. v. Atlantic Coast Development Corp. of Martin County, 493 So. 2d 1136 (Fla. 4th DCA 1983); Landmark Oaks Condominium Association, Inc. v. Rice, et al., Arb. Case No. 96-0111F, Final Order on Respondent's Motion for Attorney's Fees and Costs (July 9, 1996). There must be an end to the litigation on the merits so

> that the court can determine whether the party requesting fees has prevailed. Thornber, et al. v. City of Fort Walton Beach, 568 So. 2d 914 (Fla. 1990) citing Simmons v. Schimmel, 476 So. 2d 1342 (Fla. 3d DCA 1985), review denied, 486 So. 2d 597 (Fla. 1986). In Thornber, the Supreme Court held that where a federal civil rights action filed by a police chief against the city council and council members individually was voluntarily dismissed following a settlement, the city council members were entitled to attorney's fees pursuant to Section 111.07, Florida Statutes, as prevailing defendants. The court noted that while the chief had obtained some relief, the council members as individuals did not provide any of the relief and the dismissal was with prejudice, thus signaling an end to the litigation. In Simmons, a wrongful death action, the plaintiff had sued the hospital and several doctors. Following discovery, the case was set for trial. Prior to empanelling the jury the plaintiff voluntarily dismissed without prejudice all of the defendants except one, a strategic move on the part of the plaintiff in an attempt to reduce the possibility of jury confusion from multiple defendants. One of the doctors sought and was awarded attorney's fees. The appellate court reversed. Citing Del Valle v. Biltmore II Condominium Association, 411 So. 2d 1356 (Fla. 3d DCA 1982), the court stated that there was no basis to conclude that the doctor had prevailed. The court noted that dismissal was without prejudice to refile the suit, the plaintiff had an expert witness who would have given testimony tending to establish liability on the part of the doctor, and like Del Valle, the plaintiff insisted that the voluntary dismissal was not related to the merits of the case. Compare Vidibor v. Adams, 509 So. 2d 973 (Fla. 5th DCA 1987); Dam v. Heart of Florida Hospital, Inc., 536 So. 2d 1177 (Fla. 2d DCA 1989) (rejecting the third district's view in Simmons). [emphasis added].

The arbitrator denied the motion for attorney's fees in Vera Cruz, supra, finding that the dismissal was not related to the merits of the case. In the instant case, it cannot be said that the dismissal of the petition had any bearing whatsoever on the merits of the dispute, which involved the issue of whether the agreement had abridged rights given the owners under s. 718.110(4), Florida Statutes. The dismissal was entered because the question was pending before the court, or because questions raised in the arbitration proceeding impacted on a settlement agreement entered into in the court litigation and approved by the court. There has been no determination

here regarding the merits of the case that the parties are presumably pursuing in the courts. As a final consideration, while the dismissal was *with prejudice*, thus suggesting an end to the litigation and a possible expression on the merits of the dispute between the parties, the arbitrator acknowledged that the issue may well return for further arbitration proceedings:

> If, in the course of the circuit court proceeding, the judge, upon proper motion of the parties, rules that the issue involving the appurtenance properly lies within s. 718.1255, Florida Statutes, or if the judge refers the case to the Division for its own determination of jurisdiction, then the Division will be in a proper posture to address the jurisdictional issue and possibly the merits of the case.

Accordingly, based on the foregoing, it follows that the association was not the prevailing party in the litigation.

WHEREFORE, the arbitrator hereby denies the association's motion for costs and attorney's fees.

DONE AND ORDERED this 17th day of December, 2004, at Tallahassee, Leon County, Florida.

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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 17th day of December, 2004:

Susan K. Spurgeon, Esquire
Pennington, Moore, Wilkinson,
Bell & Dunbar, P.A.
215 S. Monroe St., 2nd Floor
Tallahassee, Florida 32301

Gary M. Schaaf, Esquire
Becker & Poliakoff, P.A.
2401 West Bay Dr., Suite 414
Largo, Florida 33770

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Karl M. Scheuerman, Arbitrator

Right to Appeal

As provided by s. 718.1255, F.S., this final order may be appealed by filing a complaint 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 final order. This order does not constitute final agency action and is not appealable to the district courts of appeal. If this final order is not timely appealed, it will become binding on the parties and may be enforced in the courts.