

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

IN RE: PETITION FOR ARBITRATION

**FIORE AT THE GARDENS
CONDOMINIUM ASSOCIATION, INC.,**

Petitioner,

v.

Case No. 2010-03-6113

**DAYNA ANDERSSON and
PATRICK ANDERSSON,**

Respondents.

SUMMARY FINAL ORDER

Procedural History

Fiore at the Gardens Condominium Association, Inc. (the "Association") filed a petition for arbitration alleging that Respondents had failed to obtain prior approval from the Association for the hard surface flooring installed in their unit and failed to install proper soundproofing under the hard surface flooring.

Statement of Issue

Is an Association estopped to require unit owners to install underlayment of hard surface flooring in their unit when the Developer, before recording of the Declaration stated in writing that the unit owners were not required to have underlayment for their first floor unit?

Statement of Facts

1. Petitioner, Fiore at the Gardens Condominium Association, Inc., is the entity responsible for operation and maintenance of Fiore at the Gardens Condominium.

2. Respondents Dayna and Patrick Andersson own a first floor, Unit #8103.

3. Sometime in late 2009, Respondents replaced the carpet in their unit with a hard surface without approval of the Board of Directors.

4. The Anderssons produced a letter written on June 14, 2005 by Tia J. Jesse, a project manager of the developer, that states:

Please be advised that, you may proceed with the following projects, once you close on your unit. You may put in any hard surface flooring. You may install an interior door to the sunroom. You may install kitchen cabinets above the sink area. You may remove the exterior window in the sunroom and install a patio door.

Our rule is that, you can remodel with interior walls. Walls that are common or exterior you cannot change or connect to. You will not need to use underlayment we only require that for second and third floor units.

5. Respondents did not put a hard surface flooring immediately after closing on their unit in 2005.

6. According to the public records of Palm Beach County, Respondent Dayna Andersson and Katharina Paprocki received title to Unit #8103 on August 25, 2005 with the Special Warranty Deed recorded in the public records on September 7, 2005.

7. The Declaration was filed in the public records of Palm Beach County on July 8, 2005.

8. Section 8.2(b) of the Condominium's Declaration states:

Unless installed by the Developer or otherwise first approved by the Board, hard and/or heavy surface floor coverings, such as tile, marble, wood and the like must be submitted to and approved, in writing, by the Board of Directors, which approval may be conditioned upon the use of appropriate soundproofing materials under such floor coverings, and must meet applicable structural requirements.

9. Section 8.2 (c) of the Condominium Declaration states:

Any unit owner making additions, alterations or improvements as provided in this Section 8.2 shall commence any such additions, alterations or improvements within three (3) months after approval by the Board of Directors and shall diligently proceed to complete such work no later than three (3) months after commencement, unless such time period is extended by the Board of Directors.

10. On November 18, 2009, the Board obtained an engineering report regarding soundproofing flooring for another ground unit, Unit #2108, from John A Petreikis, P.E. The engineer recommended that ground units be required to have ¼ inch natural cork mats under hard flooring and that the upper level units to be required to have ½ inch natural cork mats under hard flooring. The Board enforced the ¼ inch natural cork mat under hard flooring requirement on the owners of Unit #2108.

Conclusions of Law

Pursuant to section 718.1255, Florida Statutes, the Division has jurisdiction over a dispute involving the authority of the board to require an owner to take action with respect to the owner's unit or appurtenances, including common elements.

It is undisputed that Respondents installed tile in their ground floor unit in 2009. Respondents did not seek or obtain permission from the Association's board in 2009. The Respondents rely on the letter from the developer's project manager written in 2005 and claim the defenses of equitable estoppel and waiver.

Estoppel

The essential elements of estoppel are "(1) a representation as to a material fact that is contrary to a later-asserted position, (2) reliance on that representation, and (3) a change in position detrimental to the party claiming estoppel, caused by the representation and reliance thereon." *State v. Harris*, 881 So.2d 1079, 1084 (Fla.2004).

See also *WSG W. Palm Beach Dev., LLC v. Blank*, 990 So.2d 708, 715 (Fla. 4th DCA 2008).

Respondents knew they were buying a unit within a new condominium that would be governed by a declaration of condominium. The declaration of condominium, which is the condominium's "constitution," creates the condominium and "strictly governs the relationships among the condominium unit owners and the condominium association." *Woodside Vill. Condo. Ass'n v. Jahren*, 806 So.2d 452, 455-56 (Fla.2002). A declaration of condominium must be strictly construed. *Palm Beach Hotel Condo. Ass'n v. Rogers*, 605 So.2d 143, 145 (Fla. 4th DCA 1992). In order to install tile flooring, the Declaration requires Respondents to obtain written permission of the board of directors which approval may be conditioned upon the use of appropriate soundproofing materials under such floor coverings.

In *Esplanade Patio Homes Homeowners' Ass'n v. Rolle*, 613 So.2d 531 (Fla. 3d DCA 1993), the court did not find an estoppel where only the developer's agent, and not the homeowner's association, gave permission to the homeowner to install a satellite dish contrary to the declaration of covenants. The association was not estopped from enforcing the restriction, even where the developer occupied positions on the board of the association. The court ruled that two elements of estoppel were lacking: a statement by the party sought to be estopped and reasonable reliance on the representation.

In Section 8.2(c), the Declaration also states that once written approval is given, the work must commence within three months and be completed three months after commencement unless extended by the Board of Directors. Even if the 2005 letter could be considered written approval of the Board, Respondents could not rely on the

letter for improvements made in 2009. Any permission granted would have been expired pursuant the Declaration.

Waiver

Respondents also rely of the defense of waiver. They state in their brief that the developer, as fee simple owner at the time of the 2005 letter, gave permission that does not expire pursuant Section 8.2(c) of the Declaration. They claim the developer was not bound by the Declaration that had not been recorded yet. Essentially, Respondents are claiming that in a contract for sale before a declaration is recorded, a developer may waive any future restrictions in the declaration.

Respondents received title after the Declaration was recorded. Pursuant Section 718.303(1), Florida Statutes:

Each unit owner, each tenant and other invitee, and each association is governed by, and must comply with the provisions of, this chapter, the declaration, the documents creating the association, and the association bylaws which shall be deemed expressly incorporated into any lease of a unit.

Under Respondents theory, Section 718.303(1) would be meaningless. A developer could waive any and all of the provisions of the Declaration if it waived those provisions while still a fee simple owner before recording the declaration. Respondents knew they were buying a condominium unit and they knew they would have to comply with Section 718.303(1) and the Declaration.

Unreasonableness

Respondents have also challenged the need for soundproofing a first-floor unit. A party may challenge the enforcement of an otherwise valid restrictive covenant by proving defensive matters that preclude enforcement, such as the enforcing authority

acted in an unreasonable or arbitrary manner. *Curci Village Condominium Ass'n v. Maria*, 14 So.3d 1175 (Fla 4th DCA 2009). The Association has produced an engineering report that recommended ¼ inch natural cork mat be required for first floor units. Respondents have not produced any evidence to contradict the Association's engineering report.

The Association has had an engineer recommend standards and the Association has enforced those standards on another first floor unit. Therefore, requiring a ¼ inch natural cork mat underneath the tile in Respondents' unit is not unreasonable or arbitrary.

Based upon the foregoing, it is **ORDERED**:

By January 16, 2012, Respondents shall remove the hard/heavy surface flooring in their unit and may install hard surface flooring and soundproofing underlayment only upon written approval by the Association that complies with the governing documents.

DONE AND ORDERED this 4th day of November, 2011, at Tallahassee, Leon County, Florida.

Terri Leigh Jones, Arbitrator
Department of Business and
Professional Regulation
Arbitration Section
1940 North Monroe Street
Tallahassee, Florida 32399-1029
Telephone (850) 414-6867
Facsimile (850) 487-0870

Trial de novo and Attorney's Fees

This decision shall be binding on the parties unless a complaint for trial *de novo* is filed 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 in accordance with Fla. Admin. Code R. 61B-45.048.

Certificate of Service

I hereby certify that a true and correct copy of the foregoing final order has been sent by U.S. Mail and facsimile to the following persons on this 4th day of November, 2011:

Scott C. Gherman
St. John, Core & Lemme, P.A.
1601 Forum Place, Suite 701
West Palm Beach, FL 33401
Fax: (561) 659-0850
Attorney for Petitioner

Robert P. Ross
Hurd, Horvath & Ross, P.A.
8295 Military Trail, Suite A
Palm Beach Gardens, FL 33410-6312
Fax: (561) 694-9647
Attorney for Respondent

Terri Leigh Jones, Arbitrator