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

IN RE: PETITION FOR DECLARATORY STATEMENT,

Irwin Ross, Unit Owner,
No. 2 Condominium Association Palm Greens
at Villa Del Ray, Inc.,

BPR No. DS2003-008
Docket No. 2003052730

Petitioner.

DS 2003-008

DECLARATORY STATEMENT

Petitioner, Irwin Ross, a unit owner and member of Number 2 Condominium Association Palm Greens at Villa Del Ray, Inc. (Ross), requests a declaratory statement on whether general correspondence from the association counsel is exempt from unit owner access under section 718.111(12)(c)1, Florida Statutes. The Division of Florida Land Sales, Condominiums, and Mobile Homes (Division) finds that it is.

STATEMENT OF FACTS

The following facts are based on information submitted by Ross and Sidney H. Firestone (Firestone). The Division relies on the statement of facts set out in the petition and Firestone's response without taking any position with regard to the validity of the facts. The facts presented are those that are not contested.

1. Ross filed a petition with the Division on April 2, 2003. Notice of the Petition was published in the Florida Administrative Weekly on April 18, 2003.

2. Firestone, Vice President of Number 2 Condominium Association Palm Greens at Villa Del Ray, Inc., filed a petition for declaratory statement containing four issues, one of which was the same as that posed by Ross. The association is accepted as an intervenor and its petition will be treated as a response to Ross's petition.

3. Ross is a "unit owner," as that term is defined in section 718.103(28), Florida Statutes, and member of Number 2 Condominium Association Palm Greens at Villa Del Ray, Inc. (Association).

4. Number 2 Condominium Association Palm Greens at Villa Del Ray, Inc. is a "condominium association" as those terms are defined by section 718.103(2), (11), Florida Statutes.

5. At a board of directors meeting held on March 4, 2003, a unit owner questioned the board about conversations the president had with other board members individually concerning association business outside of board meetings.

6. On March 10, 2003, Ross sent a written request to inspect the letter from the association's attorney to the board that allegedly indicates that this method of conducting the association's business is authorized by the Condominium Act. Ross also asked to see all of the documents from the attorney on the issue of the renovation of the clubhouse and all of the president's notes and others' notes about the discussions held with the association's attorney on the clubhouse issue.

7. On March 13, 2003, Firestone wrote Ross advising him that the association would not release the information at the time because it was waiting for a legal opinion from the Division.

8. On March 18, 2003, Firestone wrote the Division requesting an opinion on Ross's issue and other related issues.

9. On behalf of the association, Firestone asserts that the attorney's correspondence and communications with the board are privileged.

10. Neither Ross nor Firestone requested a hearing.

CONCLUSIONS OF LAW

11. The Division has jurisdiction to enter this order in accordance with sections 120.565 and 718.501, Florida Statutes (2002).

12. Ross is substantially affected by the provisions in chapter 718, which govern the operation of condominium associations and unit owners' rights to inspect the official records of the association.

13. Section 718.111(12)(c), Florida Statutes, gives every unit owner the right to inspect and copy the official records of the association at reasonable times with three limited exceptions: (1) lawyer-client confidential communications; (2) information given for the approval of a transfer of a unit; and (3) unit owner medical records. The association alleges that the attorney's communications are privileged. Ross asserts that the attorney's letter regarding the president's serial consultation with individual board members is not privileged under this section because it was not made in anticipation of litigation.

14. Section 718.111(12)(c)1, Florida Statutes (2002), provides:

Notwithstanding the provisions of this paragraph, the following records shall not be accessible to unit owners:

1. Any record protected by the lawyer-client privilege as described in s. 90.502; and any record protected by the work-product privilege, including any record prepared by an association attorney or prepared at the attorney's express direction; which reflects a mental impression, conclusion, litigation strategy, or legal theory of the attorney or the association, and which was prepared exclusively for civil or criminal litigation or for adversarial administrative proceedings, or which was prepared in anticipation of imminent civil or criminal litigation or imminent adversarial administrative proceedings until the conclusion of the litigation or adversarial administrative proceedings.

15. This section creates an exemption from unit owner inspection of condominium association official records for both the attorney-client privilege and the work product privilege. The attorney-client privilege covers both oral and written communications and is created in statute at section 90.502, Florida Statutes. It does not encompass the work product privilege, which is a judicially created rule of trial procedure. City of Williston v. Roadlander, 425 So. 2d 1175, 1177 (Fla. 1st DCA 1983); see Fla. R. Civ. P. 1.280(b)3. The lawyer-client privilege is absolute; the work product privilege is not. Ehrhardt, Florida Evidence § 90.502 at 294 (2001 ed.). The work product privilege is broader than the attorney-client privilege in that it covers materials that are not client communications and are not confidential. Id. at 332.

16. The modifying clauses following “any record protected by the work-product privilege” describe the two forms of the work product privilege—fact and opinion work product. Fact work product concerns the materials a lawyer gathers in preparing a case for trial, such as witness statements, notes by a client made at the lawyer's direction, assembled research, and insurance claims files. Id. at 332. Opinion work product is the lawyer's written records that reflect “a mental impression, conclusion, litigation strategy, or legal theory” and that are prepared for litigation. § 718.111(12)(c)1, Fla. Stat. cf.

Ehrhardt, supra, at 335. Generally, fact work product may be shown to an opposing party under certain circumstances in civil litigation and is open to inspection under the public records law. Id. at 335. Opinion work product is almost absolutely privileged in litigation and is exempt from disclosure under the public records law “until the conclusion of the litigation or adversarial administrative proceedings.” § 119.07(3)(l), Fla. Stat. (2002) cf. § 718.111(12)(c)1 (identical language); see Ehrhardt, supra, at 337. The qualifying phrases under the work product record exemption are taken from descriptions of the work product privilege. These phrases have not been used to describe the attorney-client privilege.¹

17. Under the public records law, government agencies cannot withhold documents from public inspection under a claim of attorney-client privilege, but may withhold documents under a claim of opinion work product if the documents have been prepared in anticipation of or during litigation until the time the litigation ends. § 119.07(3)(l), Fla. Stat.; Government-In-The-Sunshine Manual 82-86 (2002 ed.) (citing City of Orlando v. Desjardins, 493 So. 2d 1027(Fla. 1986) and City of N. Miami v. Miami Herald Pub. Co., 468 So. 2d 218 (Fla. 1985); Ehrhardt, Florida Evidence, § 90.502(4), at 337-38.

18. Ross interprets section 718.111(12)(c)1, Florida Statutes, as limiting both privileges “until the conclusion of the litigation or adversarial administrative proceedings.” This is not consistent with the legal interpretation and application of both privileges.

¹ See the discussion of both privileges in Ehrhardt, Florida Evidence, § 90.502 (2001 ed.)
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19. The legislature first created the work product exception for official records of a condominium association in 1992. Ch. 92-49, § 2, at 438, Laws of Fla. As originally enacted, section 718.111(12)(c)1, Florida Statutes, included only the work product privilege in similar form to the public records law. Compare 718.111(12)(c)1, Fla. Stat.(1992) with 119.07(3)(n), Fla. Stat. (1992). In 2000, the legislature added the attorney-client privilege. Id. Ch. 2000-302, §52, at 3137. A reading of the statute shows that these two privileges are separate. The work product privilege is similar to the more restrictive work product privilege found in the public records law. However, to read the subordinate “which” clauses as defining both the attorney-client and work product privileges would turn the attorney-client privilege into the work product privilege and make the amendment adding it superfluous. So, as the exemption reads, any record covered by the lawyer-client privilege that fits the description found in section 90.502, Florida Statutes, is exempt from unit owner inspection.

20. These two privileges are narrowly construed to prevent the privileges from overwhelming the general imperative that all official records of the association are open to inspection by unit owners. This is consistent with the heightened level of scrutiny applied by courts to corporate privilege claims in litigation. Southern Bell Tel. & Tel. Co. v. Deason, 632 So. 2d 1377, 1383 (Fla. 1994). When disputes over access to records arises in litigation, a judge will require the documents to be turned over to the court for review. The judge will read the documents and the legal arguments of the parties before reaching a decision on whether the documents or any part of the documents are privileged. Nationwide Mutual Fire Ins. Co. v. Hess, 814 So. 2d 1240 (Fla. 5th DCA 2002); United Servs. Automobile Ass’n v. Crews, 614 So. 2d 1213 (Fla. 4th DCA 1993)

[hereinafter USAA]. Because any document presented to the Division in a declaratory statement proceeding is a public record open to inspection by anyone, it is not feasible for the Division to require or conduct a review of privileged documents. See § 119.07(1), Fla. Stat. A declaratory statement proceeding is not designed to decide disputed issues of fact underlying a privilege claim or rule on discovery issues. § 120.565, Fla. Stat.; Fla. Admin. Code R. 28-105.103 (only hearings involving undisputed facts may be held on petitions for declaratory statements).

21. The attorney-client privilege applies when the communication is made to secure legal advice and services, the content of the communication relates to the legal advice or services being given, and the communication is not disseminated beyond those persons in the association who need to know the legal advice, e.g. the board. § 90.502, Fla. Stat.; see Southern Bell, 632 So. 2d at 1383. The attorney-client communication covers information given to the client by the attorney and any notes the client makes of the attorney's communication. Id. at 1386.

22. From the facts presented, it appears uncontested by the parties that the clubhouse "issue" is a hotly debated and contested issue within the condominium. It also appears that the attorney's communications with the board were made for the purpose of giving the board legal advice, were given in confidence, and have been kept confidential. If so, these written communications would qualify as privileged under section 90.502, Florida Statutes, and would, therefore, be privileged under section 718.111(12)(c)1, Florida Statutes, for as long as the association retains the confidentiality of the communication. See USAA, 614 So. 2d at 1214; Fehribach, CD2001-017 (May 24, 2001) (declaring that Windjammer Condo. Ass'n attorney's letter

to president regarding legality of closed rules committee meeting was privileged and not accessible to unit owner).

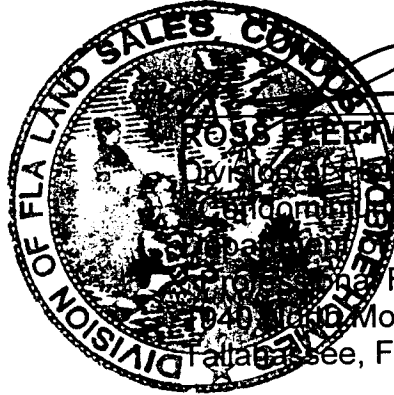
23. Because the facts presented are limited and because the attorney's communications have not been presented for review, the Division's response might vary if more specific facts were revealed. For instance, there is no evidence that the association has waived the privilege, or that the communication was made for some purpose other than giving the association legal advice.

24. It also is foreseeable that the attorney's correspondence qualifies as work product. If so, the attorney's correspondence on the clubhouse issue would be privileged and exempt only until the conclusion of litigation unless it also qualifies for protection under the lawyer-client privilege. § 718.111(12)(c)1, Fla. Stat. If the facts are other than presented to the Division, then the parties may proceed to arbitration where an arbitrator will be assigned to hold an arbitration hearing, review the privileged documents, decide the facts, and determine whether the communications are in fact privileged. See Philistin v. Shaker Village Condo. Ass'n, Inc., Case No. 98-2858 (Order Following Status Conference; Arb. Scheuerman, Apr. 9, 1998); § 718.1255, Fla. Stat.

ORDER

WHEREFORE, based upon the statement of facts and conclusions of law, it is ORDERED that the communications from the attorney to the association are exempt from disclosure under section 718.111(12)(c)1, Florida Statutes (2002).

DONE and ORDERED this 6th day of May 2003.



[Signature]
ROSS FERRWOOD, Director
Division of Florida Land Sales,
Condominiums, and Mobile Homes
Business and
Regulation
1940 North Monroe Street
Tallahassee, FL 32399-1030

NOTICE OF RIGHT TO APPEAL

THIS FINAL ORDER CONSTITUTES FINAL AGENCY ACTION AND MAY BE APPEALED BY PETITIONER PURSUANT TO SECTION 120.68, FLORIDA STATUTES, AND RULE 9.110, FLORIDA RULES OF APPELLATE PROCEDURE BY FILING A NOTICE OF APPEAL CONFORMING TO THE REQUIREMENTS OF RULE 9.110(c), FLORIDA RULES OF APPELLATE PROCEDURE BOTH WITH THE APPROPRIATE DISTRICT COURT OF APPEAL ACCOMPANIED BY APPROPRIATE FILING FEES AND WITH THE AGENCY CLERK, 1940 NORTH MONROE STREET, NORTHWOOD CENTRE, TALLAHASSEE, FLORIDA 32399-2217 WITHIN THIRTY (30) DAYS OF THE RENDITION OF THIS FINAL ORDER.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Irwin Ross, 13505C Fishtail Palm Court, Delray Beach, Florida 33484, and Sidney H. Firestone, Vice President, No. 2 Condominium Association Palm Greens at Villa Del Ray, Inc., 5801 Via Delray, Delray Beach, Florida 33484, this 8th day of May, 2003.

Carol Windham
Carol Windham,
Docket Clerk

Copies furnished to:

Ross Fleetwood
Director

Janis Sue Richardson
Chief Assistant General Counsel
Office of General