

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

IN RE: PETITION FOR ARBITRATION

**Joe Badian, Vera Badian, Sam Davit,
Cecelia Goldberger, Richard Golden,
Shelley Golden, Baruch Halpern,
Michael Izak, Danny Lavy, Steve Shulman,
Sherry Shulman, Mark Soloway, Cindy Soloway
Dr. Linda Sternau, Marta Waserstein,
Charlie Waserstein, Sergio Zelcer, and
Rosita Zelcer,**

Petitioners,

v.

Case No. 2013-04-4301

**The Majestic Tower at Bal Harbour
Condominium Association, Inc.
Mr. Jack Linzer Ms. Elsa Gotman,
Dr. Michael Krop, and Mr. Harold Commings,**

Respondents.

_____ /

FINAL ORDER OF DISMISSAL

On October 24, 2013, the 18 named Petitioners filed, through counsel, a petition for mandatory non-binding arbitration naming The Majestic Tower at Bal Harbour Condominium Association, Inc. (the Association), Mr. Jack Linzer, Ms. Elsa Gotman, Dr. Michael Krop, and Mr. Harold Commings as Respondents. The petition follows the form available on the website of the Division of Florida Condominiums, Timeshares and Mobile Homes. The petition is deficient, and because of the deficiencies, Petitioners normally would be required to file an Amended Petition. However, because of the allegations made, a Final Order of Dismissal will be entered.

In its entirety, The Statement of the Facts is quoted as follows:

A full Statement of the Facts is contained in that certain Cease and Deist Letter dated August 30, 2013, which is attached hereto and incorporated herein as **Exhibit "A."** Attached as **Exhibit "B"** please find a transcript from that certain September 23, 2013 Special Meeting of Membership and the Board of Directors.

The five-page, August 30, 2013 letter was written by counsel representing Petitioners. The letter is addressed to the Association's board of directors, care of the president, and the law firm representing the Association. In the petition, Petitioners use the letter both as their statement of the facts and as their pre-arbitration notice. The transcript consists of 24 8x11 sheets of paper with four or fewer transcript pages per sheet, for a total of 95 transcript pages.

The August 30, 2013 letter contains the following heading at the beginning of the letter:

Re: CEASE AND DESIST: ADMINISTRATION OF THE MAJESTIC TOWER AT BAL HARBOUR CONDOMINIUM ASSOCIATION, INC. IN VIOLATION OF CHAPTER 718 OF THE FLORIDA STATUTES AND THE ASSOCIATION'S GOVERNING DOCUMENTS.

(emphasis in the original). In pertinent part, the letter states the following:

The wrongful and apparently illegal activities for which I [i.e., Petitioners' counsel] have been retained to investigate and pursue swift action against the Faction [the letter defines the "Faction" as Mr. Linzer, Mr. Commings, Mr. Gotman, and Dr. Krop, who appear to be members of the Association's board of directors, and Juan Salavveria, whose relationship to the matter is unknown] for [sic] include, but are not limited to, the following:

. . . [1] The Faction unilaterally re-appropriating, assigning, and authorizing the use of special assessment funds for projects inconsistent with the residential unit owners' authorized purpose for such funds;

. . . [2] The Faction sending written correspondence to the residential unit owners indicating an intention to circumvent Chapter 718 of the Florida Statutes with regard to the use of special assessment funds;

. . . [3] The Faction negligently failing to perform a proper reserve study for the Association on a timely basis;

- . . . [4] The Faction being grossly negligent or willful in withholding the December 2008 reserve Study from certain Association board members and residential unit owners;
- . . . [5] The Faction failing to maintain full reserves for the Association without residential unit owner approval;
- . . . [6] The Faction failing to hold mandatory Association budget and reserve meetings for the residential unit owners;
- . . . [7] The Faction misrepresenting that it was going to maintain full reserves for the Association, which funds the Faction then misappropriated;
- . . . [8] The Faction being grossly negligent or willful in holding Association board meetings without the proper notice to all necessary parties despite demands from certain Association board members that such activities were likely in violation of Chapter 718 of the Florida Statutes, the Association's governing documents, and Florida corporation law;
- . . . [9] The Faction holding meetings and conducting business without proper notice to the residential unit owners;
- . . . [10] The Faction making expenditures and reimbursements from the Association's monies that are inconsistent with the approved yearly budget;
- . . . [11] The Faction misappropriating approximately \$96,000 of the Association's monies for unapproved projects;
- . . . [12] The Faction approving major expenditure projects (e.g. spa and gym renovations) on behalf of the Association, without (i) properly bidding the projects, or (ii) obtaining the required approval for such projects;
- . . . [13] The Faction failing to perform necessary due diligence in connection with the hiring of Florida Choice;
- . . . [14] The Faction failing to perform necessary oversight of work performed by Florida Choice;
- . . . [15] The Faction misrepresenting that the garage roof repairs have a ten (10) year warranty, when the contract provides for a five (5) year warranty;
- . . . [16] The Faction obstructing the ability of residential unit owners and auditors from verifying the validity of major expenditures by the Faction on behalf of the Association;
- . . . [17] The Faction routinely failing to keep residential unit owners apprised of major activities of the Association; and
- . . . [18] The Association unilaterally taking actions outside of the authority bestowed by Chapter 718 of the Florida Statutes, the governing documents, and the residential unit owners.

The Unit Owners have also informed me of an alarming situation in which the Faction is sending out a proxy on behalf of the Association, which impermissibly assigns limited proxy rights to the Association's secretary (a member of the Faction) for a vote on alterations to the common elements. This proxy is a thinly veiled attempt by the Faction to remove voting power from the residential unit owners and place it in the hands of the Faction. Please note that the proxy was not mailed to the residential unit owners via registered mail, provides for a wrongful negative option, and attempts to

circumvent requirements contained within the Association's governing documents. The Unit Owners will seek to nullify any approvals made by the Faction pursuant to the unlawful proxies.

Section 718.1255(1), Florida Statutes, provides as follows:

(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 this chapter or association document to:

1. Require any owner to take any action, or not to take any action, involving that owner's unit or the appurtenances thereto.
2. Alter or add to a common area or element.

(b) The failure of 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 a 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.

(emphasis added). With the exception of Claims [8] and [9], relating to notice of board meetings, Claim [12](ii), relating to obtaining approval of certain projects, and the "unlawful" proxies issue, all of Petitioners claims relate to assessments or breach of fiduciary duty by the board. These latter two types of dispute are specifically excluded from arbitration under the statute.

Rule 61B-45.013(4), Florida Administrative Code, provides, "(4) Where a controversy involves both matters eligible and ineligible for arbitration, the arbitrator shall determine by order whether the ineligible matters may properly be severed from

the controversy so that the remaining eligible issues may be arbitrated.” Arbitration cases have held that where some of the issues in the arbitration petition within the jurisdiction of the arbitrator pursuant to Section 718.1255(1), Florida Statutes, are intertwined with issues that are not within the jurisdiction of the arbitrator, the petition for arbitration will be dismissed. *See, e.g., Madura v. Lakebridge Condo. Ass’n, Inc.*, Arb. Case No. 2011-04-9793, Final Order of Dismissal (Oct. 25, 2011); *Esch v. Wing South, Inc.*, Arb. Case No. 2009-05-6400, Final Order of Dismissal (May 7, 2010) (where ineligible breach of fiduciary duty by the board by allegedly failing to obtain competitive bids and approving work not in compliance with FAA standards intertwined with notice of meetings and inspection of official records, petition was dismissed); *Cypress Chase Condo. “C” Ass’n, Inc. v. Austin, et al.*, Arb. Case No. 97-0082, Order Dismissing Petition for Lack of Jurisdiction (Aug. 26, 1997) (where ineligible title issue intertwined with noise, unit condition and access issues, petition was dismissed). Here, Petitioners’ Claims [8], [9] and [12](ii) and the “unlawful” proxies issue are intertwined with the 15 remaining claims that are not within the jurisdiction of the arbitrator, and the petition will be dismissed. Given the foregoing, it is unnecessary to determine whether Petitioners’ August 30, 2013 letter meets the requirements for pre-arbitration notice under Section 718.1255(4)(b), Florida Statutes, and whether Petitioners improperly have included certain parties as Respondents.

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

The petition is DISMISSED, and Arbitration Case Number 2013-04-4301 is closed. Petitioners may seek relief in a court of competent jurisdiction.

DONE AND ORDERED this 5th day of November, 2013, at Tallahassee, Leon County, Florida.

Glenn Lang, Arbitrator
Department of Business and
Professional Regulation
Arbitration Section
1940 North Monroe Street
Tallahassee, Florida 32399-1030
Phone (850) 414-6867; FAX: (850) 487-0870

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing final order has been sent by U.S. mail, postage prepaid, to the following person this 5th day of November, 2013:

Richard J. Burton, Esq.
THE BURTON FIRM
2999 NE 191st Street
Suite 805
Aventura, Florida 33180
Attorney for Petitioner

Glenn Lang, Arbitrator

Courtesy copy furnished to:

David H. Rogel, Esq.
Becker & Poliakoff, P.A.
121 Alhambra Plaza
Tenth Floor
Coral Gables, Florida 33134