

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

IN RE: PETITION FOR ARBITRATION

**Herbert S. Rose,
Petitioner,**

v.

Case No. 2006-05-0289

**The Village of Kings Creek Condominium
Association, Inc., a Florida not for profit
corporation,**

Respondent.

FINAL ORDER

Pursuant to notice, the undersigned arbitrator of the Division of Florida Land Sales, Condominiums, and Mobile Homes convened a formal hearing in this case on January 19, 2007. During the hearing, the parties presented the testimony of witnesses, entered documents into evidence and cross-examined witnesses. This order is entered after consideration of the complete record in this matter.

Appearances

For the Petitioner: Herbert S. Rose, Esq.
P.O. Box 56-5834
Miami, Florida 33256-5834

For the Association: Anthony R. Garrett, Esq.
Hyman Spector & Marss, LLP
Museum Tower
Twenty-Seventh Floor
150 West Flagler Street
Miami, Florida 33130

Statement of Issue

Whether the Association denied the Petitioner access to its official records, and if so, was the denial willful, therefore, entitling the Petitioner to statutory damages?

Findings of Fact

1. The Village of Kings Creek Condominium Association, Inc. (the Association) is the legal entity responsible for the maintenance and operation of the Village of Kings Creek Condominium (the condominium).

2. The Petitioner owns a unit located at the condominium and is member of the Association.

3. By letter dated June 23, 2006, and addressed to the Association's property manager, Mireya Villaverde, the Petitioner requested to examine various documents including, but not limited to, the original and all copies of each and every insurance policy (excluding the employees' health insurance coverage plans) purchased by and paid for and/or in effect during period from 11/1/99 through the date of the Association's response to his request, including but not limited to, all liability insurance coverage of any kind, any umbrella coverage, any property damage coverage, all directors or officers liability coverage, any errors or omissions coverage, and all coverage providing for fidelity or bonding coverage for losses from embezzlement, conversion, fraud, or criminal acts of any employee, officer, director or any other persons.

4. Ms. Villaverde is a licensed Community Association Manager in the State of Florida.

Request to Examine Insurance Policies

5. By letter dated June 28, 2006, Jeannette Calderon, secretary to Ms. Villaverde, confirmed receipt of the Petitioners' request. Ms. Calderon noted that the Association's

rules only permit access to five items at each viewing session and that the Petitioner's request exceeded five items. The letter further indicated that the Association would make five items available for inspection on July 5, 2006 at 10:00 a.m.

6. The Petitioner attended inspections on July 5 and 11, 2006 . The directors and officers liability policy and the fidelity/surety bond policies (the policies) were not made available.

7. By letter dated July 28, 2006, addressed to Ms. Villaverde, the Petitioner followed-up on his above request. In his letter the Petitioner notes that the insurance policies still needed to be made available for inspection and that Ms. Calderon had informed him that upon Ms. Villaverde's return the original documents would be made available to him. Ms. Villaverde was on trip to Europe at that time and returned on August 1, 2006.

8. By letter dated August 1, 2006, from Ms. Villaverde, the Association informed the Petitioner that the policies would be available for inspection on August 11, 2006.

9. Prior to the meeting, Ms. Villaverde requested that the Association's insurance agent send her copies of all policies. However, at the August 11, 2006, inspection, the Association did not have the policies, only the renewal certificates for the policies. Ms. Villaverde testified that she provided what the insurance agent had provided her; however, she was unaware that the documents were not the insurance policies since she is not an insurance agent. Therefore, an inspection date was scheduled for August 21, 2006, by which time the Ms. Villaverde indicated that Association would have the entire policies.

10. On August 18, 2006, while the Petitioner was visiting the Association's office in order to hand deliver a letter, he spoke via telephone to the insurance agent regarding

the policies. The agent indicated that she would forward the policies. Copies of the policies were forwarded by e-mail latter in the day on August 18, 2006.

11. According to the Association's insurance agent, each year the Association is only sent renewal certificates not the entire policy. For 2006, the renewal certificate was sent in March 2006. The Association was only sent a copy of the policy when it was originally issued in 2002.

12. The Petitioner did not attend the scheduled inspection on August 21, 2006.

Request to Inspect Roofing Documents

13. The Petitioner's follow-up letter dated July 28, 2006, regarding the insurance policies, also made a new records examination request seeking to inspect all inspection reports, proposals, invoices or specifications submitted or provided to the Association by Angel Alvarez and/or Florida Testing, Engineering and Consulting, Inc. or provided to the Association from Mr. Alvarez or his company Florida Testing, Engineering and Consulting, Inc. and any and all proposals of any kind submitted to the Association from any another person or entity with respect to any work to be done regarding the repair, replacement or other work proposed to be done to the roof of any residential building on the Association's property during the period from November 1, 1999 to the present. Additionally, the request specified all proposals of "Southeastern Roofing" and all companies mentioned in Mr. Alvarez's presentation at the Special Meeting of the Board of Directors held on June 27, 2006, including specifically the reference to a proposal for \$295,000.00.¹

14. The above letter was received by the Association on July 31, 2006.

¹ These documents will hereinafter be collectively referred to as the "roofing documents."

15. By letter dated August 2, 2006, from Ms. Villaverde, the Association indicated that the roofing documents would be made available for inspection on August 16, 2006. The letter further requested that the Respondent contact the management office to schedule an alternative date if August 16, 2006, was not convenient.

16. The Petitioner attended the August 16, 2006, meeting. When the Petitioner arrived he was provided a white binder which contained a report by Florida Testing, Engineering and Consulting. After reviewing the binder, the Petitioner terminated the inspection and presented Ms. Villaverde a handwritten statement for her signature acknowledging that this report was the only document produced by the Association in response to the Petitioner's request. Ms. Villaverde signed the statement.

17. Ms. Villaverde testified that she signed the written statement not knowing what it said because it was illegible. It was her understanding that it was only an accounting of the documents provided prior to the Petitioner's termination of the inspection, not an acknowledgement that these were the only documents the Association intended to provide. She indicated that due to voluminous nature of the Petitioner's request, she was only bringing one document into the inspection room at a time. Additional documents related to the Petitioner's request were available for inspection. She thought the Petitioner terminated the inspection because he did not have time to continue the inspection.

18. In subsequent correspondence, the Association indicated that all records related to the Petitioner's request were available for the Petitioner's inspection. The Petitioner failed to avail himself of any additional offers by the Association to inspect the records.

Conclusions of Law

The Village of Kings Creek Condominium 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.

In accordance with section 718.111(12), Florida Statutes, the records requested by the Petitioner are official records of the Association which must be made available to its members within 5 working days after receipt of a written request for access to them. Failure to make the records available within 10 days of receipt of the request results in a statutory presumption that the violation was willful.

As to the requested insurance policies, these are documents that the Association is required to maintain pursuant to section 718.111(12), Florida Statutes. It is clear that the Association failed to provide the Petitioner timely access to these records in accordance with the statute. However, it is also clear that the Association failed to properly maintain copies of the insurance policies.

The Association correctly notes that where the Association is unable to provide access to records because it has failed to maintain its records, the proper violation is not denial of access, but failure to properly maintain official records. However, where the Association has direct knowledge that a record it is statutorily required to maintain is deficient and over a period of time fails to correct the deficiency, the Association has willfully failed to provide access to the record within the meaning of section 718.111(12), Florida Statutes. *Warren v. Springwood Village Condo. Assn. Of Longwood, Inc.*, Arb. Case Nos. 00-0177 and 00-2153, Final Arbitration Order on Rehearing (August 28, 2001).

In the instant matter, the Association should have been aware that it did not have all insurance policies requested by the Petitioner upon attempting to comply with the Petitioner's request soon after its receipt at the end of June, 2006. However, it appears the Association was unable to adequately address the request due to the absence of Ms. Villaverde until August 1, 2007. Furthermore, Ms. Villaverde admitted that she lacked the ability to determine whether the documents sent to it by the Association's insurance agent were the insurance policies requested by the Petitioner. Once she understood what was needed, the documents were quickly provided by the insurance agent. However, this was over a month and a half after the Petitioner's request.

Considering that the insurance policies are documents the Association is required to maintain, the Association's delay in obtaining copies was unreasonable. The undersigned will not allow the Association to avoid a finding that it willfully denied the Petitioner access to records where the Association should have known it did not have possession of the documents and could have readily obtained copies. Any delay in acquiring such records due to the absence of the Association's manager or the manager's ignorance does not justify the delay.

The Association's delay supports a finding that the delay was willful and the length of the delay merits the awarding of \$500.00 in statutory damages to the Petitioner in accordance with section 718.111(12), Florida Statutes. It is also clear that the Association obtained copies of the policies as of August 18, 2006, and offered to make them available to the Petitioner, but the Petitioner has refused the offer. As such, the Petitioner's request for injunctive relief, that the Association be ordered to provide access to the documents, will not be granted.

The requested documents related to the Association's roofing project are also documents to which the Association is required to provide access. The Association received the Petitioners request on July 31, 2006. By letter dated August 2, 2006, the Association indicated that the roofing records would be available for inspection on August 16, 2006, however, the Petitioner could schedule a more convenient time.

The Petitioner contends that the Association's scheduling of the inspection on August 16, 2006, is a per se violation of the Association's requirement to provide timely access. However, the Association offered to make the records available at a time convenient to the Petitioner. The Petitioner has not shown that he attempted to schedule the inspection at an earlier time, that the Association refuse to permit an earlier inspection, or that it would have been unfeasible to schedule an inspection within five or ten days of the Association's receipt of the letter. The undersigned notes that the Association's response by mail left little time to reschedule inspection within the statutory time constraints; however, the Petitioner repeatedly established that he insisted the Association communicate within him in writing, therefore contributing to any delay.

The testimony presented at the final hearing supports a finding that the failed inspection of the roofing documents on August 16, 2006, was due to a misunderstanding between the parties. The Petitioner thought the Association had only produced a single roofing report and the Ms. Vilaverde was confused as to the Petitioner's dissatisfaction. Ms. Villaverde signed the statement handwritten by the Petitioner indicating that the Association was only provding a single roofing report. However, since she found the statement to be illegible she could not understand its contents. Her testimony in this regard is accepted because the handwritten statement

entered into evidence is not legible to the arbitrator. Although Ms. Villaverde's signing of a statement she could not read was ill advised and arguably negligent, it does not indicate her agreement that the Association did not intend to provide all the requested roofing documents during the August 16, 2006, inspection meeting. The Petitioner has not established that the Association failed to make the requested roofing documents available on August 16, 2006.

Based upon the foregoing, it is ORDERED:

1. The Association willfully failed to provide the Petitioner timely access to the Association's directors and officers liability policy and the fidelity/surety bond policies entitling the Petitioner to \$500.00 in statutory damages which shall be paid by the Association within thirty days of the date of this order. The Petitioner has failed to demonstrate that the Association continue to deny him access to the policies. Therefore, any relief requesting that the Association be ordered to provide him access is denied.

2. The Petitioner has failed to establish that the Association denied him timely access to the roofing documents. As such, any requested relief related to the roofing documents is denied.

DONE AND ORDERED this 13th day of April 2007, 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

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 13th day of April 2007:

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