

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

IN RE: PETITION FOR ARBITRATION

JOY H. MURPHY,

Petitioner,

v.

Case No. 2014-02-6733

BEACHAVEN ASSOCIATION, INC.,

Respondent.

_____ /

SUMMARY FINAL ORDER

On June 24, 2014, Joy H. Murphy (Petitioner) filed a petition for mandatory nonbinding arbitration naming Beachaven Association, Inc. (Beachaven) as the respondent. On July 18, 2014, Beachaven filed its answer. By order dated July 25, 2014, this matter was referred to mediation. After mediation resulted in an impasse, both parties elected to continue with binding arbitration.

Findings of Fact

1. Beachaven Condominium is a fifty-eight unit condominium located on Siesta Key in Sarasota County, Florida, constructed in 1956. Beachaven is a Florida nonprofit corporation responsible for the operation of the Condominium.

2. Petitioner owns a unit at Beachaven Condominium.

3. The original Declaration of Condominium For Beachaven Condominium (the Declaration) was recorded in Book 601 at Page 169 of the Official Records of Sarasota County, Florida. The Amended Declaration of Condominium For Beachaven Condominium was recorded in Book 1847 at page 794 of the Official Records of Sarasota County, Florida. On May 27, 2014, The Second Amended and Restated Declaration of Condominium for Beachaven Condominium (the 2014 Declaration) was

recorded in the Official Records of Sarasota County, Florida. The 2014 Declaration replaced the Amended Declaration in its entirety. Unless otherwise indicated, any reference to the "Declaration" refers to the first Amended Declaration which was in effect at all times relevant to this dispute.

4. Prior to 2005, Article 17 of the Declaration permitted owners to rent their units for thirty-day periods during any time of the year and for two week periods during the "summer months", May through November.

5. On July 19, 2005, a Certificate of Amendment (the 2005 amendment) was filed in the Official Records of Sarasota County, Florida, in Instrument Number 2005157475 amending the rental restrictions of Article 17 of the Declaration. As it related to the instant matter, the amendment changed the rental restrictions from allowing two week rentals during the months of May through November to state "[n]o rental shall be for a period of less than thirty (30) days." The recorded amendment is as follows:

AMENDMENTS

DECLARATION OF CONDOMINIUM

BEACHAVEN

(Additions are indicated by underlining; deletions by ~~strike-through~~)

17. USE RESTRICTIONS:

(a) Each unit shall be occupied only by ~~a single family related by blood or marriage~~ as a residence. No unit shall be divided into a smaller unit. ~~At least one occupant of each unit, whether owner or tenant, family or single person, must be fifty-five (55) years of age or older, except as temporary guests of not more than fifteen (15) days.~~

(b) (2) A unit owner wishing to lease a unit shall submit the proposed tenant's name and address, a copy of the proposed lease and any other information required by the association to its board of directors. The board of directors of the association shall approve or disapprove the proposed leasehold in writing within thirty (30) days. If the board of directors does not act to disapprove the proposed leasehold in writing within that time, the leasehold as proposed may go into effect. An approved lessee must deliver a security deposit in an amount to be determined by the board of directors, but in no event more than one month's rent, which shall be placed in the associations account for the protection against damages to the common elements or other association property. No lease shall be for a term of less than thirty (30) days ~~one month~~ (except for the months of May through November. During these months rentals of two weeks are permitted. No unit shall be leased for more than six months total per year.

(b) (5) No lease shall be for a term of less than thirty (30) days ~~one (1) month~~ (except during the months of May through November. During these months two (2) week ~~rentals are~~ permitted. No unit shall be leased for more than six (6) months during any calendar year.

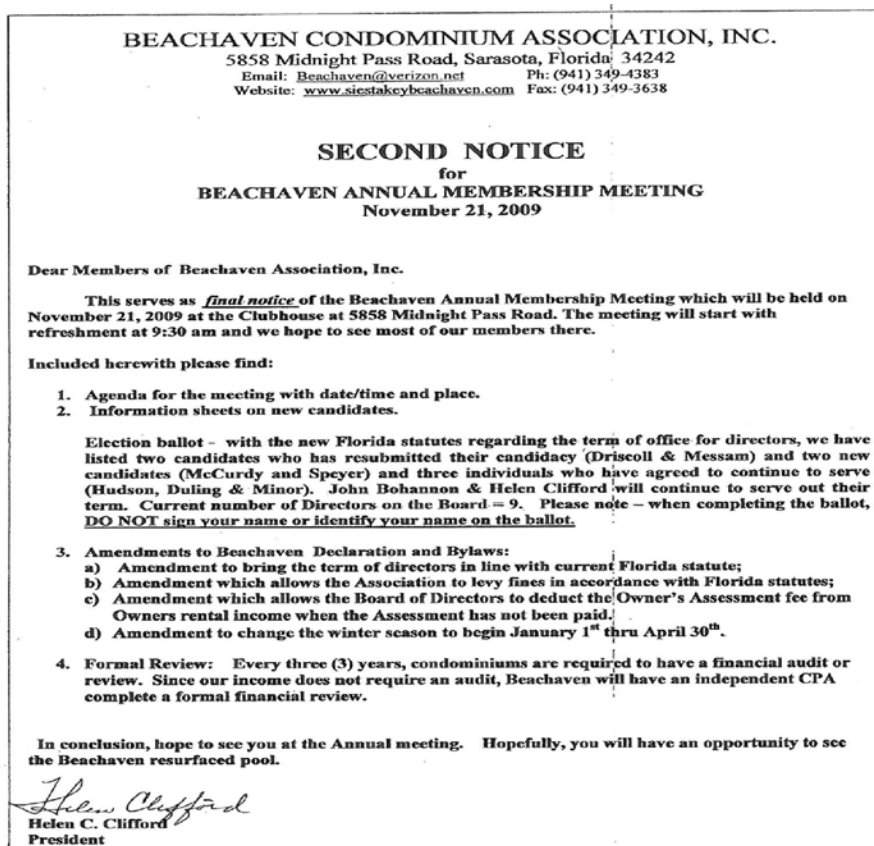
(j) ~~No child under sixteen (16) years of age shall be a permanent resident of a unit or an overnight guest in it except as a temporary guest of a unit owner for a period of not more than fifteen (15) days. This association is considered as "a community for elderly people" and accordingly, said association observes the requirements for exemption as a 55 or older community, as provided in the Fair Housing Act.~~

[Reletier Section (k) as Section (j)]

6. On January 5, 2009, an amendment to article 17(3)(b)(5) of the Declaration¹ was filed in the Official Records of Sarasota County, Florida, (instrument number 2009000713) that stated that the amendment was adopted by the membership on November 22, 2008. The amendment stated, "No lease shall be for a term of less than thirty (30) days. A unit may be leased for a period of one (1) year." The Declaration had previously provided that no unit shall be leased for more than a total of six months a year.

7. On November 21, 2009, Beachaven held its annual membership meeting at which a proposed amendment to the Declaration to change the winter rental season to run from January 1st through April 30th was submitted to a vote of the membership.

8. The final notice of the meeting sent to the membership was as follows:



¹ The recorded amendment contained an error. It should have referenced article 17(b)(5) instead of 17(3)(b)(5).

9. Prior to the members' vote to amend the rental restrictions, Beachaven provided its members a document titled "Proposed Amendment" which stated:

Beachaven Condominium Inc.
5858 Midnight Pass Road
Sarasota, Florida 34242

PROPOSED AMENDMENT - 11/21/2009

Beachaven Documents - **DECLARATION**
Page 11 Section 17 Use Restrictions (b)(2) & (b)5

I. Current Documents:

(b)(2) A unit owner wishing to lease a unit shall submit the proposed tenant's name and address, a copy of the proposed lease and any other information required by the association to its board of directors. The board of directors of the association shall approve or disapprove the proposed leasehold in writing within thirty (30) days. If the board of directors does not act to disapprove the proposed leasehold in writing within that time, the leasehold as proposed may go into effect. An approved lessee must deliver a security deposit in the amount to be determined by the board of directors, but in no event more than one month's rent which shall be placed in the association's account for the protection against damages to the common elements or other association property. No lease shall be for a term of less than one (1) month except during the months of May through ~~November~~. A unit may be leased monthly for a period of one (1) year.

NOTE: New words inserted in the text are in bold and underlined

II. Proposed Amendment:

(b)(2) A unit owner wishing to lease a unit shall submit the proposed tenant's name and address, a copy of the proposed lease and any other information required by the association to its board of directors. The board of directors of the association shall approve or disapprove the proposed leasehold in writing within thirty (30) days. If the board of directors does not act to disapprove the proposed leasehold in writing within that time, the leasehold as proposed may go into effect. An approved lessee must deliver a security deposit in the amount to be determined by the board of directors, but in no event more than one month's rent which shall be placed in the association's account for the protection against damages to the common elements or other association property. No lease shall be for a term of less than one (1) month except during the months of May through December. During these months a unit may be leased for a term of two-weeks. A unit may be leased monthly for a period of one (1) year.

III. Rationale & Implementation:

The dates for the winter rental season would start January 1st. This changes the winter season to January 1st – April 30th and the summer season to May 1st to December 31st of each year.

10. Beachaven issued a limited proxy for the 2009 annual meeting, which in pertinent part, stated:

3. Proposed Amendments:

1. Amendment regarding changing winter season to Jan 1 – Apr. 30th.

I vote to change the winter season to January 1st – April 30th and the summer season to May 1st to December 31st of each year.

Yes []

No []

11. The minutes of the November 2009 annual meeting state that the amendment of the rental provisions was passed with 35 votes in favor and 5 in opposition.

12. The amendment, as stated in the proposed amendment notice above, was recorded in the Official Records of Sarasota County in February 2010 (Instrument #2010022307)(the 2010 Amendment).

13. On July 13, 2011, a prospective purchaser interview was conducted by Beachaven for Petitioner's purchase of her unit. At this time, Petitioner asked about any rental restrictions and was told that rentals are for a minimum of thirty days, however, some units are grandfathered to allow for two-week rentals. Petitioner's purchase was approved and she completed the purchase of her unit shortly thereafter.

14. At the time of Petitioner's purchase, the Declaration of Condominium on file with the Clerk of Sarasota County, dated February 22, 2010 (instrument number 2010022307) contained the following language "No lease shall be for a term of less than one (1) month except during the months of May through December. During these months a unit may be leased for a term of two weeks."

15. Petitioner renovated her unit and entered the rental pool at Beachaven after discussing rentals with the manager for Beachaven, Veronika Bajtalova. Petitioner pointed out that the 2010 Amendment allowed for two-week rentals. At that time, Petitioner was informed that there was confusion regarding the filings related to rental restrictions and that she could rent her unit for periods of two weeks during the months of May through December. The 2012 Owner's Listing Agreement for the Beachaven Rental Program specifically stated, "No lease shall be for a term of less than one month except during the summer season (May through December)."

16. In 2012 Beachaven, through its self-managed rental pool, rented Petitioner's unit for a two-week period in May of 2012. Subsequent to the May of 2012 two-week rental, Beachaven approved five additional rentals for periods of less than thirty days, several of which were during the thirty day only period of January through April.

17. On October 25, 2013, over fifteen months after Petitioner took title to her unit, a “Corrective Certificate of Amendment” was filed in the Official Records of Sarasota County in Instrument Number 2013145764 with respect to the Amendment filed on February 22, 2010, and recorded as Instrument Number 2010022307 which stated that it was filed to correct the previously-recorded version which inadvertently included previously deleted provisions from an earlier version of the Declaration. The “corrected language” states that those unit owners who voted against the 2005 amendment to this section which eliminated two-week rentals (said amendment was voted-on and approved during the special membership meeting on July 1, 2005) may rent their units for terms of at least two-weeks only during the months of May through December.

18. Also on October 15, 2013, another “Corrective Certificate of Amendment” was filed in the Official Records of Sarasota County in Instrument Number 2013145764 with respect to a previously recorded amendment, instrument Number 20090000713, stating that the corrective certificate was recorded to correct an erroneous numerical reference to a section that was adopted by the membership on November 22, 2008.²

19. On November 16, 2013, Beachhaven held its Annual Meeting wherein amendments to the Declaration of Condominium and the By-Laws were presented to the ownership for approval. These documents had previously been contested by Petitioner due to several issues presented in Petitioner’s Petition for Arbitration. Subsequent to the meeting, Petitioner’s counsel had several discussions with Beachhaven’s counsel trying to get the issues resolved regarding the amended documents.

20. Article 22(3) of the Declaration requires amendments to the Declaration to be approved by not less than 51% of the unit owners.

² The amendment erroneously referred to subsection (3)(b)(5) of Article 17 of the Declaration. The Corrective Certificate references subsection (b)(5) of Article 17.

Conclusions of Law

The Beachhaven Condominium is a condominium within the meaning of section 718.103, Florida Statutes. The undersigned has jurisdiction over the parties and subject matter of this dispute pursuant to section 718.1255, Florida Statutes.

Petitioner contends that she has the right to rent her unit for a term of two weeks during the months of May through December.³ Beachhaven contends that the minimum permissible lease term for Petitioner's unit is one month.

Article 17 of the Declaration addresses rental restrictions. The parties are in agreement that prior to 2005, Article 17 permitted owners to rent their units for thirty-day periods any time of the year and for two-week periods from May through November (the summer months). The parties further agree that, on July 19, 2005, a Certificate of Amendment was filed in the Official Records of Sarasota County changing the rental restrictions from allowing two-week rentals during the summer months to state "[n]o rental shall be for a period of less than thirty (30) days."

It is undisputed that at the time Petitioner bought her unit, the rental restrictions, as recorded in the official records, permitted two-week rentals from May through December. It also is evident that when the rental restrictions were amended in November 2009, the language of the proposed amendment provided to the owners permitted two-week rentals from May through December. This language was recorded in the official records in February 2010.

Beachhaven claims that it was the intention of a majority of the owners to amend the Declaration in order to change the definition of summer season months from May through November to May through December. Beachhaven further alleges that when the amendment was filed in the official records in February 2010, it inadvertently contained

³ The petition also challenged 2013 amendments to Beachhaven's bylaws and declaration. However, the parties have resolved this dispute.

the pre-2005 language that permitted two-week rentals during the summer season months. In support of this argument, Beachaven points to the proxy issued for the 2009 meeting, which only refers to amending the rental season. Similarly, the Notice for the 2009 Annual meeting only refers to amending the rental season.

Prior to the members' vote to amend the rental restriction, Beachaven provided the members with a notice titled "Proposed Amendment" which stated the language of the proposed amendment, and rationale and implementation of the amendment.

Section 718.110(1)(b), Florida Statutes, provides,

No provision of the declaration shall be revised or amended by reference to its title or number only. Proposals to amend existing provisions of the declaration shall contain the full text of the provision to be amended; new words shall be inserted in the text and underlined; and words to be deleted shall be lined through with hyphens. However, if the proposed change is so extensive that this procedure would hinder, rather than assist, the understanding of the proposed amendment, it is not necessary to use underlining and hyphens as indicators of words added or deleted, but, instead, a notation must be inserted immediately preceding the proposed amendment in substantially the following language: "Substantial rewording of declaration. See provision for present text."

The intent of this statute is to avoid the confusion that might arise where an association provides notice of a proposed amendment via a summary of the amendment's language on a ballot, proxy or other notice. Beachaven's attempt to correct the claimed error of the recorded language of the 2010 amendment by recording a document titled "Corrective Certificate of Amendment to the Amended Declaration of Condominium of Beachaven, A Condominium" demonstrates why the proposed language of the amendment must control.

The Corrective Certificate states that it was filed to correct the previously recorded version, which inadvertently included previously deleted provisions from an earlier version of the Declaration. The "corrected language" states that those unit owners who voted against the 2005 amendment which eliminated two-week rentals

(said amendment was voted-on and approved during the special membership meeting on July 1, 2005) may rent their units for terms of at least two-weeks only during the months of May through December. The 2005 amendment that restricted leases to a minimum of 30 days does not provide that those who voted against it will be grandfathered and permitted to continue two-week rentals during the winter season. The Second Notice of the November 9, 2009 membership meeting, in pertinent part, states that a vote to adopt an amendment changing the winter season to begin January 1st through April 30th will be submitted to the members. It is confusing as to why Beachaven was amending the winter season when the 2005 amendment eliminated it. Additionally, the notice fails to indicate if this is related to owners who voted against the 2005 amendment and who might have been grandfathered by operation of law.⁴ The proposed language of the amendment provided to the members clearly permits anyone to rent their unit on a two-week basis during the summer season. Pursuant to Section 718.110(1)(b), Florida Statutes, the language of the proposed amendment controls. Furthermore, the Corrective Certificate of Amendment was not approved by a vote of the membership as required by the Declaration, and, therefore, did not supersede the 2009 Amendment's language.

Beachaven contends there was confusion about the rental restrictions and Petitioner was aware of such confusion at the time she purchased her unit. However, a declaration is presumed to be valid. *Beachwood Villas Condo. v. Poor*, 448 So. 2d 1143 (Fla. 4th DCA1984). Beachaven's argument might have merit, if the recorded amendment did not reflect what was adopted. The recorded amendment was identical to the language of the proposed amendment provided by the owners, and therefore, was valid.

⁴ It is arguable that section 718.110(13), Florida Statutes, requires Beachaven to permit the owners who voted against the 2005 amendment to rent their units on a two-week basis during the winter season.

Beachaven attempts to avoid the application of the 2010 amendment by alleging that the certificate of amendment did not identify the declaration being amended and was not executed with the form required for the execution of a deed as required by section 718.110(2), Florida Statutes. Beachaven relies upon section 718.110(3), Florida Statutes, which states, "An amendment of a declaration is effective when properly recorded in the public records of the county where the declaration is recorded."

Beachaven is correct in that the certificate does not include the required recording information and was not executed with the form required of a deed.⁵ However, Beachaven is under a legal obligation to properly execute and record an amendment adopted by its owners. Additionally, section 718.110(3), Florida Statutes, provides that an amendment to a declaration is effective when it is properly recorded. The statute does not address the validity of an amendment which is not executed in accordance with section 718.110(2), Florida Statutes, rather the import of the statute is that the amendment be properly recorded, thus providing notice of the amendment. Beachaven has not alleged that the 2010 amendment was recorded in such a manner that it should not constitute constructive notice. Additionally, the amendment was recorded and accepted by the clerk of the circuit court, and therefore, pursuant to section 695.26(4), Florida Statutes, the recording was valid, providing constructive notice of the amendment. Beachaven will not be permitted to use its failure to comply with a law as a defense to Petitioner's action.

It is undisputed that on May 27, 2014, The Second Amended and Restated Declaration of Condominium for Beachaven Condominium was recorded in the official records of Sarasota County, Florida. The 2014 declaration limits rentals to a minimum term of 30 days. Pursuant to Section 718.110(13), Florida Statutes, the rental

⁵ The certificate was notarized, however, it lacked the signatures of two witnesses.

restrictions of the 2014 Declaration are not applicable to the Petitioner's unit. The statute states:

An amendment prohibiting unit owners from renting their units or altering the duration of the rental term or specifying or limiting the number of times unit owners are entitled to rent their units during a specified period applies only to unit owners who consent to the amendment and unit owners who acquire title to their units after the effective date of that amendment.

Petitioner took title to her unit before the 2014 Declaration was adopted and recorded. Therefore, pursuant to section 718.110(13), Florida Statutes, the rental restrictions of the 2014 Declaration are not applicable to Petitioner's unit. Therefore, Petitioner may rent her unit during the summer months for two-week terms.

Based upon the foregoing, it is ORDERED:

Beachaven may not prohibit Petitioner from renting her unit for two-week terms during the months of May through December.

DONE AND ORDERED this 28th day of May, 2015, at Tallahassee, Leon County, Florida.

James W. Earl, Arbitrator
Department of Business and
Professional Regulation
Arbitration Section
1940 North Monroe Street
Tallahassee, Florida 32399-1030
Telephone: (850) 414-6867
Facsimile: (850) 487-0870

Attorney's Fees

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 Rule 61B-45.048, Florida Administrative Code.

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 28th day of May 2015:

Eric C. Fleming, Esq.
The Law Offices of Eric Fleming, P.A.
5116 Ocean Blvd.
Sarasota, FL 34242
Attorney for Petitioner

Terrance A. Bostic, Esq.
Mashell, Dennehey, Warner
Coleman & Goggin, P.A.
201 East Kennedy Blvd.
Suite 1100
Tampa, FL 33602
Attorney for Respondent

James W. Earl, Arbitrator