

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

IN RE: PETITION FOR ARBITRATION

CHAMPLAIN TOWERS SOUTH CONDOMINIUM
ASSOCIATION, INC.,

Petitioner,

v.

Case No. 02-5969

OSVALDO UTRILLA and ANGEL WAGNER,

Respondents.

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SUMMARY FINAL ORDER

On December 23, 2002, the petitioner, Champlain Towers South Condominium Association, Inc., filed a petition for arbitration naming Osvaldo Utrilla and Angel Wagner as respondents. The petition alleges that the respondents placed a satellite dish antenna on the condominium common elements without the authorization of the board of directors, creating a safety hazard, in violation of the declaration of condominium and Section 718.113(2), Florida Statutes. As relief, the petition requests entry of an order requiring the respondents to remove the satellite dish antenna from the common elements of the condominium.

On January 27, 2003, the respondents filed an answer. In their answer, the respondents admit having installed a satellite dish. The respondents contend that the dish is not affixed to the balcony and denies that the installation constitutes a material alteration of the common elements or a safety hazard. Finally, the

respondents assert that the petitioner is engaging in “discriminatory conduct and this enforcement is motivated on personal grounds” (sic).

On February 19, 2003, an order requiring supplemental information was entered requiring the parties to submit pictures showing the present installation of the satellite dish. The condominium is a high rise building with each unit having a balcony that is enclosed by a steel railing. The pictures further demonstrate that the satellite dish is attached to the exterior of the balcony railing with plastic zip-ties and hangs out past the balcony by approximately two feet.

The respondents argue that the satellite dish is not affixed to the common elements and does not constitute a material alteration. Article 8(B)(3) of the declaration of condominium provides in pertinent part that the unit owner shall not decorate or otherwise change the appearance of the exterior of the building. It is clear from the pictures, that the balconies and the outside railings thereon are part of the exterior of the building. Article 17(b), as amended on September 10, 1981, provides that the balconies are limited common elements, reserved for the use of a particular unit. The area or air space outside the balcony railing constitutes a common element.

Section 718.113(2), Florida Statutes, prohibits material alterations or additions to the common elements except in the manner provided in the declaration. The declaration, as quoted above, states that a unit owner shall not decorate or otherwise change the appearance of any portion of the exterior of the building. The court in Sterling Village Condo., Inc. v. Breitenbach, 251 So. 2d 685,

687 (Fla. 4th DCA 1971), held that as applied to buildings, the phrase material alteration or addition means "to palpably or perceptively vary or change the form, shape, elements, or specifications of a building from its original design or plan, or existing condition, in such a manner as to appreciably affect or influence its function, use, or appearance."

Whether the placement of a satellite dish on the common elements constituted a material alteration was addressed in Misty Lake South Condo. Assn., Inc. v. Caron, Arb. Case No. 94-0113, Summary Final Order (April 28, 1995). In that case, the arbitrator held that where the declaration of condominium prohibited alterations to the common elements without board approval, a unit owner's installation of a satellite dish on the common elements without board approval constituted a violation of the documents. The arbitrator further wrote "[t]here can be no doubt but that the addition of the satellite dish to the common elements adjacent to the Respondent's unit constitutes a material alteration or change to the common elements prohibited by section 23.06 of the declaration except with the consent of the board of administration." See also, Bay Hill Village Club Condo. Assn., Inc. v. Farah, Arb. Case No. 93-0255, Final Order (June 19, 1995)(The installation of a satellite dish constituted an alteration or improvement requiring compliance with the procedures for such set forth in the condominium documents.)

When applying the foregoing authorities to the facts of the present case there can be no doubt that the addition of the satellite dish to the exterior of the balcony railing (which is a part of the common elements) constitutes a material

alteration or change to the common elements. Accordingly, the addition of a satellite dish to the exterior balcony railing is prohibited by Article 8(B)(3) of the declaration.

The respondent asserts as a defense that this action is “motivated on personal grounds and discriminatory grounds” (sic). The unit owners further state that other unit owners have installed satellite dishes. This defense is characterized as the affirmative defense of selective enforcement. Selective enforcement involves the failure of an association to enforce the condominium documents in other instances bearing sufficient similarity to the instant case to warrant the conclusion that it is discriminatory, unfair, or unequal to permit the association to enforce the restriction in the present case. Oceanside Plaza Condo. Assn., Inc. v. Salussolia, Arb. Case No. 96-0384, Order Striking Certain Defenses (September 4, 1996). The burden of proving an affirmative defense is on the party asserting it. Mercede v. Mercede Park Italian Restaurant, Inc., 392 So. 2d 997 (Fla. 4th DCA 1981). The respondents have failed to assert the existence of any other satellite dish or similar device installed on any portion of the common elements by another unit owner, without board approval against which the association has failed to take enforcement action; thus, the defense of selective enforcement is stricken.

The respondents admit installing and maintaining a satellite dish on the outside of the balcony railing, which is a part of the common elements, without board approval. By installing and maintaining the satellite dish on the exterior of the balcony railing, the respondents have violated Article 8(B)(3) of the declaration

of condominium. The respondents have offered no viable defense that would bar the association's enforcement effort.

Therefore, it is ORDERED:

1. The relief requested by the association is GRANTED.

2. Within thirty days of the date of entry of this order, the respondents shall remove the satellite dish from the exterior balcony railing of the condominium building. All wiring and other items used in connection with the operation or placement of the dish shall also be removed. The respondents shall restore the area to its prior condition, failing which, the association may remove the dish, restore the area and bill the cost of removal and restoration to the respondents.

DONE AND ORDERED this 14th day of April 2003, at Tallahassee, Leon County, Florida.

Richard M. Coln, Arbitrator
Arbitration Section
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-1029

RIGHT TO TRIAL DE NOVO

PURSUANT TO SECTION 718.1255, FLORIDA STATUTES, THIS DECISION SHALL BE BINDING ON THE PARTIES UNLESS A COMPLAINT FOR TRIAL DE NOVO IS FILED BY AN ADVERSELY AFFECTED PARTY IN A COURT OF COMPETENT JURISDICTION IN THE CIRCUIT IN WHICH THE CONDOMINIUM IS LOCATED WITHIN 30 DAYS OF THE DATE OF MAILING OF THIS ORDER. THIS FINAL ORDER DOES NOT CONSTITUTE FINAL AGENCY ACTION AND IS NOT APPEALABLE TO THE DISTRICT COURTS OF APPEAL.

ATTORNEY'S FEES

As provided by s. 718.1255, F.S., the prevailing party in this proceeding is entitled to have the other party pay its reasonable costs and attorney's fees. Rule 61B-45.048, F.A.C., requires that a party seeking an award of costs and attorney's fees must file a motion seeking the award not later than 45 days after rendition of this final order. The motion must be actually received by the Division within this 45-day period and must conform to the requirements of rule 61B-45.048, F.A.C. The filing of an appeal of this order does not toll the time for the filing of a motion seeking prevailing party costs and attorney's fees.

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing was mailed by U.S. mail, postage prepaid, this 14th day of April 2003, to:

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Richard M. Coln, Arbitrator