

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

IN RE: PETITION FOR ARBITRATION

MARK STERN,

Case No. 2007-06-6957

Petitioner,

v.

PLAYA DEL MAR ASSOCIATION, INC.

Respondent.

**RESPONDENT'S REPLY TO MEMORANDUM SUBMISSION OF
PETITIONER, MARK STERN, CONCERNING STANDING**

Respondent, PLAYA DEL MAR ASSOCIATION, INC. ("PLAYA DEL MAR"), by and through its undersigned counsel, hereby serves its reply, on the issue of Petitioner MARK STERN's ("STERN") standing, to the filing of Petitioner Mark Stern's Response to Respondent's Motion to Determine Standing of Petitioner and to Seek Relief Sought by Petition for Non-Binding Arbitration.

In his response, STERN asserts two arguments: (1) By virtue of an unrecorded Quit Claim Deed, STERN alleges that he had a one percent (1%) ownership interest in Unit 1401 of the Play Del Mar Condominium (the "Unit"); (2) STERN contends that he is one of the beneficiaries of a Residence Trust Agreement concerning the Unit. PLAYA DEL MAR addresses each of these fallacious arguments, in turn, below.

BRIEF STATEMENT OF FACTS

On February 27, 2003, a Quit Claim Deed was executed, by Grantors Beverly Kohn and Mark S. Stern, granting to Beverly Kohn 100% interest in the Unit of the Playa Del Mar Condominium. (Hereafter, said Deed is referred to as the "BK-100 Deed".) On March 1, 2003, according to Exhibit A of STERN's Response, a Quit Claim Deed was executed whereby Grantor Beverly Kohn conveyed ownership of the Unit to Beverly Kohn (99%) and Mark S. Stern (1%). (Hereafter, said Deed is referred to as the "BK99/MSS1 Deed".) Thereafter, on March 21, 2003, the BK-100 Deed was duly recorded in Official Records Book 34793 at Page 974 of the Public Records of Broward County, Florida (see attached Exhibit 1). The BK-100 Deed, having been recorded, was the Deed in effect as a matter of Public Record, and as such governed the Condominium and the Association concerning ownership of the Unit, until February 22, 2007. The BK99/MSS1 Deed was never recorded in the Public Records of Broward County.

On February 27, 2007, PLAYA DEL MAR had its annual meeting and election of Directors. In advance of the annual meeting, despite not being an owner of record in Broward County for the Unit, STERN submitted his name as a candidate for the Board. At the time of STERN's submission for candidacy, the BK-100 Deed was the deed of record in the Public Records of Broward County. Moreover, at the time of STERN's submission for candidacy, the Residence Trust Agreement did not exist.

Less than one week prior to the annual meeting, on February 22, 2007, a Warranty Deed was recorded in the Public Records of Broward County, Florida at Official Records Book 43646 at Page 328. (Said Deed, hereafter referred as the "Trust Deed", is attached hereto as Exhibit 2.) The Trust Deed makes no reference to Mark S. Stern, individually, having a 1%

ownership interest in the Unit. The Trust Deed makes no reference to Mark S. STERN being a grantor of any interest in the Unit. Thus, it is clear from the Trust Deed that MARK S. STERN did not have an interest in the Unit to convey as a grantor. Additionally, since the Trust Deed was recorded on February 22, 2007, there can be no dispute that STERN did not have an ownership interest in the Unit as of the date of the elections held on February 27, 2007.¹

Beverly Kohn as Grantor, executed a Residence Trust Agreement dated February 21, 2007. (Said Trust Agreement is attached as Exhibit B to STERN'S Response Memorandum of Law.) Pursuant to the clear terms of the Trust Agreement, STERN is a Trustee. STERN is not a named grantor in the Trust Agreement. STERN is not a named beneficiary in the Trust Agreement.

The plain language of the Trust Agreement shows that STERN was not a beneficiary. See, e.g., Article IV, which distinguished between the beneficiary, the grantor, and STERN, as follows:

"If any beneficiary, and the Grantor and/or MARK S. STERN should die under such circumstances that the order of deaths cannot be established by proof, it shall be conclusively presumed for all purposes of this Trust that such beneficiary predeceased the Grantor and/or MARK S. STERN."

Thus, there was a delineation between STERN and beneficiaries under the terms of the Trust Agreement. The beneficiaries of the Trust Agreement are identified to be Larry Stern and Sherri Stern, the children of Mark Stern, with Michel Kohn and the American Cancer Society named as residuary beneficiaries. See, Article I.A. and Article XI of the Trust Agreement.

¹
In his opposition Memorandum of Law, STERN does not identify the basis for his reliance upon the unrecorded BK99/MSS1 Deed as a basis for claim to title to the Unit at the time he was elected to the Board of Directors, in light of the pre-election recording of the Trust Deed.

1. The Unrecorded Quit Claim Deed Dated March 1, 2003 Did Not Make STERN an Owner of Record of Unit 1401 as of the Date of the February 21, 2007 Annual Meeting and Election of the Board of Directors.

Up to less than one week prior to the 2007 Annual Meeting of PLAYA DEL MAR, the Deed of record concerning title to the Unit was the BK-100 Deed. STERN was not an owner of the Unit, according to the BK-100 Deed. Accordingly, at the time of his submission for candidacy to the 2007 Board of Directors, STERN lacked standing to seek such candidacy.

STERN's contention that he properly ran for the Board, on the basis of an unrecorded deed (the BK99/MSS1 Deed), should be rejected outright by the Division. The unrecorded BK99/MSS1 Deed did not put PLAYA DE MAR on notice that STERN had an interest in the Unit. Unrecorded deeds, in the State of Florida, are effective (if at all) only as to the interests of the parties to same or those taking property with notice of such deed. Sweat v. Yates, 463 So.2d 306 (Fla. 1st DCA 1984). As such, the unrecorded BK99/MSS1 Deed is not binding upon PLAYA DEL MAR, it is not binding upon the State of Florida, and it is not binding upon the Division.

Moreover, as of five (5) days prior to the annual meeting, the Trust Deed for the Unit had been recorded in the Public Records of Broward County. The Trust Deed superseded any interest that STERN could assert to the Unit under the unrecorded BK99/MSS1 Deed. STERN was not even named as a grantor on the Trust Deed, based on his purported "1% ownership interest" in the Unit; such omission underscores the actual absence of an ownership interest for STERN in the Unit, in advance of the Trust Deed. As such, STERN's argument that the unrecorded BK99/MSS1 Deed entitled him to serve on the Board of Directors is without merit.

2. The Residence Trust Does Not Entitle STERN to Serve as a Director of Playa Del Mar Condominium, Since He is Not a Beneficiary of the Residence Trust Agreement.

STERN's second argument is that he was entitled to serve on the Board due to the provisions of a Trust Agreement, executed on February 21, 2007, wherein STERN is named as Trustee. First, such argument must fail because the Trust Agreement did not even exist as of the date on which STERN submitted his name for candidacy to the 2007 Board of Directors. The Trust Agreement did not give STERN standing, and could not possibly have given STERN standing, to submit his name for candidacy to the Board pursuant to the provisions of Florida Statutes § 718.112(2)(d)3. According to Subsection 718.112(2)(d)3, "any unit owner or other eligible person desiring to be a candidate for the board must give written notice to the association not less than forty days before a scheduled election." Clearly, on the basis of the recorded BK-100 Deed, as well as the nonexistence of the Trust Agreement at the time of his submission for candidacy, STERN was not a unit owner and was not an "other eligible person" qualified to submit his name for candidacy for the 2007 elections.

Moreover, STERN's reliance on Florida Statutes § 617.0802(2) is misplaced. Such provision only deems a grantor or a trust beneficiary to be eligible to serve as a Director of a Condominium Association. By the terms of the Trust Agreement, entered into within one (1) week prior to the annual meeting, STERN was the named Trustee. The Director eligibility provision set forth in Florida Statutes § 617.0802(2) does not extend to Trustees; that statute merely enables a grantor (here, Beverly Kohn) or beneficiaries (here, Larry Stern and Sherri Stern, the children of Mark Stern) to serve as Board members.

The plain language of the Trust Agreement makes a distinct and indisputable delineation between the beneficiaries of the Trust Agreement and STERN. The beneficiaries of the Trust

Agreement are identified to be Larry Stern and Sherri Stern, the children of Mark Stern, and in addition names residuary beneficiaries (also not including STERN). The Division should recognize and give effect to the delineation between the beneficiaries and STERN, under the express terms of the Trust Agreement, and thus make a finding that STERN was a Trustee under the Trust Agreement. On the basis of such finding, the appropriate conclusion is that STERN had no standing to (a) run for the Board of PLAYA DEL MAR at the 2007 Annual Meeting, (b) serve as a member of the Board in 2007 or thereafter, and thus (c) to challenge his recall in these proceedings.

While STERN was granted use rights to various properties, in the same vein as were use rights granted to the Grantor, such use rights did not convert STERN nor Grantor into a beneficiary of the Trust estate. By the terms of the Trust, Larry Stern and Sherri Trust are the beneficiaries of the Trust estate. Grantor and STERN were merely afforded rights of use of subject properties, up to their demise. Such right of use, under the terms of the Trust Agreement, did not make Grantor Beverly Kohn a beneficiary of the Trust estate. By the same token, such right of use did not make STERN a beneficiary. Again, as noted in Article IV of the Trust Agreement, there is a clear delineation between the beneficiaries, the Grantor, and STERN.

Thus, on the basis of the absence of ownership interest in the Unit for STERN, as well as application of Florida Statutes § 617.0802(2) which does not extend Board member eligibility to a Trustee under a trust agreement, STERN did not have standing as of the candidacy submission for 2007 annual meeting, and further did not have standing to serve on the Board of Directors as of the date of the election held on February 27, 2007 annual meeting. Accordingly, STERN does not have standing to advance a challenge to his recall.

WHEREFORE, PLAYA DEL MAR ASSOCIATION, INC. respectfully requests entry of an order determining that MARK S. STERN, the Trustee of the Trust Agreement, did have standing to apply for candidacy to the 2007 Board, did not have standing to serve on the Board as of the 2007 Annual Meeting, and thus lacks standing to advance this challenge to his subsequent recall, and for such other and further relief as the Arbitrator deems appropriate.

I hereby certify that a true and correct copy of the foregoing was served on April 17, 2008, via U.S. Mail upon Inger M. Garcia, Esq., 3389 Sheridan Street, Suite 546, Hollywood, Florida 33021.

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