

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

IN RE: PETITION FOR ARBITRATION

Kinelmi LLC (Tim McGee),

Petitioner,

v.

Case No. 2011-04-1931

**Meadows of Estero Condominium
Association, Inc.,**

Respondent.

_____ /

FINAL ORDER OF DISMISSAL

On August 22, 2011, Kinelmi LLC (Tim McGee)[sic] filed a Mandatory Non-Binding Petition for arbitration against Meadows of Estero Condominium Association, Inc. with an attached copy of a proposed court action against the Association and multiple (unnamed) defendants arising from construction of all units in the condominium with defective drywall.¹ As relief, the Petition seeks:

1. Compensatory Damages;
2. Permanent injunction requiring Defendant to repair and maintain common elements, including the defective drywall existing throughout the condominium property;
3. Attorney's fees and costs pursuant to Florida Statute § 718.303.

The proposed complaint attached to the petition alleges four causes of action: breach of contract, negligence, breach of fiduciary duty and nuisance.

Section 718.1255, Florida Statutes, limits the disputes that can be subject to

¹ The arbitrator takes official notice of conditions associated with "Chinese drywall" more fully discussed in publications from the Florida Department of Health, Bureau of Community Environmental Health, and from the U. S. Center for Disease Control & Prevention, Agency for Toxic Substances and Disease Registry.

Mandatory Nonbinding Arbitration. It provides:

(1) DEFINITIONS.- As used in this section, the term “dispute” means any disagreement between two or more parties that involves:

(a) The authority of the board of directors, under any law or association document to:

1. Require any owner to take any action or not to take any action involving that unit owner’s unit.
2. Alter or add to a common element.

(b) The failure to a governing body, when required by this chapter or an association document, to:

1. Properly conduct elections.
2. Give adequate notice of meetings or other actions.
3. Properly conduct meetings.
4. Allow inspection of books and records.

“Dispute” does not include any disagreement that primarily involves: title to any unit or common element; the interpretation or enforcement of any warranty; the levy of a fee or assessment, or the collection of an assessment levied against any party; the eviction or other removal of a tenant from a unit; alleged breaches of fiduciary duty by one or more directors; or claims for damages to a unit based upon the alleged failure of the association to maintain the common elements or condominium property.

The Petition does not allege that the Association altered or added to any common element. The disputes arise from one fundamental allegation:

The drywall that was used to construct the buildings, including the common elements of the Meadows of Estero Association, was not fit for its intended use and was unreasonably dangerous.

Arbitration jurisdiction under Chapter 718 does not extend to disputes arising from initial construction of the condominium, as opposed to subsequent alterations or additions. Rather, section 718.203(1), Florida Statutes, provides that the developer shall be deemed to have granted to the purchaser of each unit an implied warranty of fitness and merchantability for the unit and all other improvements for the use of unit owners.

Jurisdiction over the interpretation or enforcement of any warranty is specifically excluded by section 718.1255, Florida Statutes.

The clear terms of the statute exclude breaches of fiduciary duty from arbitration jurisdiction.

Additionally, case law has consistently denied arbitration jurisdiction when a petition seeks primarily money damages. See *Filardi v. Boca Teeca Condominium No. 3, Inc.*, Arb. Case No. 2004-01-7187, Final Order Dismissing Petition for Lack of Jurisdiction (June 28, 2004); *Vizcaya of Bradenton Condominium Ass'n, Inc. v. Allendoerfer-Fernandez*, Arb. Case No. 2008-01-5333, Final Order Determining Jurisdiction (March 20, 2008); *Stark v. Estancias of Capri Isles Condominium Ass'n, Inc.*, Arb. Case No. 2009-00-5447, Final Order of Dismissal (February 25, 2009).

Finally, Rule 61B-45.013, Florida Administrative Code, provides that no petition will be accepted for arbitration that lacks the requirements of a true case or controversy. Given the allegations and prayer for relief, it appears that the Association is at most a nominal party.² In essence, a unit owner is suing on behalf of all the unit owners, individually, against the group of unit owners identified as the Association. Because of the airborne nature of the corrosive, and possibly toxic, gases, no individual could obtain adequate injunctive relief unless the drywall for all the units and common elements were replaced. That is, the unit owners are suing themselves.

Based on the foregoing, it is Ordered that arbitration Case No. 2011-04-1931, is Dismissed, and Petitioner may pursue its claims in a court of competent jurisdiction.

DONE AND ORDERED this 6th day September, 2011, at Tallahassee, Leon

² The proposed court case includes as defendants "Does 1 through 50, inclusive", alleging an intent to amend to name unknown defendants (John Does) at a later date.

County, Florida.

Bruce A. Campbell, Arbitrator
Department of Business and
Professional Regulation
Arbitration Section
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Copy furnished to:

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