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

IN RE: PETITION FOR ARBITRATION

Filed with
Arbitration Section

Barbara Roduner,

Petitioner,

JUL 17 2009

v.

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

Fee Case No. 2008-05-6980
Rel. Case No. 2008-02-6960

Roll's Landing Condominium
Association, Inc.,

Respondent.
_______________________________________/

FINAL ORDER ON RESPONDENT'S MOTION FOR AWARD OF ATTORNEY'S FEES AND COSTS

On October 13, 2008, Respondent Roll's Landing Condominium Association, Inc. (Association) filed its motion to recover attorney's fees and costs incurred in the underlying arbitration case, 2008-02-6960, asserting entitlement thereto as the prevailing party. The Association's motion requests $1,775.00 in attorney's fees; the motion does not seek reimbursement for any costs. On October 20, 2008, before an Order Permitting Response could be entered pursuant to Rule 61B-45.048, Fla. Admin. Code, Petitioner filed her Response to Motion to Award Attorney's Fees and Costs.

Findings of Fact

In the underlying case, Petitioner alleged in the Petition for Mandatory Non-Binding Arbitration that the Association's board of directors improperly certified her recall at a board meeting held on April 30, 2008. Petitioner's case is commonly referred to as a "reverse recall." Specifically, Petitioner alleged that the Association improperly counted some of the recall ballots that were in favor of her recall.

On September 30, 2008, a Summary Final Order was entered denying Petitioner's request that the recall not be certified. The Summary Final Order found that the Association had properly accepted a sufficient number of ballots to affirm Petitioner's recall.

Conclusions of Law

Pursuant to section 718.1255(4)(k), Florida Statutes, the prevailing party in an arbitration proceeding shall be awarded the costs of the arbitration and reasonable attorney's fees in an amount determined by the arbitrator. A party is a "prevailing party" if it succeeds on a significant issue in the arbitration and achieves some of the benefit sought in bringing the action. *See Moritz v. Hoyt Enterprises, Inc.*, 604 So. 2d 807, 809 (Fla. 1992) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)).

Petitioner argues that the Association received no benefit and that the prevailing party is the unit owners voting for recall. Petitioner argues that the Association had no duty to defend the certification of the recall. Rather, the Association "could simply have turned over the documents to the DBPR [Florida Department of Business and Professional Regulation] and agreed to abide by the DBPR's ruling, because "[a]rguably the board's fiduciary duty to its members would be not to take sides in an election by defending the recall at all."

Arbitration cases have authorized the filing of a "reverse recall" petition. *Ringler et al. v. Tower Forty One Ass'n,* Arb. Case No. 2005-04-1867, Summary Final Order (Dec. 12, 2005); *Scariati v. The Villages at Emerald Lakes One Condo. Ass'n*, Arb. Case No. 2005-02-1485, Summary Final Order (Sept. 2, 2005). Petitioner's argument that the Association received no benefit is misplaced – it is Petitioner who challenged the Association's decision to certify Petitioner's recall, and the Association was required

to defend its decision to certify Petitioner's recall. In any event, the benefit to the Association is that its action certifying the recall was vindicated in the underlying case. *See Ringler et al. v. Tower Forty One Ass'n,* Arb. Case No. 2006-01-0719, Final Order On Attorney's Fees and Costs (June 20, 2006)(Petitioners were prevailing party on issue of board's failure to timely hold meeting to address recall, but Association was prevailing party on issue of validity of recall agreement and Petitioners were required to pay Association's attorney's fees on that issue); *cf. Scariati v. The Villages at Emerald Lakes One Condo. Ass'n*, Arb. Case No. 2005-05-3841, Final Order on Fees and Costs (Feb. 28, 2006)(prevailing *pro se* Petitioner entitled to recover cost of filing fee, copying costs and mailing costs but no amount was awarded for Petitioner's time spent on and on typing, research, preparation and drafting petition, and responses to Respondent's pleadings and to orders).

Petitioner also argues that it is the unit owners voting for recall who are the real party in interest and not the Association. However, the statutes and the rules charge the Association with the decision to certify or not to certify a recall agreement that is properly served on the Association. In the instant case, Petitioner has challenged the correctness of the Association's decision to certify the recall of Petitioner, therefore the Association is the proper party to defend that decision.

Finally, Petitioner argues that it is the public policy of the State of Florida not to award attorney's fees in a "recall petition." Rule 61B-50.1405, Fla. Admin. Code, provides, "No party shall be entitled to recover its costs and attorney's fees in a recall proceeding initiated pursuant to Section 718.112(2)(j) or 719.106(1)(f), Florida Statutes." In pertinent part, Petitioner's public policy argument is as follows:

> The reverse recall was a response by the Department to the unusual case where a majority board faction seeks the recall of a troublesome minority.

A recalled majority can always trigger a free review by the Department by refusing to certify. A recalled minority cannot. The situation lends itself to abuse of the system as a review of the cases cited by the arbitrator clearly shows.

Because of the nature of association politics and law, any ruling which is not carefully crafted will invite majority board factions in other associations seeking to rid itself of a troublesome minority to game the system. The DBPR has observed this gaming, whereby the majority faction of a Board can certify any petition, defective or not, to recall the unwanted board member -- knowing the only review available to the minority risks an adverse award of fees and costs. In effect, a troublesome minority board member could be "voted off the board" by a mere majority vote of the board certifying a deficient recall petition, or by failing to hold a meeting and allowing certification by default. This result is clearly not what the legislature intended.

In every case where the Association does not certify the recall, the Association is required to file a recall arbitration petition, and the unit owners voting for recall must respond. § 718.112(2)(j), Fla. Stat.; Fla. Admin. Code R. 61B-50.105(1). In the typical case, no prevailing party attorney's fees and costs are permitted or awarded.[1]

In contrast, the recall rules and cases authorizing a "reverse recall" are clear that filing a petition is discretionary on the part of the unit owners or the board member who has been recalled. *See* Rule 61B-50.105(3), Fla. Admin. Code, and the *Ringler* and *Scariati* cases cited above. Thus, just like in an election dispute authorized under Section 718.1255(b), Fla. Stat., wherein the decision to file a petition is discretionary on the part of the petitioner and the prevailing party is entitled to recovery of its attorney's fees and costs, the decision to file a petition in a reverse recall is discretionary and the prevailing party is entitled to have its attorney's fees and costs paid by the non-prevailing party. The Association in the instant case is the prevailing party and is entitled to recover its reasonable attorney's fees.

[1] The one exception that may arise is when the unit owners seek to withdraw the recall after the petition for recall arbitration has been filed.

The next issue to be decided is the reasonableness of the attorney's fees and costs claimed by the Association. In *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145, 1150 (Fla. 1985), the Supreme Court adopted the federal lodestar approach as the foundation for setting reasonable fee awards. This approach requires the trial court to determine a "lodestar figure" by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate for the services of the prevailing party's attorney. *Fashion Tile & Marble v. Alpha One Construction*, 532 So. 2d 1306 (Fla. 2d DCA 1988). In undertaking this analysis, the reasonableness of the hourly rate and the number of hours reasonably expended must be separately considered. See *Rowe*, 472 So. 2d at 1150-51. In determining the reasonableness of attorney's fees, the criteria set forth in Rule 4-1.5, Rules Regulating the Florida Bar, Rules of Professional Conduct [then Disciplinary Rule 2-106(b) of the Florida Bar Code of Professional Responsibility] should be applied. *Id.* at 1150. The factors for determining a reasonable attorney's fee set forth in Rule 4-1.5 are basically the same as the factors set forth in Rule 61B-45.048, Florida Administrative Code.

The Association's counsel, Ernest W. Sturges, Jr., charged an hourly rate of $250.00. Mr. Sturges has been practicing law in Florida since 1997. A reasonable hourly rate for an attorney with eleven years of experience practicing in Port Charlotte, Florida during the pendency of the underlying case is $200.00.

The Association seeks an award of 7.1 hours of attorney time. Counsel for the Association billed for e-mail exchanges with an individual whose relationship to this case is unidentified. Counsel also billed for a conference regarding "capital improvement fund;" this charge is unrelated to the instant case. Therefore, 5.9 hours of attorney time is

awarded. The amount of attorney fees for 5.9 hours of attorney time at $200.00 per hour is $1,180.00.

The Association does not seek recovery of any costs, and none are awarded.

Based on the foregoing, it is ORDERED:

Within thirty (30) days of the date of this order, Petitioner shall reimburse the Association's attorney's fees in the amount of $1,180.00.

DONE AND ORDERED this 17th day of July, 2009, at Tallahassee, Leon County, Florida.

Glenn Lang, Arbitrator
Department of Business and
Professional Regulation
Arbitration Section
1940 North Monroe Street
Tallahassee, Florida 32399-1029

Right to Trial De Novo

A party may appeal this decision by filing a complaint for trial de novo in accordance with section 718.1255, Florida Statutes.

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 17th day of July 2009:

Barbara Roduner
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23465 Harborview Road
Port Charlotte, FL 33980

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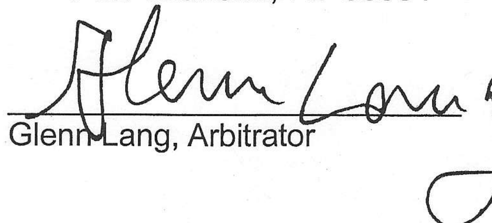

Glenn Lang, Arbitrator