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Covenant Enforcement: Suspensions and Fines

By Erum Kistemaker



LEASING AND SALES RESTRICTIONS

LEASING AND SALES RESTRICTIONS:

- A. Fla. Stat. §718.104(5), provides that [t]he declaration as originally recorded or as amended under the procedures provided therein may include covenants and restrictions concerning the use, occupancy, and transfer of the units permitted by law with reference to real property.
 - However, the rule against perpetuities shall not defeat a right given any person or entity by the declaration for the purpose of allowing unit owners to retain reasonable control over the use, occupancy, and transfer of units.
- B. Restrictions that unreasonably restrain the right of a property owner to transfer his or her property are known as “unreasonable restraints on alienation.”
- C. A restrictive covenant found in a declaration differs from an arbitrary and absolute right of a grantor to approve a grantee’s subsequent purchaser.
- D. Florida courts recognize the right of an association to screen prospective purchasers and tenants. However, the right to do so must be contained within the declaration.

LEASING AND SALES RESTRICTIONS:

- E. The most common screening procedures are background checks to ensure the community is free from those who may pose a threat to the health and safety of the other residents.
- F. Often times, declarations contain minimum lease durations and restrictions on the number of times an owner can lease in a given period. This discourages the number of transient residents.
- G. Fla. Stat. § 718.110(13), provides that amendments prohibiting owners from renting their units, setting minimum or maximum rental terms, or limiting the number of times a unit can be rented during a period, are only effective against owners who consent to the amendment and owners who acquire title after the effective date of the amendment.
- H. Fla. Stat. § 718.116 provides that if the declaration or by-laws provide approval or disapproval rights, then an association may disapprove a proposed lease, if the unit owner is delinquent in the payment of an assessment.

LEASING AND SALES RESTRICTIONS:

- I. An association may not make any charge in connection with a lease, mortgage, or transfer unless the association is required to approve the transfer and the fee is provided for in the governing documents. Said fee may not exceed \$100 per applicant.
- J. If permitted by the declaration or bylaws, the association may require a tenant to place a security deposit into an escrow account maintained by the association in an amount not to exceed one month's rent. Disputes regarding this deposit are governed by the Florida Residential Landlord and Tenant Act.
- K. Rules impacting the use of a Unit or parcel require 14 days' notice. (Fla. Stat. 9.2 §718.112(2)(c) and Fla. Stat. 720.303(2)(c)(2).

FINING

(Fla. Stat. §718.303 and Fla. Stat. §720.305)

Condominium Fining

(Fla. Stat. §718.303)

Provided the governing documents provide the association with the ability to fine, the association may levy reasonable fines for a unit owner, tenant, guest or invitee's failure to comply with the Declaration, Bylaws or Rules and Regulations.

1. A fine cannot exceed the sum of \$100 per violation.
2. A fine cannot become a lien.
3. A fine may be levied by the Board on the basis of each day of a continuing violation with a single fourteen (14) day notice and opportunity to be heard before a committee of at least three members who are not officers, directors or employees of the association, or the spouse, parent, child, brother, or sister of an officer, director, or employee.
4. A fine may not exceed \$1,000 in the aggregate.
5. The committee's sole role is to determine whether to confirm or reject the proposed fine.
6. When a fine is imposed, written notice of same must be provided.
7. A fine must be paid within five (5) days after the committee meeting.

Homeowner's Association Fining

(Fla. Stat. §720.305)

Provided the governing documents provide the association with the ability to fine, the association may levy reasonable fines for a member, tenant, guest or invitee's failure to comply with the Declaration, Bylaws or Rules and Regulations.

1. A fine cannot exceed the sum of \$100 per violation.
2. A fine may be levied by the Board for each day of a continuing violation with a single fourteen (14) day notice and opportunity to be heard before a committee of at least three members who are not officers, directors or employees of the association, or the spouse, parent, child, brother, or sister of an officer, director or employee.
3. A fine may not exceed \$1,000 in the aggregate unless the governing documents provide otherwise.
4. A fine under \$1,000 may not become a lien against a parcel.
5. When a fine is imposed, written notice of same must be provided.
6. A fine must be paid within five (5) after the committee meeting.



Suspensions

(Fla. Stat. §718.303 and Fla. Stat. §720.305)

Suspensions

(Fla. Stat. §718.303 and Fla. Stat. §720.305)

Both Fla. Stat. §718.303 and §720.305 provide for the association to suspend the voting rights of an owner or member due to nonpayment of any fee, fine or other monetary obligation.

1. Fla. Stat. §718.303 requires the delinquency to be more than ninety (90) days and in excess of \$1,000.00 and requires that proof of the obligation be provided thirty (30) days before the suspension. There is no requirement for a hearing, prior to the suspension, but the suspension must occur at a properly noticed Board meeting. The suspension ends upon full payment of all obligations due or overdue.
2. Fla. Stat. §720.305 requires only that the delinquency be more than ninety (90) days. There is no requirement for a hearing, prior to the suspension, but the suspension must occur at a properly noticed Board meeting. The suspension ends upon full payment of all obligations due or overdue.
3. When a voting right is suspended, it reduces the total number of voting interests in the association.
4. When a voting right is suspended, notification must be provided via mail or hand delivery.

Condominium Suspension of Common Element Use for Failure to Comply with Governing Documents

(Fla. Stat. §718.303)

An association may suspend, for a reasonable period of time, the right of a unit owner, or a unit owner's tenant, guest or invitee to use the common elements, common facilities or any other association property for failure to comply with the Declaration, Bylaws or Rules and Regulations.

1. The suspension does not apply to the limited common elements of the specific Unit, common elements that are needed to access the unit, utility services provided to a unit, parking spaces, or elevators.
2. A suspension may be imposed with a single fourteen (14) day notice and an opportunity to be heard before a committee of at least three (3) members appointed by the Board of Directors who are not officers, directors, or employees of the association, or the spouse, parent, child, brother, or sister of an officer, director, or employee.
3. The committee's sole role is to determine whether to confirm or reject the proposed suspension. If the committee does not approve the proposed suspension, by a majority vote, it is not imposed.
4. When a suspension is imposed, written notice of same must be provided by mail or hand delivery 9.4

Condominium Suspension of Common Element Use for Nonpayment

(Fla. Stat. §718.303)

1. If a unit owner is more than 90 days delinquent in paying a fee, fine, or other monetary obligation due to the association, the association may suspend the right of the unit owner or the unit's occupant, licensee, or invitee to use common elements, common facilities, or any other association property until the fee, fine, or other monetary obligation is paid in full.
2. This subsection does not apply to limited common elements intended to be used only by that unit, common elements needed to access the unit, utility services provided to the unit, parking spaces, or elevators.
3. Notice and hearing requirements do not apply.

Homeowner's Association Suspension of Common Area Use for Failure to Comply with Governing Documents

(Fla. Stat. §720.305)

An association may suspend, for a reasonable period of time, a member, tenant, guest or invitee's right to use the common areas and facilities for failure to comply with the Declaration, Bylaws or Rules and Regulations.

1. The suspension does not apply to the common areas that are used to provide access or utilities to a parcel and cannot prohibit an owner or tenant from having vehicular or pedestrian ingress and egress, including, but not limited to, the right to park.
2. A suspension may be imposed with a single fourteen (14) day notice and opportunity to be heard before a committee of at least three members appointed by the Board who are not officers, directors, or employees of the association, or the spouse parent, child, brother, or sister of an officer, director or employee.
3. When a suspension is imposed, written notice of same must be provided.
4. All suspensions imposed must be approved at a Board meeting.

Homeowner's Association Suspension of Common Area Use for Nonpayment

(Fla. Stat. §720.305)

1. If a member is more than 90 days delinquent in paying any fee, fine, or other monetary obligation due to the association, the association may suspend the rights of the member, or the member's tenant, guest, or invitee, to use common areas and facilities until the fee, fine, or other monetary obligation is paid in full.
2. The suspension does not apply to the common areas that are used to provide access or utilities to a parcel and cannot prohibit an owner or tenant of a parcel from having vehicular and pedestrian ingress to and egress from the parcel, including, but not limited to, the right to park. 9.5
3. The notice and hearing requirements do not apply to a suspension imposed under this subsection.

DUTY TO ENFORCE COVENANTS

DUTY TO ENFORCE COVENANTS

- A. Enforcement obligation falls on the board of directors in exercise of its fiduciary duty, F.S. §718.111(1) and F.S. §720.303(1), F.S. §617.0830. *B&J Holding Company v. Weiss*, 353 So. 2d 141 (Fla. 3rd DCA 1978).
- B. While a board may not ignore a covenant, the extent or degree of enforcement actions is within the Board's business judgment.
- C. An action against an individual director for failure to enforce (breach of fiduciary duty) will only lie if the facts demonstrate the director is guilty of fraud, self-dealing or unjust enrichment. *Avila South Condominium Assn., Inc. v. Kappa Corp*, 347 So. 2d 599 (Fla. 1977)
- D. The obligation of a board to seek enforcement may be impacted by the language of the covenants relative to a specific community. *Heath v. Bear Island Homeowner Assn., Inc.*, 76 So. 3d 39 (Fla. 4th DCA, 2011). May enforce.
- E. While covenants have wide latitude under Florida law, they may not be unconstitutional or contrary to law.

RECORDED COVENANTS

RECORDED COVENANTS

- A. Properly adopted covenants or declaration restrictions are presumed valid.
- B. Declaration provisions are not subject to a reasonableness test.
- C. The recorded declaration is both a contract and a covenant running with the land.
- D. A declaration that is subject to amendment may change even if the change is to a provision on which a purchaser may have relied.
- E. Only provisions that are arbitrary, against public policy or unconstitutional will not be enforceable.
- F. In the HOA context, “Scheme of Development” may be an issue for challenge of a covenant amendment. *Pepe v. Whispering Sands Condominium Assn., Inc.*, 351 So. 2d 755 (Fla. 2nd DCA 1977); *Woodside Village Condominium Assn., Inc. v. Jahren*, 806 So. 2d 452 (Fla. 2002). 9.8



MANDATORY NON-BINDING ARBITRATION - CONDOMINIUMS AND COOPERATIVES

(718.1255 AND 719.1255, FLORIDA STATUTES)

MANDATORY NON-BINDING ARBITRATION - CONDOMINIUMS AND COOPERATIVES (718.1255 AND 719.1255, FLORIDA STATUTES)

- A. Prior to the institution of court litigation, a party to a “dispute” shall petition the Division of Florida Condominiums, Timeshares, and Mobile Homes of the Department of Business and Professional Regulation (the “Division”) for nonbinding arbitration.
- B. The petition must recite, and have attached thereto, supporting proof that the petitioner gave the respondents: 1. Advance written notice of the specific nature of the dispute; 2. A demand for relief, and a reasonable opportunity to comply or to provide the relief; and 3. Notice of the intention to file an arbitration petition or other legal action in the absence of a resolution of the dispute.
- C. Failure to include the allegations or proof of compliance with these prerequisites requires dismissal of the petition without prejudice.
- D. Section 718.1255(1), Florida Statutes, defines the term “dispute” as any disagreement between two or more parties that involves the authority of the board of directors, under Chapter 718, F.S. or association document to: 1. Require an owner to take, or not take any action, involving that owner’s unit, or the appurtenances thereto. 2. Alter or add to a common area or element.

MANDATORY NON-BINDING ARBITRATION - CONDOMINIUMS AND COOPERATIVES (718.1255 AND 719.1255, FLORIDA STATUTES)

- E. Section 718.1255(1), Florida Statutes, also defines “dispute” as any disagreement between two or more parties that involves a plan of termination, pursuant to Section 718.117, Florida Statutes, and/or that involves: 1. The failure of a governing body, when required by this chapter, or an association document, to properly conduct elections and meetings, give adequate notice of meetings or other actions, and allow inspection of books and records.
- F. Although the Condominium Act does not define the term “association document” to include the rules and regulations governing a community, the Division does accept cases involving rules when the subject matter of the dispute falls under the statute.
- G. The condominium and cooperative alternate dispute resolution provisions encourage, but do not require, dispute resolution through mediation. See Section 718.1255(2), Florida Statutes. 9.9

MANDATORY NON-BINDING ARBITRATION - CONDOMINIUMS AND COOPERATIVES (718.1255 AND 719.1255, FLORIDA STATUTES)

- H. Disagreements Not Subject to Arbitration:
 - Pursuant to Section 718.1255(1), Florida Statutes, the term “dispute” does not include any disagreement that primarily involves:
 - a) Title to any unit or common element;
 - b) The interpretation or enforcement of any warranty;
 - c) The levy of a fee or assessment, or the collection of an assessment levied against a party;
 - d) The eviction or other removal of a tenant from a unit;
 - e) Alleged breaches of fiduciary duty by a director; or
 - f) Claims for damages to a unit based upon the alleged failure of the association to maintain the common elements or condominium property

MANDATORY NON-BINDING ARBITRATION - CONDOMINIUMS AND COOPERATIVES (718.1255 AND 719.1255, FLORIDA STATUTES)

- I. Miscellaneous cases
 - 1. Habitat II Condo., Inc. v. Kerr, 948 So. 2d 809 (Fla. 4th DCA 2007) Participation in statutorily-mandated non-binding arbitration is a condition precedent to bringing a lawsuit concerning any “dispute” between a condominium association and a unit owner within the scope of the statutory definition of that term
 - 2. Neate v. Cypress Club Condo., Inc., 718 So. 2d 390 (Fla. 4th DCA 1998) Arbitration provision in statute governing condominium disputes creates a condition precedent to filing an action in court. Actions covered by statute providing for nonbinding arbitration in some condominium disputes, that are filed without prior arbitration, are subject to dismissal and are not to be stayed pending statutory compliance. West's F.S.A. § 718.1255
 - 3. Sterling Condo. Ass'n, Inc. v. Herrera, 690 So. 2d 703 (Fla. 3d DCA 1997) Owner and condominium association would not be required to engage in mandatory nonbinding arbitration of dispute, where parties had litigated in circuit court for over two years.
 - Condominium owner waived her right to compel arbitration of dispute with condominium association by filing answer, affirmative defenses, and counterclaim, and by actively participating in litigation in circuit court for over two years before raising issue of arbitration.
 - Statutory requirement that owner and condominium association engage in mandatory nonbinding arbitration of dispute was not jurisdictional and did not deprive circuit court of subject matter jurisdiction to hear dispute. 9.10

MANDATORY NON-BINDING ARBITRATION - CONDOMINIUMS AND COOPERATIVES (718.1255 AND 719.1255, FLORIDA STATUTES)

- I. Miscellaneous cases (Cont.)
 - 4. Florida Tower Condo., Inc. v. Mindes, 770 So. 2d 210, 211 (Fla. 3d DCA 2000) A dispute over title to and the right to use particular condominium parking spaces, which are, by definition, “limited common elements,” is not subject to the nonbinding arbitration provisions of § 718.1255.
 - 5. Nat'l Ventures, Inc. v. Water Glades 300 Condo. Ass'n, 847 So. 2d 1070 (Fla. 4th DCA 2003) Condominium Arbitration Act applies only to disputes between a unit owner and a condominium association. Dispute between corporate unit owner and condominium association resulting from change in rules that limited use of property by corporate executives was not subject to Condominium Arbitration Act, and thus, trial court erred in dismissing owner's claims on grounds that owner failed to comply with act and timely file for de novo trial.
 - 6. John Mckay, v. Harbor Breeze Condominium Association, Arb. Case No. 11-04- 5002, Final Order Dismissing Petition (September 16, 2011) Petitioner's claim for damages, punitive or otherwise, while not one of the disputes specifically excluded from arbitration, nevertheless is not within the jurisdiction of the arbitrator under section 718.1255(1).
 - 7. Vizcaya of Bradenton Condo. Association, Inc. v. Allendoerfer-Fernandez, Arb. Case No. 2008-01-5333, Final Order Determining Jurisdiction (March 20, 2008) Petition which only sought damages from Respondent for cost of repairs was not dispute within meaning of section 718.1255.

MANDATORY NON-BINDING ARBITRATION - CONDOMINIUMS AND COOPERATIVES (718.1255 AND 719.1255, FLORIDA STATUTES)

- I. Miscellaneous cases (Cont.)
 - 8. Daskrealty, LLC v. 900 Biscayne Bay Condominium Ass'n, Inc., Arb. Case 15- 01-9338, Final Order of Dismissal (May 4, 2015) Compensatory damages may not be awarded in the arbitration proceedings when the claim for damages is unaccompanied by a request for other affirmative relief based on a perceived lack of jurisdiction to award damages, despite the fact that, rule 61B-45.043(5) expressly permits the arbitrator to grant mandatory or prohibitory relief, monetary damages, declaratory relief, or any other remedy or relief which is deemed just and equitable.
 - 9. Arbor Heights Condominium Ass'n, Inc. v. Brooks, Arb. Case 15-01-3105, Order on Motion to Dismiss (May 28, 2015) When emergency relief is not available in an arbitration proceeding, a motion to stay the proceeding may be filed, along with a “verified petition alleging facts that, if proven, would support entry of a temporary injunction” in court. § 718. 1255(4)(c), Florida Statutes. 9.11
 - 10. Executive Bay Club Condominium, Inc. v. McCormick, Arb. Case 10-02-2702, Order to Show Cause (May 27, 2010) Division dismissed petition because demand letter failed to name co-owner of unit.
 - 11. Oceania V Condominium Ass'n, Inc. v. Fronshtein, Arb. Case 15-01-5877, Final Order of Dismissal (May 4, 2015) Division dismissed post-petition, pre-arbitration demand letter because it did not provide notice to respondent prior to filing of petition.

MANDATORY NON-BINDING ARBITRATION - CONDOMINIUMS AND COOPERATIVES (718.1255 AND 719.1255, FLORIDA STATUTES)

- I. Miscellaneous cases (Cont.)
 - 12. Feurring, Goldberg, Hirsch, Kaufman, Kantor, Katz Peters, Winker & Zietz v. LE LAC Property Owners' Ass'n, Inc., Arb. Case 15-01-6745, Order Dismissing Claims & Order Requiring Amended Petition (May 11, 2015) Division dismissed petition because three full business days and a few hours was an insufficient amount of time for pre-arbitration notice.
 - 13. United Grand Condo. Owners, Inc. v. Grand Condo. Ass'n, Inc., 929 So. 2d 24 (Fla. 3d DCA 2006) Condominium association for mixed-use condominium was not required to file petition for non-binding arbitration with Division of Florida Land Sales, Condominiums and Mobile Homes prior to filing lawsuit against non-profit corporation that was formed by owners of residential units to challenge developer's control of association; statute requiring the filing of a petition for nonbinding arbitration prior to the filing of a lawsuit did not apply, since Division had enacted rule providing that petitions would not be accepted unless they involved a purely residential cooperative or condominium.

MANDATORY NON-BINDING ARBITRATION - CONDOMINIUMS AND COOPERATIVES (718.1255 AND 719.1255, FLORIDA STATUTES)

- J. Defenses

- 1. Unreasonable Rule The test identified by the courts in assessing whether an association rule or regulation is valid is whether it contravenes an express or implied condition found in the declaration, and whether it reflects reasoned decision making (whether it was designed to accomplish its stated purpose); An association cannot adopt a rule or regulation which amends the declaration; and Board rules and regulations are not entitled to any presumption of correctness. 9.12
- 2. Waiver The right to enforce a restrictive covenant may be lost by waiver or acquiescence. Waiver is the intentional or voluntary relinquishment of a known right or conduct which infers the relinquishment of a known right. The elements of waiver are: (1) the existence, at the time of the waiver, of a right, privilege, advantage, or benefit which may be waived; (2) the actual or constructive knowledge of the right; and (3) the intention to relinquish the right. Waiver may be express or implied from conduct or acts that lead a party to believe a right has been waived. In the context of restrictive covenants, courts have stated that there must be a “long-continued waiver or acquiescence in the violation of a restrictive covenant” for waiver to be found. The defendant/respondent has the burden of proving a “waiver” defense.

MANDATORY NON-BINDING ARBITRATION - CONDOMINIUMS AND COOPERATIVES (718.1255 AND 719.1255, FLORIDA STATUTES)

- J. Defenses (cont.)
 - 3. Estoppel The defense of estoppel applies only where to refuse its application would be to sanction a fraud. It is well settled that estoppel based upon silence cannot exist where the parties have equal knowledge of the facts, or the same means of ascertaining such knowledge. However, the estoppel defense has been effective when the party asserting such acted in reliance upon prior inconsistent conduct.
 - 4. Selective Enforcement Selective Enforcement is the “unequal and arbitrary enforcement of a restriction.” To prove the defense of selective enforcement, a party must show that there are instances (of the same alleged violation) of which the association has notice but refuses to act. Selective Enforcement is not a cause of action. It is a defense.
 - 5. Laches Laches prevents the enforcement of a restriction due to an association’s unreasonable delay in asserting its rights to enforce the alleged violation (which delay causes undue prejudice to the opposing party). For example, the Division has held that the doctrine of laches prevents an association from seeking the removal of a dog which has been on the premises for over ten (10) years. 9.13 6. Failure to abide by a condition precedent The Division will dismiss an arbitration proceeding based on an improper prearbitration demand letter.

MANDATORY NON-BINDING ARBITRATION - CONDOMINIUMS AND COOPERATIVES (718.1255 AND 719.1255, FLORIDA STATUTES)

- K. Miscellaneous Defense Issues and Cases
 - 1. Sorrento Villas Section 5 Ass'n, Inc. v. Sheets, Arb. Case NO. 2014-02-7000 The Division found that the Association's motive and apparent malice towards the arbitration petitioner was not a legal defense to the proceeding, where enforcement was not arbitrary or inconsistent.
 - 2. Abaco Village Condo. Ass'n, Inc. v. Lipschutz, Arb. Case No. 2014-01-3761 In dog removal proceeding, it was unclear whether the pre-arbitration demand letter was sent in one envelope to both unit owners, or whether separate letters were sent to each owner. Therefore, the petition was dismissed.
 - 3. ASDM, LLC v. Beach Club Villas Condo., Inc., Arb. Case No. 2015-00-8095 Where pre-arbitration demand letter requested double the statutory penalty for a willful failure to provide access to the official records of the association, without explaining why the penalty demanded was double the statutory amount, the Division found the notice to be deficient.

MANDATORY NON-BINDING ARBITRATION - CONDOMINIUMS AND COOPERATIVES (718.1255 AND 719.1255, FLORIDA STATUTES)

- K. Miscellaneous Defense Issues and Cases (cont.)
 - 4. Harbour Light Towers Ass'n, Inc. v. Prizio, Arb. Case No. 2014-01-3920 Where demand sent by the association's counsel cited to the wrong rule regarding flooring in a unit, and where two other letters, sent by the property manager, also cited the wrong rule, the petition was dismissed.
 - 5. Oceania v. Condo. Ass'n, Inc. v. Fraonshtein, Arb. Case No. 2015-015877 Case was dismissed by the Division, given that:
 - 1) the pre-arbitration demand notice was only addressed to one of three unit owners;
 - 2) prior demand letters, dated in 2013, were deemed stale and ineffective; and
 - 3) the last demand letter failed to express an intention to pursue legal remedies.

HOMEOWNER ASSOCIATION DISPUTES

HOMEOWNER ASSOCIATION DISPUTES

- A. Mandatory Demand for Pre-Suit Mediation Pursuant to Section 720.311, Florida Statutes 9.14 1.
 1. Disputes subject to pre-suit mediation:
 - Disputes that are subject to mandatory pre-suit mediation, pursuant to Section 720.311(2), Florida Statutes, include:
 - a) Those between the association and a parcel owner regarding use of or b) changes to a parcel, or the common areas and other covenant enforcement c) disputes; d) Regarding amendments to the association documents; e) Regarding meetings of the board and committees appointed by f) the board; g) Membership meetings not including election meetings; and h) Those related to access to the official records.
 2. Disputes not subject to pre-suit mediation include:
 - a) Collection of any assessment, fine, or other financial obligation; and b) Any dispute subject to pre-suit mediation where emergency relief is c) Required and a motion for temporary injunctive relief is filed with the Court.

HOMEOWNER ASSOCIATION DISPUTES

- B. Section 720.311, Florida Statutes, applies to disputes between an HOA and a parcel owner regarding use of or changes to the parcel or the common areas and other covenant enforcement disputes, disputes regarding amendments to the association documents, disputes regarding meetings of the board and committees appointed by the board, membership meetings not including election meetings, and access to the official records of the association.
- C. The statute requires that, before filing suit, the “aggrieved party”—whether the HOA or the homeowner—send a written notice to the other party, setting forth the nature of the dispute and requesting that the party agree to take part in a mediation conference.
- D. Statutory Offer to Participate in Pre-suit Mediation pursuant § 720.311(2)(a), Florida Statutes must include: 1. a description of the specific nature of the dispute(s); 2. an offer to participate in the process; 3. an explanation of the process, including that an attorney is not required; 4. a list of five certified mediators with hourly rates; 5. an agreement to pay half of the mediator's fee, and to prepay that amount, or make the deposit required by the mediator; 6. an agreement to mediate acceptance form; and 9.15 7. service to the last address on record with the association.

HOMEOWNER ASSOCIATION DISPUTES

- E. Mediation is to be scheduled within 90 days of the date of the offer; however, once a mediator is selected, the mediator may reschedule mediation to a mutually convenient time. § 720.311(2)(b), Florida Statutes. A failure to participate in scheduling may be considered to be a refusal to participate in mediation.
- F. The mediation session is in substance no different from court-ordered mediation sessions. Mandatory presuit mediation proceedings are conducted in accordance with the Florida Rules of Civil Procedure and are privileged and confidential to the same extent as court ordered mediation.
- G. A party refusing to take part in the mediation, or, failing to respond to the request within the 20 days provided in the statute, will lose any claim it may have for attorneys' fees and costs if it is the prevailing party in the ensuing lawsuit. This can be a substantial penalty, since Chapter 720, Florida Statutes, provides for an award of attorneys' fees and costs to the prevailing party in nearly all types of disputes which are subject to the mediation requirement.
- H. Homeowner association election and recall disputes are subject to arbitration proceedings pursuant to Section 718.1255, Florida Statutes.

HOMEOWNER ASSOCIATION DISPUTES

- I. Homeowner Association Arbitration Decisions
 - 1. Bartosch v. Moultrie Trails Homeowner's Ass'n, Inc., Arb. Case No. 2015-02-6253 Under HOA statute, election challenge must be filed within 60 days of the election, not within 60 days of the pre-arbitration demand letter.
 - 2. Alicea v. Verde Ridge Homeowner's Ass'n, Inc., Arb. Case No. 2015-00-8016 A petition challenging a November 14, 2014 election was filed on December 1, 2014. Such was dismissed on January 29, 2015. Thereafter, a second petition was filed on February 20, 2015. The Division held that the filing of the first petition tolled the 60- day election challenge statutory requirement. As such, the second petition was timely filed, as only 37 out of the 60 days had elapsed (taking into account the days during which the time was tolled).
 - 3. Zimmerman v. Norfolk House, Inc., Arb. Case No. 2015-02-7206 The Division found that the 60-day dispute challenge requirement, found in the co-op statute, was not tolled where the parties engaged in settlement negotiations prior to the filing of the election challenge. 9.16 4. Martin v. Watermill Master Ass'n, Inc., Arb. Case No. 2014-00-2332 An HOA election challenge was dismissed, without prejudice, where homeowner had not sent the association the pre-arbitration demand notice required by condominium statute. Chapter 720, Florida Statutes, incorporates the procedures contained in Section 718.1255, Florida Statutes, including the pre-arbitration notice requirement, even though the Division's homeowner association standard petition form did not set forth such requirement.



Thank You.



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