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

IN RE: PETITION FOR ARBITRATION

Richard Adelson,

Petitioner,

v. **Case No. 2008-05-2810**

Third Gulfstream Garden Apartments Condominium, Inc.,

Respondent.
_____/

SUMMARY FINAL ORDER

Statement of the Issues

The issue in this case is whether the Association willfully failed to allow inspection of its official records.

Procedural History

Petitioner sought to open an arbitration case by letter on September 18, 2008. A Notice of Deficiency was entered on October 12, 2008, advising of the need for a petition. On October 20, 2008, a petition for arbitration was filed alleging a number of disputes. An Order Requiring Answer was entered on October 22, 2008. On October 28, 2008, the arbitrator received a letter from Petitioner seeking to add an additional individual as a petitioner. On December 3, 2008, an Amended Order Requiring Answer was entered. On December 12, 2008, a letter from the president of the Association was filed, requesting an extension of time to file an Answer.

On December 16, 2008, a Notice of Communication and Order on Pending Motions was entered requiring the parties to send copies of all filings to the other party, granting the

extension, requiring a qualified representative application from Respondent and denying the addition of another party petitioner. On December 22, 2008, a letter from Petitioner was filed.

On January 14, 2009, the president of the Association filed an Answer that did not recite that a copy had been sent to Petitioner and was not accompanied by a Qualified Representative Application. Additionally, the Answer did not admit or deny specific allegations of the Petition but generally described disputes with Petitioner continuing four months after the Petition was filed. On January 26, 2009, an Order Striking Answer and Requiring Appointment of Qualified Representative was entered. The January 26 Order also provided instructions to both parties to limit the issues and ordered Petitioner not to file any more documents until after an answer was filed. On January 29, 2009, Petitioner filed documents pertaining to Association actions in January 2009. On February 4, 2009, Petitioner filed a request for a copy of the January 14, 2009 Answer that had been stricken.

On February 9, 2009, the arbitrator entered an Order of Clarification and Second Order Limiting Filings, limiting the issues for arbitration to requests to inspect official records before September 2008. The Order directed the parties to limit pleadings and evidence to specific requests, records and actions in response to the requests.

On February 25, 2009, a Default was entered against Respondent. On March 13, 2009, an attorney representing Respondent requested an extension of time to file an answer. On March 19, 2009, Respondent filed an Answer that did not comply with the orders of January 26, 2009 and February 9, 2009. On March 31, 2009, the arbitrator entered an Order Requiring Amended Answer.

On April 24, 2009, an Amended Answer to the Petition was filed. On April 28, 2009, an Order Allowing Reply and Requiring Supplemental Filing was entered, requiring Petitioner to file all documents supporting Petitioner's position as to inspection requests before September 2008. On May 7, 2009, Petitioner filed a Response to Amended Answer. On May 12, 2009, Petitioner filed a Reply to Defense #3 with supporting documents.

This Summary Final Order is entered based upon the portions of the pleadings that comply with the limitations and instructions set forth in earlier orders.

Findings of Fact

1. Petitioner, Richard Adelson, owns apartment 103H of Third Gulfstream Garden Apartments in Hallandale Beach, Florida.

2. Respondent is the entity responsible for operation and maintenance of Third Gulfstream Garden Apartments Condominium.

3. On February 8, 2008, Petitioner sent a package of five "cover letters" to Respondent, consisting of one cover letter describing the transmittal of four cover letters, each relating to a different previous request from Petitioner.

4. The first "cover letter" asked why the board of directors had not responded to a request for information dated July 10, 2007. The body of the July 10 2007 letter is as follows:

> The following items were lacking even though they were requested in my certified letter dated June 20, 2007.
> 1- The minutes from February 2006 to June 2007.
> 2- The decisions in written form for the $442.50 paid to legal counsel.
> 3- The legal decisions that the lawyer provided "free of charge" must be made available in written form. (Otherwise they have no value in a court of law or to the unit owners.)

> Provided was a written request that I be advised when the above information could be viewed.
> A Review of the available records revealed the waste of unit owner's funds for the following:
> 1- $412.50 was paid for legal fees freely available by reading our Bylaws, or from the Ombudsman of the Florida Department of Business and Professional Regulation.
> 2- More than $1,200.00 was paid for keys and locks replacing keys and locks already owned by the unit owners.
> 3- More than $200.00 was paid for parking permits that unit owners already had.
> 4- More than $100.00 was paid for a lock to the garbage dumpster that was subsequently removed.
> Official records pursuant to Florida State Section 718.111(12) were requested at the last meeting June 20, 2007 when a copy was left in the Business Office with the Recording Secretary. Excluded from the request are items 1,9,10, 12.
> Thank you in advance for responding to this letter within the required ten day period.

5. The second "cover letter" asked why the board had not responded to a request dated December 16, 2007 in reference to roof damage. The December 16, 2007 letter submitted a number of inquiries, but no request to inspect records.

6. The third "cover letter" asked why the board had not responded to a request dated December 17, 2007 for a roster of unit owners. The body of the December 17, 2007 letter is as follows:

> Please accept this request to inspect the comprehensive list of the entire roster (from A to Z) of the U nit Owners of the Third Gulfstream Apartments Condominium Association.
> It is my understanding that you have five days to make the records available, as per the Condominium Act.
> Please contact me with a day, place, and time to view and copy said record. The phone numbers listed above may be used.

7. The fourth "cover letter" asked why the board had not responded to a request dated December 23, 2007 for five items listed. The December 23, 2007 letter requested that records be made available for review as to the following:

1- Please provide the writer with copies of all minutes, correspondence, and notices listing or alluding to his name Richard Adelson. This is in accordance with his legal right to know.
2- Please provide statements for all cell phone charges. If there are charges for broadband use pleas include those statements.
3. Please provide the statements and documents relating to charges for legal services for the past two years. Please include the emails from all parties, letters, summonses, legal opinions, and other documents paid for to the lawyer.
4- Please provide the financial records, and minutes for all of the Board Meetings dating back to January 2006. Excuses were previously made for the absence of minutes and financial records at the previous meetings.
5- Please provide the mailings for correspondence sent by the president to the unit owners in support of the amendments. If copies of the handwritten notes left on unit owner's doors are available, please provide these notes.

8. On February 29, 2008, Petitioner sent a letter to the board of directors, the body of which states:

Please respond to the following requests within the required statutory time period.
1- I will be renting my vacant apartment, so please provide the screening application for new tenants. Previous requests have not been responded to.
2- Provide the complete address and phone list of the condo's unit owners. This list request was previously made in certified mailings that were refused by the board's recipients when delivered by the US Postal Service.
3- Please provide responses to the certified letters dated :
Dated July 10, 2007
December 16, 2007
December 17, 2007
December 23, 2007
The letter dated February 17, 2008 dropped in the Board's Mail Box.
4- Please be advised that copies of the refused certified mailings have been provided to the complaint investigator of the Florida Regulatory Department.

9. On March 5, 2008, Petitioner sent a letter to the board of directors asking why the directors had not responded to the mailing of February 8, 2008 and repeating requests to view the following records:

> 1- All of the billing statements from the Condominium's lawyer with the documents relating to their charges. This request was previously made in a certified letter to Vice President Jack Griffin on December 23, 2007.
> 2- The comprehensive list of the unit owner's names, addresses, phone numbers, and email addresses. This list was requested December 17, 2007 in a certified mailing to President Kathy Ball.
> 3- All of the documents relating to amendments that were voted on December 6, 2008 [*sic*]. This request was previously made in certified mailings January 4, 2008 and February 17, 2008 to President Kathy Ball.
> 4- All of the minutes, correspondence, and notices alluding to the name Richard Adelson. This is in accordance with my legal right to know how my name is being used in my absence. This request was in a certified mailing to Vice president Jack Griffin December 23, 2007.

10. On February 11, 2008, the board provided a written notice to Petitioner that available records could be inspected at the office at 6:00 p.m. on February 13, 2008. Petitioner did not attend, but later requested the inspection be rescheduled due to ongoing court action.

11. On March 16, 2008, the board provided written notice to Petitioner that available records could be inspected at the office at 6:00 p.m. on March 18, 2008. Petitioner did not attend, but later requested the inspection be rescheduled due to ongoing court action.

12. Although Respondent denies receipt of the February 29, 2008 letter, the records of the U.S. Post Office show it delivered to the secretary of the board of directors on March 3, 2008.

13. The records of the U.S. Post Office show the letter of March 5, 2008 was delivered to the secretary of the board of directors on March 15, 2008.

Conclusions of Law

The Division has jurisdiction over this matter pursuant to section 718.1255,

Florida Statutes, over disputes involving alleged failure to allow inspection of books and records.

Section 718.111(12)(b), Florida Statutes, provides:

> The official records of the association shall be maintained within the state. The records of the association shall be made available to a unit owner within 5 working days after receipt of a written request by the board or its designee. This paragraph may be complied with by having a copy of the official records of the association available for inspection or copying on the condominium property or association property.

Section 718.111(12)(c), Florida Statutes, provides, in pertinent part:

> The official records of the association are open to inspection by any association member or the authorized representative of such member at all reasonable times. The right to inspect the records includes the right to make or obtain copies, at the reasonable expense, if any, of the association member. The association may make reasonable rules regarding the frequency, time, location, notice, and manner of record inspections and copying. The failure of an association to provide records within 10 working days after receipt of a written request shall create a rebuttable presumption that the association willfully failed to comply with this paragraph. A unit owner who is denied access to official records is entitled to the actual damages or minimum damages for the association's willful failure to comply with this paragraph. The minimum damages shall be $50 per calendar day up to 10 days, the calculation to begin on the 11th working day after receipt of the written request.

Because the statute provides for a monetary penalty, it must be strictly construed. *See., Eden Isles Condominium Ass'n., Inc. v. Department of Business and Professional Regulation*, 1 So. 3d 291 (Fla. 3rd DCA 2009). The penalty provision applies only to failure to make available official records described in section 718.111(12), Florida Statutes. It does not apply to records that have not been created, or documents the Association might obtain but would not normally receive, such as copies of negotiated checks.

Respondent made available dates at its office for inspection within ten days after receipt of the requests dated February 8, February 29 and March 8, 2008. Petitioner chose not to participate in those schedule inspections. The evidence fails to establish that Respondent willfully failed to provide access for inspection of records within the statutorily required time. *See, Gosselin v. Sand Castle Condominium Ass'n., Inc.*, Arb. Case No. 02-5465, Final Order (December 18, 2002) (association did contact counsel for the petitioner and attempt to schedule a time for him to review the records in a timely manner). Petitioner's statutory right to inspect records is never lost and the parties should communicate in good faith to reschedule times for such inspections. However, the penalty provision will not be applied if Petitioner chooses not to, or cannot, participate at a reasonable time and place set by the association within the narrow period set by statute.

Indeed, the actions of Petitioner show multiple requests for the same records that seem intended to reactivate the penalty provision. The issue of whether an association would be found to willfully fail to allow inspection if a unit owner repeatedly fails to attend scheduled meetings, but then immediately files new requests for the same records is not before the arbitrator in this case. Section #2 of the Petition for Arbitration limits the official records requests from Petitioner to those presented in the certified letters dated February 8, 2008, February 29, 2008 and March 5, 2008. Although those letters refer to and incorporate previous requests, no relief can be awarded in this case for failure of Respondent to comply with those earlier letters.

Although no relief may be granted as to the earlier letters, they will be briefly addressed for guidance of the parties. It is important that requests for inspection of

official records be plain, direct and specific, if they are to be a basis for claimed damages for willful failure to allow inspection. *Aldrich v. Tahitian Gardens Condominium Ass'n., Inc,*, Arb. Case Nos. 96-0055 and 96-0070, Summary Final Order (August 5, 1996). In *Aldrich*, the arbitrator denied damages with the following explanation:

> In this connection, it is noted that petitioner, in choosing to include his request for records in the same envelope as other correspondence to the association, utilized a procedure which was inherently capable of generating confusion and administrative error. Predictably, the association erred in processing the request, and technically failed to produce the records within the statutory deadline. However it is the petitioner in this case who must bear the risk associated with using a suspect procedure, since he chose to utilize this procedure.

Confusion arises when a unit owner mixes a request for access to inspect records with: a) questions or inquiries; b) requests for copies of records without inspection; c) requests for preparation of documents.

Analysis of the earlier requests leads to the conclusion that the July 10, 2007 letter does not contain a request to inspect official records, but merely reports past transactions and expresses the unit owner's opinions. As noted above, the December 16, 2007 letter does not contain a request to inspect records. The December 17, 2007 request to inspect the roster of unit owners is a simple and clear request to inspect official records. The December 23, 2007 request would not result in willful failure to allow inspection because it mixes one legitimate request (financial records and minutes back to 2006) with others that would require the association to perform investigation to find content within some documents that may be official records, some that are clearly not official records and some that likely do not exist. By mixing all these together in the

February 8 and February 29, 2008 letters, Petitioner compounded the confusion.

Based upon the foregoing, it is ORDERED that Petitioner's requests for relief are Denied.

DONE AND ORDERED this 18th day of May, 2009, at Tallahassee, Leon County, Florida.

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Bruce A. Campbell Arbitrator
Dept. of Bus. & Prof. Reg.
Arbitration Section
1940 North Monroe Street
Tallahassee, Florida 32399-1029

Trial *de novo* and Attorney's Fees

This decision shall be binding on the parties unless a complaint for trial *de novo* is filed within 30 days in accordance with section 718.1255, Florida Statutes. As provided by section 718.1255, Florida Statutes, the prevailing party in this proceeding is entitled to have the other party pay reasonable costs and attorney's fees. Any such request must be filed within 45 days in accordance with Rule 61B-45.048, F.A.C

Certificate of Service

I hereby certify that a true and correct copy of the foregoing final order on default has been sent by U.S. Mail to the following persons on this 18th day of May, 2009:

Joseph R. Gibson, Esq.
9112 Griffin Road, Suite E
Cooper City, FL 33328

Mark Perlman, Esq.
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Hallandale Beach, FL 33009

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Bruce A. Campbell