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

IN RE: PETITION FOR ARBITRATION

THE PALMS 2100 TOWER ONE
CONDOMINIUM ASSOCIATION, INC.,

Petitioner,

Filed with
Arbitration Section

v. Case No. 2021-03-8040

NOV 16 2021

DAVIS MATESIC and
BELINDA BUCCI,

Div. of FL Condos, Timeshares & MH
Dept of Business & Professional Reg

Respondents.

_______________________________________/

FINAL SUMMARY ORDER

Statement of the Issue

The issue in this case is whether the Respondents granted the Association access to their unit for purposes of inspecting said unit as is required by section 718.111, Florida Statutes.[1]

Procedural History

On or about July 20, 2021, The Palms 2100 Tower One Condominium Association, Inc., (Association) sent Davis Matesic and Belind Bucci (Respondents) correspondence that requested access to their unit (July 20 Correspondence). The July 20 Correspondence states, in relevant part, that:

> As you are aware a Dade County condominium suffered catastrophic damage and loss of life last month. The Board, of which you are members, simply needs to make sure that the condominium structure is safe and respectfully requests you cooperation and assistance in this regard. The Board wants access within seven (7) days.

[1] Underlying the Association's request to inspect Respondents' unit is that at some point in time, either the previous or present owners installed a Jacuzzi and loft in the unit. As discussed later in this order, whether, when or by who a Jacuzzi and or loft has been installed in the unit is entirely irrelevant and immaterial to a resolution of this case.

On August 17, 2021, the Association filed a petition for mandatory non-binding arbitration alleging Respondents failed to give the Association access to their unit as was requested in its July 20 Correspondence. As relief, the petition requests

> ...entry of a final order requiring the Respondents to allow the Petitioner and its designees, contractors, subcontractor and employees the right to enter the Unit 31A in order to inspect and photograph same, where necessary, and an award of attorney's fees and costs. Petitioner further requests that, if it is found that the Respondents have made material alterations of modification to Unit 31A or common elements that were never approved by the Board of the Petitioner, the arbitrator reserve jurisdiction to enter further orders as may be deemed necessary.

On September 2, 2021, Respondents filed a Motion to Dismiss. Respondents' Motion to Dismiss was denied on October 26, 2021. On November 5, 2021, the Respondents filed their answer to the petition. Selective allegations contained in the petition, and their corresponding answers,[2] state:

> P12. The Petitioner has made numerous requests of the Respondents to allow its Board to inspect Unit 31A in order to determine if Respondents have, in fact, installed a Jacuzzi and/or loft and what, if any, actions need to be taken to address potential damage to the structural integrity of the building.
>
> A12. As to the allegations in paragraph 12, the *Respondents would admit Petition has made numerous requests to allow the Board to inspect their Unit and take pictures;* however Respondents **deny** the Board's stated purpose for said requested inspection. No Board Member had a reason to make such request, nor the expertise to determine whether or not there are any elements of the Unit or building as a whole that would contradict their own hired engineer's reports.
>
> P13. The Respondents have repeatedly denied the Petitioner's request to allow entry into Unit 31A .
>
> A13. Respondents **deny** the first sentence in paragraph 13 of the Petition for Arbitration as written. *Respondents admit that Petitioner has been denied access to Respondents' Unit to inspect and take pictures*, in that, the Petition has no justifiable reasons to do so. ...
>
> P16. The Respondents have denied any and all of the Petitioner's requests for entry into Unit 31A.
>
> A16. The Respondents **deny** the allegations in paragraph 16 of the Petition for Arbitration to the extent that Respondents *offered to meet with Management of the Petition to discuss any concerns with regard to their*

[2] Allegations contained in the petition are denoted as "P#" while statements in the Answer corresponding to said petition allegation are denoted as "A#."

> *Unit and if necessary accompany Management to the Unit*, **without allowing taking photographs** which would invade Respondent's privacy.

[Bold in original, italics added]

Respondents' answer also advanced several affirmative defenses. These defenses are: 1) Selective enforcement; 2) failure of condition precedent; 3) Rule 61B-45.013(5), Florida Administrative Code, bars actions that are moot, abstract, hypothetical or otherwise lacking in the requirements of a case or controversy; 4) statute of limitation; 5) waiver; 6) laches and undue delay; 7) barred from relief based because actions are in bad faith; and, 8) Petitioner is barred from recovery because it has not plead facts that the improvements made to the Respondents' Unit were volatile of any law, rule or regulations.

On November 8, 2021, an Order Setting Case Management Hearing was entered. Later in the day, the Association filed a motion for summary disposition. On November 15, 2021, an Order Cancelling Case Management Hearing was entered.

Findings of Fact

1. The Association made numerous requests to inspect Respondents' unit, and provided the Respondents with the pre-arbitration notice required by section 718.1255, Florida Statutes.

2. Respondents' refused the Association's request to inspect their unit or, placed conditions on the Association's inspection of the unit.

3. Section 3.4c of the Declaration provides that

> ...[t]he Association (and its designees, contractors, subcontractors, employees) *shall have the right to have access to each Unit* from time to time during reasonable hours as may be necessary for pest control purposes and for the maintenance, repair or replacement of any Common Elements or any portion of Unit if any, to be maintained by the Association, or at any time and by force, if necessary, *to prevent damage to the Common Elements, the Association Property or to a Unit or Units*, including without limitation, (but without obligation or duty) to close hurricane shutters in the event of the issuance of a storm watch or storm warning.

Conclusions of Law

The Division has jurisdiction over this matter and the parties pursuant to Section 718.1255, Florida Statutes. Rule 61B-45.030, Florida Administrative Code, requires entry of a Summary Final Order when no disputed issues of material fact have been raised by the pleadings.

The authority of an Association to enter a condominium unit without the owner's permission is based upon Section 718.111(5), Florida Statutes, which provides:

> (5) RIGHT OF ACCESS TO UNITS. —The association has the irrevocable right of access to each unit during reasonable hours, when necessary for the maintenance, repair, or replacement of any common elements or of any portion of a unit to be maintained by the association pursuant to the declaration or as necessary to prevent damage to common elements or to a unit or units.

Use of the word "irrevocable" emphasizes the legislative intent that the right of access cannot be limited by governing documents of a condominium or by a negotiated condition in the sale of units. Access will be allowed even when a unit owner has given a written warning that the association should not enter a unit. *Hidgon v. Seaspray Condo. Ass'n, Inc.*, Arb. Case No. 96-0430, Final Order (March 24, 1998).

The interest of Respondents to protect their property behind the locked door of their unit must yield to the need for the Association to protect condominium property. Section 3.4c of the Declaration puts Respondents on notice that condominium property also lies behind the locked door to his unit, and that Respondents must provide the Association access *to prevent damage to the Common Elements, the Association Property or to a Unit or Units.*

It is a basic principle of condominium law that, by choosing to live in a condominium, individual unit owners give up certain freedoms and accept certain restrictions upon rights which could be expected in separate, privately-owned property. *Woodside Village Condo. Ass'n, Inc. v. Jahren*, 806 So. 2d 452 (Fla. 2002); *Hidden Harbour Estates, Inc. v. Norman*, 309 So. 2d 180 (Fla. 4th DCA 1975). The statute provides two broad purposes for access: for maintenance or to prevent damage. *Cypress Isle at the Polo Club Condo. Ass'n. Inc. v. Shelton*, Arb. Case No. 98-

4090 (July 22, 1998). [Emphasis added]

Selective Enforcement

Respondents claim the defense of selective enforcement. Rule 61B-45019(2) states, in part, that "[t]he defense of selective enforcement shall contain all examples of selective enforcement upon which the respondent depends, shall indicate the unit(s) to which each example pertains, shall identify the unit owner(s), how long the violation has existed, and shall indicate whether the board knew of the existence of the violation(s)." Rule 61B-45.019(3), Florida Administrative Code, requires the answer to contain all examples of selective enforcement. This rule does not provide relief to conduct discovery in order to develop facts for the defense of selective enforcement or any other defense. *The Grand at Olde Carrolwood Condominium Association, Inc., v. Morrison*, Arb. Case No. 2019-04-5595, Order Denying Respondent's Motion for Extension of Time to Supplement Answer and Striking Respondent's Selective Enforcement Defense (December 5, 2019). An answer that fails to conform to the requirement of Rule 61B-45.019(3), Florida Administrative Code, is subject to being struck by the arbitrator without motion by a petitioner. *Id.*

Respondents' answer does not contain any of the necessary facts/information that are required by the rule for a valid selective enforcement defense. Accordingly, Respondents' selective enforcement defense fails as a matter of law.

Failure of Condition Precedent

Respondents' failure of condition precedent defense is premised on the argument that "Petitioners failed to overcome conditions precedent to take this action of proving the necessity for maintenance, repair or replacement of any common element or portion of unit for purposes of inspecting and photographing same. (Florida Statutes §718.111))" This issue was addressed in the Order Denying Respondent's Motion to Dismiss (Order Denying) wherein the undersigned emphasized that section 718.111(5), Florida Statutes, contemplates inspections "as necessary to *prevent* damage to the common elements or to a unit." Order Denying at 1. [Underline in

original, italics added.] The purpose of an inspection is to determine whether there exists a condition that requires maintenance or repair. To have to prove that a condition exists *prior* to an inspection to determine whether the condition exists is inconsistent with the prospective nature of the statute and, as a practical matter, is illogical.

Rule 61B-45.013(5), F.A.C.; Statute of Limitations; Waiver; Laches and Undue Delay; Bad Faith and Failure to Plead Facts of Violation

Respondents contend that this action is prohibited under Rule 61B-45.013(5), F.A.C.; the statute of limitations; waiver; laches and undue delay; bad faith and failure to plead facts of violation. Respondents are mistaken. All of the above defenses are geared towards the underlying issue of the improvements.[3] Whether, who, and when a Jacuzzi and loft were installed are issues that are irrelevant and immaterial to the issue in this case: whether Respondents granted the Association access to their unit upon request.

Photographing During Inspection

In the present case Respondents advised the Association that they would grant access to the unit providing no pictures were taken during the inspection. An impermissible denial of access occurs where a unit owner seeks to place conditions upon the association's access to his or her unit. *Park Lake Towers Condo. Ass'n, Inc. v. Halley,* Arb. Case No. 2003-08-3367, Amended Final Order on Motions for Attorney's Fees (January 28, 2004) (Where the association sought access to the respondent's unit in order to fix a plumbing assembly, and when the respondent directed that the association would only be permitted access upon providing proof of insurance and a valid building permit, the respondent was held to have denied access to the unit.)

It is not uncommon for an Association to take pictures during the inspection of a unit. *Marcus v. O.R. Condominium Association, Inc. and Parc Royale East Development, Inc.*, Arb. Case No. 2001-2449, Order on Petitioners' Motion for Temporary Injunction and Relief (March

[3] See, Footnote 1, *supra*.

7, 2001) (Association's management company took pictures of leak in ceiling during inspection of unit.) *Boca Royal Apartments Condominium Building "B", Inc., v. Longman*, Arb. Case No. 2018-00-9439, Order Abating Case and Requiring Filing (July 23, 2018) (Association manager permitted to walk through apartment and take pictures of personal property and garbage located therein.); *Harbour Hill Condominium Association, Inc., v. Mueller*, Arb. Case No. 2014-00-2696, Order to Show Cause (March 20, 2014) (After respondent alleged in his response to a notice of default that he had cleaned the unit, the arbitrator ordered the Association and Respondent to take pictures of the unit to prove that Respondent had in fact cleaned the unit.) [Emphasis added]

Based on the foregoing, it is:

ORDERED:

1. Respondents shall, upon receipt of 72 hours written notice, provide the Association, its designees, contractors, subcontractors, or employees with access to their unit for the purposes of inspecting said unit.[4] Written notice may be accomplished by hand delivery of said notice to Respondents or by delivery of said notice by hand or email, to Respondents attorney in this matter. The Association, its designees, contractors, subcontractors or employees shall have the right to take pictures during this inspection.

2. The pre-arbitration notice in this case states, in part, "entry of a final order requiring the Respondents to allow the Petitioner and its designees, contractors, subcontractor and employees the right to enter the Unit 31A in order to inspect and photograph same, where necessary, and an award of attorney's fees and costs." The petition, in addition to requesting access to, and photographing of, the unit requests "... that, if it is found that the Respondents have made material alterations of modification to Unit 31A or common elements that were never approved by the Board of the Petitioner, the arbitrator reserve jurisdiction to entree further

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[4] The Association shall **not** time the delivery of the notice such that inspection of the unit occurs on November 25-28, 2021 (Thanksgiving Weekend).

orders as may be deemed necessary."

The purpose of providing pre-arbitration notice is to give the respondent an opportunity to provide the requested relief without the necessity of a formal legal proceeding. *Water Glades 300 Condo. Assn., Inc. v. Interco Management Services, Inc.*, Case No. 2006-00-1728, Order on Motion for Reconsideration (April 13, 2006). Generally, when a petition asks for relief that is fundamentally different than the relief that was requested in the pre-arbitration notice the petition is dismissed subject to section 718.1255, Florida Statutes. *Roselli v. Oak Chase Property Owners Association, Inc.*, Arb. Case No. 2020-02-7927, Order of Dismissal for Improper Pre-Arbitration Notification (July 8, 2020).

In the present instance the petition requests the arbitrator "reserve jurisdiction to enter further orders as may deemed necessary" in the event that it is found that Respondents have made material alterations to the unit or common elements. This statement appears aimed at litigating any violations that may be found as a result of the inspection under the umbrella of the present petition. The arbitrator finds this relief is fundamentally different than the relief requested in the pre-arbitration notice. Petitioner's request to reserve jurisdiction is DENIED.

3. All pending motions are either DENIED or rendered MOOT by this order.

DONE AND ORDERED on November __, 2021, in Tallahassee, Leon County, Florida.

J. A. Spejenkowski

J.A. Spejenkowski, Arbitrator
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Mediation Program
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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

within 30 days in accordance with Section 718.1255(4)(k), Florida Statutes and Rule 61B-45.043, Florida Administrative Code. 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, Florida Administrative Code.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been sent by US Mail on November 16, 2021, to:

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