

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

FILED	
<small>Department of Business and Professional Regulation Deputy Agency Clerk</small>	
CLERK	Brandon Nichols
Date	11/7/2013
File #	2013-06663

IN RE: PETITION FOR DECLARATORY STATEMENT

Dockets Nos. 2013038413
2013037045

SEA COAST MANAGEMENT, INC.

DS 2013-081

DECLARATORY STATEMENT

The Department of Business and Professional Regulation, Division of Florida Condominiums, Timeshares, and Mobile Homes issues this Declaratory Statement under section 120.565, Florida Statutes.

PRELIMINARY STATEMENT

The Division received a petition for declaratory statement from Richard D. and Genna W. Herbert on September 05, 2013, seeking a declaratory statement as to whether the books and records of Sea Coast Rentals, Inc. (hereinafter "the rental corporation") are considered part of the "official records" of Sea Coast Management, Inc. (hereinafter "the association") and available for inspection by unit owners under section 718.111(12), Florida Statutes. On September 18, 2013, the Division received a petition for declaratory statement from the association asking substantially the same question.

On September 18, 2013, the Division counsel responded to the association's petition and explained that the Division may not issue a declaratory statement where the facts are in dispute. However, the Division explained that if the parties agreed to

consolidate the two petitions with an agreed set of facts, the Division may be able to issue a declaratory statement. The Division received a consolidated petition dated October 8, 2013 in which the parties agreed to an undisputed set of facts. The Division consolidated the two petitions and issues this one statement addressing both.

Notice of receipt of the Herberts' petition was published in the September 10, 2013 edition of the Florida Administrative Register. Notice of receipt of the association's petition was published in the September 19, 2013 edition of the Florida Administrative Register. Neither of the parties has requested a hearing.

FINDINGS OF FACT

The material facts are set out in the consolidated petition. The Division takes no position as to the accuracy of the facts and accepts them as submitted by the petitioners for the purposes of issuing this order.

1. Sea Coast Management, Inc. (the association) is a Florida corporation responsible for the operation of Sea Coast Gardens, A Condominium.¹
2. Sea Coast Gardens, A Condominium is a ninety (90) unit complex located in New Smyrna Beach, Florida.²
3. The association has entered into a Management Agreement with Sea Coast Rentals, Inc. (the rental corporation) for the operation of a rental program at the condominium.³
4. The rental corporation's stock is 100% owned by the association.⁴

¹ Consol Pet for Decl. Stmt , ¶ 1

² *Id* at ¶ 6

³ *Id* at ¶ 1-2

⁴ *Id* at ¶ 2.

5 The broker for the rental corporation is licensed by the Florida Real Estate Commission. The broker collects commissions, which are used to pay expenses incurred by the rental corporation.⁵

6 Some of the expense records of the rental corporation and the association are maintained together. The association pays expenses that are shared with the rental corporation, and the rental corporation pays the association a fee to cover those expenses.⁶

7 The association and the rental corporation file a consolidated federal income tax return.⁷

8 The rental corporation's books and records reflect rental income, security deposits, sales tax and cleaning fees from renters, and the payment of rent to unit owners whose units are rented by the rental corporation, sales tax to the State of Florida, cleaning fees to a cleaning service, brokerage commission to the broker, the fee to the association, and rental deposits to tenants. The rental corporation's books and records contain additional information, including, but not limited to, names and unit numbers of owners who rent their units through the rental corporation, time periods that units are rented, and other private information relating to the rental of individual units owned by a unit owned and rented through the rental corporation.⁸

9 Employees of the association also provide services to the rental corporation. The rental corporation pays the association a fee to cover those employee costs.⁹

⁵ *Id.* at ¶ 3

⁶ *Id.* at ¶ 4

⁷ *Id.* at ¶ 7

⁸ *Id.* at ¶ 10

⁹ *Id.* at ¶ 11

10. The association property manager is a licensed real estate broker and community association manager (CAM). She also receives a brokerage fee from the rental corporation. The rental corporation is licensed with the Florida Real Estate Commission as a Real Estate Brokerage Corporation.¹⁰

CONCLUSIONS OF LAW

11. The Division has jurisdiction to enter this order pursuant to sections 719.501 and 120.565, Florida Statutes.

12. Section 120.565, Florida Statutes, provides:

(1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances.

(2) The petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule, or order that the petitioner believes may apply to the set or circumstances.

13. Rule 28-105.001, Florida Administrative Code (2007), provides:

A declaratory statement is a means for resolving a controversy or answering questions or doubts concerning the applicability of statutory provisions, rules, or orders over which the agency has authority. A petition for declaratory statement may be used to resolve questions or doubts as to how the statutes, rules, or orders may apply to the petitioner's particular circumstances. A declaratory statement is not the appropriate means for determining the conduct of another person.

14. Both parties have standing to petition for a declaratory statement.¹¹

15. Section 718.111(12), Fla. Stat., provides in part that "[t]he official records of [a condominium] association are open to inspection by any association member or the

¹⁰ *Id.* at ¶ 12

¹¹ §§ 718.103(28), 120.565, Fla. Stat. (2012).

authorized representative of such member at all reasonable times.” At issue here is whether the records of the subsidiary rental corporation are “official records of the association” under this section.

16. The Division’s jurisdiction is limited to enforcing and ensuring compliance with the Condominium Act.¹² In order for the Division to enforce the Herberts’ right to inspect the rental corporation’s records, the Division must first establish jurisdiction over the rental corporation. The rental corporation is not a condominium association or developer subject to the Division’s jurisdiction under the Condominium Act.¹³ Although the rental corporation is a wholly-owned subsidiary of the association, the rental corporation is nonetheless a separate legal entity. The rental corporation does not operate the condominium, but exists to provide rental services to unit owners. The company and the broker are licensed and regulated by the Florida Real Estate Commission under chapter 475, Florida Statutes. As the treatise Florida Jurisprudence explains:

A parent corporation and its wholly-owned subsidiary are separate and distinct legal entities. As with corporations solely owned or controlled by one or a few individuals, corporations solely owned or controlled by other corporations do not, by virtue of such stock ownership alone, lose their identities as distinct legal entities. . . .¹⁴

17. Florida courts have recognized a limited exception to the legal protections offered to subsidiary corporations under the doctrine of “piercing the corporate veil.” Under this doctrine, courts may ignore the separate legal status of a subsidiary corporation where 1) the subsidiary is a mere instrumentality or alter ego of the parent corporation, and 2)

¹² § 718 501, Fla Stat (2013).

¹³ See § 718 103, Fla Stat (2013) (defining “association” and “developer”)

¹⁴ 8A FLA JUR. 2d *Business Relationships* § 16 (2013) See also *Molenda v. Hoechst Celanese Corp.*, 60 F Supp 2d 1295, 1300 (S D Fla. 1999) (“Indeed, the well-settled rule is that a corporation is a separate legal entity and, thus, that separate corporate form cannot be disregarded” (citing *Copperweld Corp. v Independence Tube Corp* , 467 U S 752, 786 (1984))

the subsidiary corporation is being used for an improper purpose.¹⁵ However, Florida courts are reluctant to pierce the corporate veil and will only do so “in exceptional cases.”¹⁶ Courts have found that alleged “greenmailing,”¹⁷ failing to maintain and pay for insurance,¹⁸ and poorly handled business affairs¹⁹ are not improper purposes sufficient to pierce the corporate veil. Because the petition does not allege that the rental corporation is being used for an improper purpose, the Division may not pierce the corporate veil. Since the second prong is not met (an alleged improper purpose), it is not necessary to address the first (whether the rental corporation is a “mere instrumentality” of the association).

18. Any records that “are related to the operation of the association” are official records of the association subject to inspection by the members of the association unless specifically exempted by section 718.111, Florida Statutes.²⁰ However, this section applies only to records that are produced or acquired by the association in the course of operating the association. It does not apply to records that are held by the rental corporation in the course of operating the rental program.

19. In sum, the rental corporation is a separate legal entity notwithstanding the fact that it is a wholly-owned subsidiary of the association that shares facilities and employees with the association. In order to “pierce the corporate veil” and disregard the separate legal status of the rental corporation, the petition would have to allege that the

¹⁵ *Dania Jai-Alai Palace, Inc. v. Sykes*, 450 So. 2d 1114, 1117-21 (Fla 1984); *Johnson Enters. Of Jacksonville, Inc. v FPL Grp., Inc* , 162 F 3d 1290, 1320 (11th Cir 1998)

¹⁶ *Johnson Enters.-Of Jacksonville, Inc v. FPL Grp., Inc.*, 162 F 3d 1290, 1320 (11th Cir 1998) (quoting *State ex rel Cont'l Distilling Sales Co. v Vocelle*, 27 So 2d 728, 729 (Fla 1946)

¹⁷ *Id.* at 1321

¹⁸ *See Munder v. Circle One Condo , Inc.*, 596 So 2d 144 (4th DCA 1992)

¹⁹ *See Advertects, Inc v. Sawyer Indus., Inc.*, 84 So 2d 21, 24 (Fla 1955)

²⁰ § 718 111(12), Fla Stat (2013) (providing “[a]ll other records of the association which are related to the operation of the association” are subject to inspection)

rental corporation was being used for an "improper purpose." That is not alleged here. The books and records of the rental corporation are not "official records of the association" under section 718.111(12), Florida Statutes, unless or until those records are provided to the board of directors and become a part of the association's official records. In other words, a unit owner may not reach through the association to acquire access to another corporation's books and records.

For the reasons stated above it is hereby:

ORDERED that the books and records of Sea Coast Rentals, Inc. are not part of the "official records" of Sea Coast Management, Inc. Therefore, the books and records of Sea Coast Rentals, Inc. are not subject to inspection by members of Sea Coast Management, Inc. under section 718.111(12), Florida Statutes.

DONE and **ORDERED** this 1 day of November 2013, at Tallahassee, Leon County, Florida.




RONNIE WHITAKER, Director
Department of Business and
Professional Regulation
Division of Florida Condominiums, Timeshares,
and Mobile Homes
Northwood Centre
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 ANY PARTY ADVERSELY AFFECTED 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 James M. Kosmas, Esq., 111 Live Oak Street, New Smyrna Beach, Florida 32168 and Richard D. & Genna W. Herbert, 608 N. Longview Place, Longwood, Florida 32779, on this 7th day of November 2013.


Agency Clerk's Office

Copies furnished to:

Janis Sue Richardson
Chief Attorney