

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

IN RE: PETITION FOR ARBITRATION

Janet Nassif,
Petitioner,

v.

Case No. 2005-04-8962

Continental Towers, Inc.,
Respondent.

SUMMARY FINAL ORDER

Upon the review of the pleadings filed in this matter, the arbitrator finds that there are no material issues of fact in dispute. Accordingly, this order is entered pursuant to rule 61B-45.030, Florida Administrative Code.

1. Janet Nassif is the record title holder of unit 1005 at Continental Towers Condominium (the condominium).

2. Continental Towers, Inc., is the entity responsible for the operation of the condominium.

3. Section 1.a. Article IV of the association's by-laws provides, in pertinent part, as follows:

- a. Number and Qualification. The affairs of the association shall be governed by a Board of Directors. The number of directors which shall constitute the Board shall be not less than three (3) nor more than nine (9). The number of directors may be increased or decrease within the above limits by affirmative vote of a majority of the membership. All directors shall be members of the Association. The terms of the members of the Board of Directors shall be staggered. At the annual meeting in 1981, if nine (9) directors are to be elected, three (3) shall be elected for one, two and three year terms, respectively. In the event there shall be less than nine (9) directors, the terms and

the number elected shall be determined by the membership. At the annual meeting beginning in 1982 and for each annual meeting thereafter, there shall be elected for a term of three years directors to replace the directors whose terms are then expiring. No person shall serve as a director for more than three consecutive years, but a person may be again elected to the Board after an absence therefrom for a period of one year. Directors shall be elected by a majority vote. Any vacancy occurring on the Board of Directors prior to the annual meeting shall be filled by a majority vote of the remaining directors, and the person so named to fill such vacancy shall serve until the next annual election, at which time the members of the Association shall elect a director to fulfill the unexpired term, if any, of the original director....

4. On March 5, 2002, Circerello, Clow and Price were each elected to the association's board of directors to serve three-year terms each.

5. In March 2003, board member Wolf was appointed to replace board member McKerrow who resigned during the last year of his seat's term.

6. On May 30, 2003, Price resigned and Parr was appointed to replace Price until the March 2004 election.

7. At the March 2004 election, four seats on the board were open for election. Three seats were for three year terms for outgoing board members elected in 2001 (including replacement board member Wolf's seat). The remaining seat was for the uncompleted term of Price's seat(due to expire in 2005) which had been temporarily filled by Parr.

8. Brandt, Miskel, Parr and Wolf were declared the winners of the 2004 election. The minutes of the meeting indicate that the terms of Brandt and Miskel expire in 2007 and the terms of Parr and Wolf would expire in 2006.

9. In May 2004, Ciccarello sold his unit terminating his membership in the association. At the May 2004 board meeting, Cormey was appointed as Ciccarello's replacement.

10. In March, 2005, the association conducted an election for two seats on the board of directors, each a three year term.

11. The petitioner and two other unit owners timely filed their notice of candidacy for the 2005 election.

12. Unit owners Cormey and Roy were elected to the positions.

CONCLUSIONS OF LAW

Continental Towers 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.

Due to her ownership of a unit at the association, the petitioner eligible to seek a position on the association's board of directors. It is undisputed that the petitioner along with two other unit owners were candidates in the association's 2005 election. The petitioner contends that three seats on the board should have been open during the 2005 election, instead of the two that were actually considered in the election.

The petitioner is correct that the 2005 election should have involved three seats on the board. As there are seven seats on the board, it appears based upon the pattern of elections, every year there should be either three seats elected for a three-year term or one seat elected for a three-year term, plus any seats open for a partial term. It is undisputed that in 2002, three board seats were filled during the annual election, with each

seat having a three-year term as required by the above by-law. Thus, in 2005, there should have been at least three seats open for election.

The petitioner is also correct that pursuant to section 781.112(2)(d)1., Florida Statutes, where the number of vacancies equals or exceeds the number of candidates, no election is required. Therefore, the petitioner should have been seated on the board in March 2005. It is clear that the board seats to which Circerello, Clow and Price were each elected in March 2002 should be open for election in the March 2005 election. As board member Clow remained on the board for an entire term, it is clear that Clow's seat should have been open for election in 2005. Likewise, since Cormey was appointed in May 2004 to complete the unexpired term of Circareello, Cormey's seat should have been open for election in 2005.

The confusion arises as to which of the remaining board member's seats should have been open for election in 2005. It is agreed that Price was elected to the board in March 2002 for a three year term. In May 2003, Price resigned and pursuant to the by-laws Parr was appointed his replacement by the board until the membership could vote on a replacement at the next annual election. During the March 2004 election, the membership was permitted to choose a person to fill the remaining term of the Price/Parr seat. Also, three seats with three year terms had expired were included in the election. The minutes of the election meeting indicate Brandt, Miskel, Parr and Wolf were the winners of election with the terms of Brandt and Miskel expiring in 2007 and the terms of Parr and Wolf expiring in 2006. None of these terms match the expiration of the term of the Price/Parr seat which is March 2005. Thus the association failed to

designate which newly elected board member was intended to fill the unexpired term of the Price/Parr seat and appears to have impermissibly extended the term of the seat.

It is undisputed that both Parr and Wolf served on the board of directors during 2003. In March 2003, Wolf was appointed to replace board member McKerrow who resigned during the last year of his term and Parr was appointed in May 2003 to replace Price.

The parties disagree as to the application term of service limitations contained in section 1.a. article IV of the association's by-laws. The by-law clearly provides, "...No person shall serve as a director for more than three consecutive years, but a person may be again elected to the Board after an absence therefrom for a period of one year..." The petitioner contends that a person who serves a partial term should not be eligible to run for another term as the person would be prohibited from completing the subsequent three year term. The association argues in the alternative, that any partial service due to appointment to fill a vacant seat is exclusive of the three year limitation.

The undersigned is not persuaded by either argument. The by-law speaks clearly in terms of service. It makes no distinction as to board members elected or appointed. Furthermore, there is no provision in the condominium documents that would prevent a member from seeking election to a board seat which term he could not complete due to time-of-service of restrictions. The board member would simply have to resign upon the expiration of his eligibility and a replacement candidate would be selected pursuant to the by-laws. Furthermore, this would not disrupt the staggered terms of the board seats, as the term of a seat is specific to that seat, not the eligibility of the member holding the seat.

The association seems to have confused the concept of the eligibility of a member to serve on the board of directors due to time restrictions with the term limit for a specific seat. For example, in the instant case if Parr and Wolf are considered to have been elected to fill two of the three-year-term seats open during the 2004 election, they are not serving a two-year term. Rather they have approximately two years of eligibility left to serve on the board, and at the end of their third year of service, when their eligibility expired, replacement board members would be appointed/elected to fill the time remaining on the term of their seats pursuant to the by-laws.

It is clear from the minutes for the 2004 election that the association expected Brandt and Miskel to serve an entire three year term, indicating that their terms would expire in 2007. Moreover, it was expected that Parr and Wolf would not serve on the board for an entire three year term. This was most likely because it was clear that their eligibility would be expiring in approximately two years from the date the election. The association correctly concluded that Parr and Wolf are eligible only to serve until early 2006.

In 2004, one of the seats up for election had to be a seat with one year remaining on the term. It appears that association intended Brandt and Miskel would each serve an entire three-year term. Thus, the remaining seat must be the Price/Parr seat that should have been open for election in 2005. However, the minutes from the 2004 election meeting reveal that the association confused the candidates' eligibility with the term of the seat. Thus, either Parr or Wolf was elected to the other seat with one year remaining on its term the other was elected to the Price/Parr seat with a full three-year term.

In the 2005 election, the seat with one year remaining in the 2004, would be open for election along with the two other seats whose term also expired that year. The petitioner should have been elected to the board in 2005, and either Wolf or Parr has been improperly permitted to hold the position. Therefore, as to the 2006 election, of the seats held by Wolf and Parr, only one of the seats should be open (due to expiration of eligibility to serve) for election in order to fill the remaining one-year of the unexpired three-year term. The other seat is not open for election as it is the seat that should have been open for election during the 2005 election. As concluded above it should have been filled by the petitioner in 2005. Therefore, the petitioner shall assume the seat for the remaining two years of its term.

Based upon the foregoing it is ORDERED:

1. There should have been three seats on the association's board of director open for election during the associations election conducted in March of 2005. As only three candidates sought election, the petitioner and two other owners, all candidates should have been placed on the board. Therefore, effective immediately, the petitioner is hereby placed upon the board for the remaining two years of the term of the seat that should have been hers in 2005.

2. As to the association's 2006 election, of the seats held by Wolf and Parr, only one of the seats should be open for election in order to fill the remaining one year of an unexpired three year term.

3. Any member of the association may seek election for a seat even though they may not be eligible to complete the term. Any time served on the board by a member as the result of being appointed or elected to fill an expired term shall be

considered service, and pursuant Section 1.a. Article IV of the association's by-laws after three years of service a member is no longer eligible to serve on the board except upon one year absence therefrom.

DONE AND ORDERED this 6th day of March 2006, at Tallahassee, Leon County, Florida.

James W. Earl, Arbitrator
Department of Business and
Professional Regulation
Arbitration Section
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 by trial de novo of this final order tolls the time for the filing of a motion seeking prevailing party costs and attorney's fees until 45 days following the conclusion of the de novo appeal proceeding and any subsequent appeal.

Certificate of Service

I hereby certify that a true and correct copy of the foregoing summary final order on default has been sent by U.S. Mail to the following persons on this 6th day of March 2006:

Jeffrey R. Pegler, Esq
Bush Ross, P.A.
P.O. Box 3913
Tampa, Florida 33601
Facsimile: 813.223.9620

Richard A. Zacur, Esq.
Zacur & Graham, P.A.
5200 Central Avenue
Post Office Box 14409
St. Petersburg, Florida 33733
Facsimile: 727.822.7686

James W. Earl, Arbitrator