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

IN RE: PETITION FOR ARBITRATION

William W. Killeen and
Beverly Killeen,

Petitioner,

v. **Case No. 2008-06-4403**

S.B. Club Condominium Association, Inc.,

Respondent.
_____/

SUMMARY FINAL ORDER

Statement of the Issue

The issue in this case is whether the Association improperly refused to permit Petitioners to install screen enclosures on two limited common element balconies appurtenant to Petitioners' unit.

Procedural History

On November 24, 2008, Petitioners, William W. Killeen and Beverly Killeen, filed a Petition for Arbitration against Respondent, S.B. Club Condominium Association, Inc. An Order Requiring Answer was entered on December 17, 2008. Respondents filed an Answer and Affirmative Defenses on January 5, 2009. On January 7, 2009, an Order Allowing Reply and Requiring Supplemental Filing was entered, requiring Petitioner to file a copy of a December 5, 2005 letter referred to in allegations of both the Petition and in the Answer. On February 10, 2009, a telephone case management conference was held with the attorneys for each party. An Order Following Case Management

Conference, entered the same day, tentatively established certain facts, subject to challenge by supplemental filings by either party within twenty days of the Order. The Order Following Case Management Conference also allowed the parties to submit memoranda as to whether the balconies are limited common elements and as to the allegation of selective enforcement. Respondent filed a memorandum on March 5, 2009; as of the date of this Order, Petitioners have not filed a memorandum. This Order is entered based upon consideration of the complete case file.

Findings of Fact

1. Petitioners, William W. Killeen and Beverly Killeen, own Unit 135, Building 9, Unit I of Sun Bay Club Condominium in Maitland, Florida.

2. Respondent, S.B. Club Condominium Association, Inc., is the entity responsible for the operation and management of Sun Bay Club.

3. Petitioners purchased their unit in July 2004.

4. At the time Respondents purchased their unit, approximately 66% of the units at Sun Bay Club had screen or glass enclosures of the balconies or porches appurtenant to the units.

5. The Declaration of Condominium of Sun Bay Unit I, specifies that the balconies are limited common elements.

6. In July 2004, Petitioners submitted a request to screen in the two balconies of their unit.

7. The initial request to screen the balconies was denied in November 2004, apparently based on lack of drawings and specifications.

8. In February 2005, Petitioners submitted a more detailed request to screen

the balconies, which was revised in March 2005.

9. The second request to screen the balconies was denied because the balconies were a “common area”.

10. In December 2005, Respondent caused a letter to be sent to all unit owners in the condominium advising that the association would begin to strictly enforce the provision of the Declaration of Condominium against alteration of limited common elements, particularly, “installation of screen enclosures and/or glass enclosures on the balcony (*sic*) and patios of the units.” The letter acknowledged a number of existing enclosures that had not been approved by the association, and, therefore violated the new enforcement policy; however, the association would not require removal of such enclosures existing as of December 1, 2005. On the other hand, existing enclosures would have to be permanently removed if they interfered with maintenance of the exterior of the buildings or if they suffered substantial damage.

11. Petitioners have brought the current action seeking an order to allow Petitioners to enclose their balconies or in the alternative requiring immediate removal of screen or glass enclosures from all other units in the condominium.[1]

Conclusions of Law

The Division has jurisdiction over this matter pursuant to Section 718.1255, Florida Statutes, to determine the authority of the board of directors to require the owner to take any action, or not take any action, involving the owner’s unit or the appurtenances thereto.

Rule 61B-45.030, Florida Administrative Code, provides that if no disputed issues

[1] Petitioners originally filed an action in circuit court on May 9, 2006, asserting related claims. That action was dismissed for failure to pursue mandatory non-binding arbitration, but the dismissal was not final until it was affirmed on appeal in August 2008.

of material fact exist, the arbitrator shall issue a summary final order. There are no disputed issues of material fact in this case.

This case is substantially controlled by the precedent of *Chattel Shipping and Investment, Inc. v. Brickell Place Condominium Assoc., Inc.*, 481 So. 2d 29 (Fla. 3rd DCA 1986). In a circuit court action, Brickell Place Condominium Association had secured a mandatory injunction requiring the removal of a balcony enclosure erected without permission. Although the association's Declaration of Condominium prohibited such enclosures without prior approval, some forty-five unit owners had installed unauthorized enclosures. On a certain date, the association informed all owners that it would take "no action with respect to existing, but prohibit future balcony constructions and enforce the prohibition." 481 So. 2d at 30. Chattel Shipping, the unit owner, argued that because the association had failed to require dismantling of previously existing enclosures, the action to remove Chattel Shipping's enclosure represented unequal and arbitrary enforcement. The appellate court affirmed the injunction, holding that, "[T]he adoption and implementation of a uniform policy under which, for obvious reasons of practicality and economy, a given building restriction will be enforced only prospectively cannot be deemed "selective and arbitrary"." *Id.*

In this case, the letter of December 5, 2005, establishes that Respondent adopted and implemented a uniform policy to enforce the restriction on balcony enclosures only prospectively. *Chattel Shipping, supra* disposes of both of Petitioners' requests for relief - to be allowed to install enclosures on their own balconies or to require removal of existing unauthorized enclosures.

Based upon the foregoing it is ORDERED that Petitioners' requests for relief are

Denied.

DONE AND ORDERED this 16th day of March, 2009, at Tallahassee, Leon County, Florida.

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Bruce A. Campbell, Arbitrator
Department of Business and
Professional Regulation
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 summary final order has been sent by U.S. Mail to the following persons on this 16th day of March, 2009:

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Bruce A. Campbell