

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

IN RE: PETITION FOR ARBITRATION

JEFFREY FELDMAN and CRAIG THIER,

Petitioners,

v.

Case No. 2008-05-2765

**HARBOR VILLAGE COMMUNITY
ASSOCIATION, INC.,**

Respondent.

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FINAL ORDER

Pursuant to notice, the undersigned arbitrator of the Division of Florida Condominiums, Timeshares and Mobile Homes conducted a telephonic final hearing in this case on December 15, 2009. During the hearing, the parties presented the testimony of witnesses, entered documents into evidence and cross-examined witnesses. The parties have filed post-hearing memoranda. This order is entered after consideration of the complete record.

Appearances

For Petitioners: Theodore R. Bayer, Esquire
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For Respondent: Barry A. Postman, Esquire
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Statement of the Issues

1. Whether Respondent willfully excluded Petitioners from the decision-making process and from participation in the operations of Respondent's board of directors.
2. Whether Respondent, in violation of the condominium's governing documents, operated without holding meetings of its board of directors or any committee meetings for over one year and without obtaining the written consent of all directors to actions taken during that time.
3. Whether Respondent, in violation of the condominium's governing documents, improperly removed Petitioner Craig Thier as its representative to the Waterways Community Association without a vote of the board of directors or written consent of all the directors.

Findings of Fact

1. Harbor Village Community Association, Inc. (hereafter Harbor Village) is the corporate entity responsible for the operation of Harbor Village at The Waterways, a master condominium association.
2. Three separate condominium sub-associations compose the component parts of Harbor Village at The Waterways. These are: La Mirage of Harbor Village Condominium Association, Inc. (hereafter La Mirage); Costain Townhomes of Harbor Village Condominium Association, Inc. (hereafter Costain); and Marina Cove at Harbor Village Condominium Association, Inc. (hereafter Marina Cove).
3. The board of directors of Harbor Village consists of five members. One director comes from La Mirage; two directors come from Costain; and two directors come from Marina Cove.

4. Pursuant to the governing documents for Harbor Village, the owners of each condominium sub-association select the director(s) representing that condominium sub-association on the board of directors of Harbor Village.

5. Petitioners, Jeffrey Feldman and Craig Thier, are the two directors selected by the owners of Marina Cove to represent Marina Cove on Harbor Village's board of directors.

6. Harbor Village is itself part of a master association, Waterways Community Association, Inc. (hereafter Waterways).

7. Harbor Village is entitled to appoint a representative to Waterways.

8. On April 23, 2007, Petitioner Craig Thier was appointed by the board of directors of Harbor Village as the representative to Waterways.

9. The minutes of the February 22, 2007 meeting of Harbor Village's board of directors state the following, in pertinent part:

Motion by Fran that no person other than the manager and President may act on behalf of H.V. Any actions taken by either shall be in accordance with the motions passed by the Board or as deemed necessary by the manager or President. Should action be required for which H.V. board has not set policy, the manager or the President shall notify the Board members, advise as to the issue and state what action has been taken. The President may appoint no person other than a Board member to act in his or her absence without the approval of the Board.

10. The minutes of the February 22, 2007 meeting do not indicate that the "motion by Fran" referred to in the previous paragraph was ever voted on and passed by the board. In an apparent attempt to rectify this deficiency, on September 17, 2008, the president of board of directors of Harbor Village, Patricia Rogers, signed a Resolution

affirming that the following was duly and regularly adopted at the February 22, 2007 meeting:

The Board hereby states that no person other than the manager and President may act on behalf of HV. Any actions may act [sic] on behalf of Harbor Village, taken by either shall be in accordance with the motions passed by the Board. Should action be required for which Harbor Board has not set policy, the manager or president shall notify the Board members, advise as to the issue, and state what action is to be taken. Further, the president may appoint no person other than a Board member as provided for the in [sic] HV documents to act in his or her absence without the approval of 4 of the 5 Board members.

11. Patricia Rogers states in the September 17, 2008 resolution, "I have been duly authorized to make this certificate on behalf of the corporation." However, there is no reference to the date the board voted to authorize her to make the certificate. Moreover, Respondent did not explain at the final hearing the reason for the numerous discrepancies between the text of the "motion by Fran" made at the February 22, 2007 meeting and the text of the September 17, 2008 resolution.

12. More than a year and a half after the "motion by Fran", and after Petitioners had sued Respondent in circuit court,¹ the September 17, 2008 resolution changed the terms of the "motion by Fran" to state that the president, where the board had not set policy, was required to advise the board members and state what action is to be taken. In other words, the language of the September 17, 2008 resolution differed from the prior version in that the president, in the latter version, was not permitted to take unilateral action and then subsequently advise the board as to what had been done. Under the September 17, 2008 resolution, the president was to advise the board members before action was taken.

¹ The circuit court case was dismissed on the basis that Petitioners had not first sought relief through mandatory arbitration with this Division.

13. Harbor Village did not conduct meetings of its board of directors between November 19, 2007 and December 15, 2008. Furthermore, there were no committee meetings for over a year.

14. The record in this case establishes that, during the time there were no meetings of the Harbor Village board, the board conducted association business via email.

15. Fran Zeligman was a member of the board of directors of Harbor Village during the time period at issue in this case. Ms. Zeligman blocked and refused to accept emails from Petitioners Jeffrey Feldman and Craig Thier.

16. The president of the board of directors of Harbor Village, Patricia Rogers, unilaterally removed Petitioner Craig Thier as Harbor Village's representative to Waterways by way of an email dated April 8, 2008.

17. At the final hearing, the following individuals gave testimony: Petitioner Jeffrey Feldman, director of Harbor Village; Petitioner Craig Thier, director of Harbor Village, Patricia Rogers, president and director of Harbor Village; and Fran Zeligman, former director of Harbor Village.

18. Respondent Jeffrey Feldman testified that he became involved on the Harbor Village board due to his concerns about security and crime in the community. As a United States probation officer for 18 years, he felt he could use his law enforcement experience to help the community with security issues. Mr. Feldman testified that he was made the chair of Harbor Village's security committee in January, 2009. There had been no meetings of the security committee between January, 2008 and January, 2009. He further testified that, shortly after he was named as chairman, Ms. Rogers changed the security committee from an executive committee to an advisory committee and removed all authority from the chair to give direction to the security personnel. This was a

unilateral action by Ms. Rogers without the approval of the board of directors or the written consent of all directors. Mr. Feldman also stated that he was not allowed to participate in meetings related to Harbor Village's budget.

19. Petitioner Craig Thier testified that he was the appointed representative to Waterways from Harbor Village. Mr. Thier attended a Waterways meeting on behalf of Harbor Village on April 2, 2008. That same day, he prepared a report of what transpired at the meeting and emailed a copy of that report to Harbor Village's property manager. The report contained a notation that Costain was delinquent on its payments to Waterways and had given Waterways an "NSF" check. Mr. Thier testified that Costain's president was angered by the inclusion of this information in the Waterways report. On April 8, 2008, Patricia Rogers sent the members of Harbor Village's board an email which stated in pertinent part, "Mr. Thier chose to ignore the written directive of this President, to send an email to HV, the association he represents, subsequent to the Waterways meeting. Therefore, effective immediately, I am removing Mr. Thier as representative to the Waterways." Ms. Rodgers copied Costain's president with the email.

20. Mr. Thier further testified to numerous actions that were taken by Ms. Rogers in the absence of either a board meeting or the written approval of all directors, ostensibly under the authority of the "motion by Fran." Such actions included authorizing non-routine tree trimming; ordering the movement of a palm tree from Harbor Village property to La Mirage property; creating a credentials requirement for board members to demonstrate that they had been properly appointed by their respective community; and selecting and hiring an attorney to represent Harbor Village.

21. Patricia Rogers testified that Petitioners made it difficult to conduct meetings. Ms. Rogers stated that the governing documents of Harbor Village did not require

meetings of the board of directors. She testified that the “motion by Fran” merely clarified existing board policy which she believed was an attempt to narrowly define what the president could do in the absence of a board approval. Ms. Rogers admitted that she did not have the authority to unilaterally remove Mr. Thier from his post as Waterways representative.

22. Fran Zeligman, a former member of the Harbor Village board, testified that she blocked all emails from Mr. Thier and Mr. Feldman when she was on the board. She confirmed that the Harbor Village board did not hold a meeting for over a year.

23. At the December 15, 2008 board meeting of Harbor Village (the first board meeting to be held for over a year), the following motion was made and passed:

Motion: To confirm Bob Lanier as the HV representative to the Waterways, and to require any person representing HV on a Waterways board or committee to provide a written report to the HV President within 48 hours of any meeting or discussion of Waterways and/or HV activities. To authorize the President to remove any person from representation at Waterways board or committees should he or she fail to report in the manner prescribed herein.

Conclusions of Law

The undersigned has jurisdiction of the parties and this dispute pursuant to § 718.1255, Fla. Stat.

As to the first issue to be determined, the petition alleges that Harbor Village willfully excluded Petitioners from the decision-making process and from participation in the operations of Harbor Village’s board of directors. This issue is intertwined with the second issue, whether Harbor Village, in violation of its governing documents, operated without holding meetings of its board of directors or any committee meetings for over one year and without obtaining the written consent of all directors to actions taken during that

time. Clearly, if Harbor Village operated without holding board meetings and allowed its president to take action in the absence of obtaining the written consent of all directors, then Petitioners, as the two minority directors on a five-person board, were willfully excluded from Harbor Village's decision-making process.

In order to analyze the first two issues under consideration, we must turn to Harbor Village's governing documents. Article V, Section 1 of the Bylaws of Harbor Village provides as follows:

Regular Meetings. Regular meetings of the Board shall be held at such time and place as shall be fixed from time to time by a majority of the Board. Notice of said meeting shall be given to each Director, personally or by mail, telephone, or telegraph, at least five (5) days prior to each meeting. Should said meeting fall on a legal holiday, then the meeting shall be held at the same time on the next day which is not a legal holiday. This Section shall not be construed as to require regular meetings of the Board of Directors.

Furthermore, Article IV, Section 4 of the Bylaws of Harbor Village provides as follows:

Action Without Meeting. The Directors shall have the right to take any action in the absence of a meeting which they could take at a meeting by obtaining the written approval of all Directors.

Emphasis supplied. Thus, the Bylaws provide that, while regular meetings of the board of directors are not required of Harbor Village, any actions taken in the absence of a board meeting must be approved in writing by all directors.

In this case, the evidence showed that Harbor Village did not conduct meetings of its board of directors between November 19, 2007 and December 15, 2008. Furthermore, there were no committee meetings for over a year. Nevertheless, the evidence also showed that Harbor Village did conduct business and activities during this time. Thus, in order to have taken action without having held a meeting, the board was

required to obtain the unanimous written approval of all directors, including Petitioners, for such action. Respondent has failed to demonstrate that it complied with its own Bylaws by obtaining unanimous consent for actions taken in absence of a meeting.

The majority directors of Harbor Village apparently tried to legitimize the actions taken in the absence of either a board meeting or unanimous consent of all directors by the use of the “motion by Fran.” However, given the lack of minutes to demonstrate the adoption of the “motion by Fran” made at the February 22, 2007 meeting or to indicate that the board authorized the president to make the September 17, 2008 resolution, and given the substantial differences between the two provisions, the arbitrator finds that neither the “motion by Fran” made at the February 22, 2007 meeting nor the September 17, 2008 resolution were properly adopted and approved by the Harbor Village board. Especially of concern is the fact that the “motion by Fran” apparently authorized the president, where the board had not set policy, to take action and then to advise the board members what action “has been taken.” Such unilateral action of Harbor Village’s president in the absence of prior board approval is the major item of which Petitioners complain.

Per Article VI of the Bylaws of Harbor Village, “The Board shall exercise all of the powers of the Association” Thus, the Harbor Village board is the entity with all authority to act, not its president. Concerning the powers and duties of the president, Article VII, Section 7 of the Bylaws of Harbor Village provides, in pertinent part, as follows:

Duties. The President shall preside at all meetings of the Board, shall see that orders and resolutions of the Board are carried out, shall sign all leases, mortgages, deeds, and other written instruments on behalf of the Association, and shall co-sign all checks and promissory notes of the Association

Therefore, under the governing documents of Harbor Village, the president has no power whatsoever to take action concerning the association in the absence of a specific order or resolution of majority of the board. Indeed, this comports with prior arbitration case law. *See Simon v. High Point of Delray West Condominium Association, Inc.*, Arb. Case No. 94-0265, Final Order (April 3, 1995)(A single director has no power to act in representative capacity for the corporation on matters for which a vote of the directors is required.); *June Katchen and Lawrence Katchen v. Braemer Isle Condominium Association, Inc.*, Arb. Case No. 98-5485, Final Order (August 5, 1999)(Association president, acting alone, did not have the authority to act for the board and bind the association). In point of fact, an association president has no greater authority than any other member of the board. *See Aldrich v. Tahitian Gardens Condominium Association, Inc.*, Arb. Case No. 96-0472, Summary Final Order (May 22, 1997).

Notwithstanding the foregoing, this is not how the president of Harbor Village conducted herself, given the April 8, 2008 email in which Ms. Rogers removed Mr. Thier as Harbor Village's representative to Waterways. She wrote, "Mr. Thier chose to ignore the written directive of this President, Therefore, effective immediately, I am removing Mr. Thier as representative to the Waterways."

The president improperly took numerous other actions in the absence of a board approved motion or resolution or the unanimous written approval of all directors. Such actions included changing the security committee from an executive committee to an advisory committee and removing all authority from the chair to give direction to the security personnel; authorizing non-routine tree trimming; ordering the movement of a palm tree from Harbor Village property to La Mirage property; creating a credentials requirement for board members to demonstrate that they had been properly appointed by

their respective community; and selecting and hiring an attorney to represent Harbor Village. The other two board members who were part of the three-person majority, by their inaction and their failure to demand that board meetings be held, participated in allowing the president to act in the absence of the appropriate authorization.

Respondent attempts to defend itself as to the failure to hold board meetings by claiming that Petitioners objected to essentially every meeting notice. As a result, Respondents contend that Petitioners intentionally hampered Harbor Village's ability to meet and conduct business. However, this argument ignores the fact that, as a three-person majority on a five-member board, a board meeting could have been scheduled at any time during the year in which no meetings were held. A simple majority vote would have been all that was required to set a board meeting. Rather than doing so, it appears that the majority members were content to improperly conduct business by email, while excluding Petitioners, and allowing the president to handle the association's affairs by executive fiat. This does not comport with Harbor Village's governing documents, nor does it comply with § 718.112(2)(c), Fla. Stat. ("Meetings of the board of administration at which a quorum of the members is present shall be open to all unit owners. . . ."). If no board meeting is held and business is done improperly by email or by the president alone, neither Petitioners, nor the unit owners, are afforded the rights of participation given to them by the governing documents or the Florida statutes.²

Respondent also argues that the "business judgment rule" insulates Harbor Village from liability as a result of the decisions made and the actions taken in the absence of the appropriate board votes or unanimous written consent. Under the "business judgment

² It is not possible to conduct an open meeting by email.

rule,” a board is given wide latitude in its exercise of discretion in the performance of its duties. See e.g. *DiBiase v. Beneva Ridge Condo. Assn.*, Arb. Case No. 92-0210, Final Order (January 19, 1994). Nonetheless, Respondent’s reliance on the “business judgment rule” is misplaced here because the rule gives the board wide discretion. In the case under consideration, the board did not hold a valid meeting and vote, and did not obtain unanimous consent. Actions taken in the absence of these requirements are not actions by the board and are accordingly not protected by the “business judgment rule.”

As a result of the foregoing, the arbitrator finds that Harbor Village willfully excluded Petitioners from the decision making process and from participation in the operations of Harbor Village’s board of directors. Furthermore, the arbitrator determines that Harbor Village, in violation of its governing documents, operated without holding meetings of its board of directors or any committee meetings for over one year and without obtaining the written consent of all directors to actions taken during that time.

The third issue to be determined is whether Respondent, in violation of the condominium’s governing documents, improperly removed Mr. Thier as its representative to the Waterways without a vote of the board of directors or written consent of all the directors. On this issue, Ms. Rogers herself admitted that she did not have the authority to unilaterally remove Mr. Thier from his post as Waterways representative. Respondent again attempts to use the “business judgment rule” to protect itself here. However, as set forth above, the “business judgment rule” is not applicable to the president’s unilateral action.

Moreover, the arbitrator determines that the December 15, 2008 motion confirming Bob Lanier as Harbor Village’s representative to Waterways did not ratify Ms. Rogers’ removal of Mr. Thier. The text of the motion merely approves Mr. Lanier’s appointment.

Nowhere in the motion is there an authorization to remove Mr. Thier. The undersigned declines to read into the motion any implicit authorization to remove Mr. Thier. As a result of the foregoing, the arbitrator finds that Respondent, in violation of the condominium's governing documents, improperly removed Mr. Thier as its representative to the Waterways without a vote of the board of directors or written consent of all the directors.

Based upon the above, it is ORDERED:

1. Respondent is directed to promptly disclose all information about Harbor Village to all directors, to provide all directors with all of the written communications, including emails, exchanged between any of the directors about association matters and to include all directors in the decision-making process.

2. Respondent is directed to take all action by majority vote at duly noticed meetings or with the written consent of all directors.

3. Neither the "motion by Fran" made at the February 22, 2007 meeting nor the September 17, 2008 resolution were properly adopted and approved by the Harbor Village board and both are therefore null and void.

4. The removal of Petitioner Craig Thier on April 8, 2009 by Respondent's president as Harbor Village's representative to Waterways was unauthorized and is invalid.

DONE AND ORDERED this 27th day of April, 2010, at Tallahassee, Leon County, Florida.

David R. Slaton, Arbitrator
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Arbitration Section
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Trial de novo and Attorney's Fees

This decision shall be binding on the parties unless a complaint for trial *de novo* is filed in accordance with section 718.1255, Florida Statutes. 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, F.A.C.

Certificate of Service

I hereby certify that a true and correct copy of the foregoing final order has been sent by U.S. Mail to the following persons on this 27th day of April, 2010:

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