Filing # 144354046 E-Filed 02/22/2022 11:27:22 AM

IN THECIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

DAVID VERLANDER, BRIAN FRIEDEL,
LYNN SANDFORD, and LOUISE DUTTON,

Petitioners,

Case No.: 2020-CA-7345-O

vs.

NORTH SHORE AT LAKE HART
HOMEOWNERS ASSOCIATION, INC.,
a Florida not-for-profit corporation,

Respondent.
_____/

ORDER DENYING PETITIONERS' JOINT MOTION FOR FINAL SUMMARY JUDGMENT AS TO COUNT I

THIS CAUSE came before the Court on Petitioners' Joint Motion for Final Summary Judgment as to Count I of Petitioners' Amended Petition, and the Court, having considered the motion, the response, the relevant materials, the arguments of counsel, and being otherwise fully advised, hereby finds and concludes as follows.

Relevant Proceedings

Petitioners filed an Amended Petition for Enforcement of Final Arbitration Order Pursuant to Section 718.1255, Florida Statutes and for Injunctive and Other Relief, seeking the "confirmation and enforcement of a Final Summary Order issued in a mandatory arbitration proceeding conducted before the Florida Department of Business and Professional Regulation on November 22, 2019, pursuant to section 720.311(1)." Amended Petition ¶3. In Count I, Petitioners assert their cause of action for confirmation and enforcement of the Summary Final Order ("SFO"), and ask this Court to enforce the award, to appoint an Independent Election Monitor, at Respondent's sole expense, to monitor a proper election, and to enjoin Respondent

from engaging in the obstruction of this lawful process. Respondent filed six affirmative defenses to Count I.

Petitioners later filed their Motion for Summary Judgment on Count 1 of the Amended Petition, seeking an order: (1) requiring Respondent to notice, schedule, and hold an election for all 5 board seats, reestablishing staggered terms by a date certain; and (2) appointing a receiver, at Respondent's sole expense, to oversee the election and administer the association's affairs until a new board is seated. Respondent counters that Petitioners improperly (1) seek a ruling on an HOA election issue made moot by subsequent elections and resignations; (2) seek to enforce a final summary order that grants relief outside the authority or jurisdiction of the arbitrator; and (3) seek relief outside the scope of the SFO it seeks to enforce.

The Standard

Under the new standard, summary judgment is appropriate only if the movant shows there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The party seeking summary judgment must first identify grounds that show the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden then shifts to the opposing party, who must go beyond the pleadings and present affirmative evidence to show that a genuine issue of material fact exists. *Liberty Lobby, Inc.*, 477 U.S. at 257. "A mere 'scintilla' of evidence supporting the opposing party's position will not suffice; there must be enough of a showing that the jury could reasonably find for that party." *Walker v. Darby*, 911 F.2d 1573, 1577 (11th Cir. 1990). In resolving a summary judgment motion, the Court must view the record evidence and draw all reasonable inferences in the light most favorable to the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (per curiam).

Analysis

The Court finds there are disputed issues of material fact in this case which preclude summary judgment. First, the summary judgment evidence creates a question of fact as to whether the issue of enforcement of the SFO is now moot. For example, Respondent asserts this issue is moot because it has held annual elections since entry of the SFO, Petitioners have initiated recall efforts as to some of the director seats, and the elections previously set for March of 2021 could not be completed because Respondent could not obtain a quorum. These assertions are supported by the Affidavit of David Gordon. The Court cannot resolve the factual disputes created by this affidavit on summary judgment.

Second, as to Petitioners' request that the Court enter a permanent injunction, prohibiting Respondent from violating the SFO by appointing a receiver, the Court again finds Petitioners are not entitled to summary judgment. The appointment of a receiver is outside the scope of the relief afforded by the SFO, which is the very order Petitioners seek to enforce by way of their Amended Petition. Further, the Court agrees with Respondent that there are mechanisms by which Petitioners may seek the appointment of a receiver for the purposes overseeing the election and managing the affairs of a homeowners' association, which Petitioners have not pursued in this case. The Court finds there are disputed issues of material fact that preclude summary judgment as to Petitioners' entitlement to this relief.

Third, the Court finds Petitioners are not entitled to summary judgment because the motion for summary judgment on Count I does not address Respondent's affirmative defenses. Respondent asserted defenses to Count I in its third, fourth, fifth, seventh, eighth, and ninth affirmative defenses, but Petitioners' motion does not argue that these defenses are legally insufficient. Nor do Petitioners attempt to factually refute these defenses. The Court notes that

the proposed order submitted by Petitioners after the hearing addresses each of those defenses, but Respondent did not have an opportunity to rebut those points in writing, and/or through summary judgment evidence, prior to the hearing on Petitioners' motion for summary judgment. Because Petitioners did not address Respondent's affirmative defenses to Count I, they are not entitled to summary judgment on that Count. *See Hurchalla v. Homeowners Choice Prop. & Cas. Ins. Co., Inc.*, 281 So. 3d 510, 513 (Fla. 4th DCA 2019) ("Where the defendant has raised affirmative defenses, the plaintiff must factually refute them or establish that they are legally insufficient before being entitled to summary judgment in its favor.") (quotations omitted).

Finally, the parties disagree as to whether the SFO is final because Respondent did not file a complaint for trial de novo within 30 days of entry of the SFO, and the time for doing so has now expired. While Petitioners assert Respondent was obligated to file a complaint for trial de novo lest the SFO become final, Respondent asserts the trial de novo requirement applies only to nonbinding arbitration, and the parties participated in mandatory binding arbitration in this case pursuant to section 720.306(9)(c).

The plain language of sections 720.306(9)(c) and 718.1255 supports Respondent's argument. Section 720.306(9)(c) provides, in pertinent part: "Any election dispute between a member and an association must be submitted to binding arbitration with the division or filed with a court of competent jurisdiction. Such proceedings that are submitted to binding arbitration with the division must be conducted in the manner provided by s. 718.1255 and the procedural rules adopted by the division." (emphasis added). Section 718.1255 governs alternative dispute resolution in cases involving condominium associations. Section 718.1255(4)(a) addresses "nonbinding arbitrations … of disputes." It provides, in relevant part: "Nothing in this provision shall be construed to foreclose parties from proceeding in a trial de novo unless the parties have

agreed that the arbitration is binding." (emphasis added). The statute continues: "An arbitration decision is also final if a complaint for a trial de novo is not filed in a court of competent jurisdiction in which the condominium is located within 30 days." Fla. Stat. § 718.1255(4)(k).

Because section 718.1255 calls for nonbinding arbitration, it addresses "binding" arbitration only where the parties have agreed to it. *See Page v. Deutsche Bank Tr. Co. Americas*, 308 So. 3d 953, 958 (Fla. 2020) (citations omitted) (" 'The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means.' "). And the statute then excludes those binding arbitrations from the requirement that parties file a complaint for trial de novo in 30 days. Section 718.1255 does not address mandatory binding arbitrations at all.

In addition, the language in chapter 720, applying section 718.1255, is limited in scope. Indeed, section 720.306(9)(c) mandates that arbitrations be "conducted in the manner" provided by section 718.1255 and other "procedural rules" adopted by the division. This simply addresses the manner in which the arbitration itself must be conducted.

Notwithstanding the foregoing, in their proposed order on the motion for summary judgment, Petitioners cite section 718.1255(4)(k), Florida Statutes, and several decisions interpreting that statute, and argue the 30-day requirement applies to mandatory binding arbitrations as well. Section 718.1255(4)(k) provides: "An arbitration decision is final in those disputes in which the parties have agreed to be bound. An arbitration decision is also final if a complaint for trial de novo is not filed … within 30 days." The Court notes that this statute still does not address mandatory binding arbitrations. *See Florida Dept. of Revenue v. Florida Mun. Power Agency*, 789 So. 2d 320, 324 (Fla. 2001) ("Under fundamental principles of separation of powers, courts cannot judicially alter the wording of statutes where the Legislature clearly has not

done so. A court's function is to interpret statutes as they are written and give effect to each word in the statute."). Petitioners, however, then cite a number of arbitration orders from the Division of Florida Land Sales, Condominiums, and Mobile Homes, as well as an appellate opinion from the Ninth Judicial Circuit Court, applying section 718.1255(4)(k) and the 30-day trial de novo requirement to cases involving binding arbitrations pursuant chapter 720. But Petitioners did not cite these orders and opinions in their motion for summary judgment nor did they argue them at the hearing. Rather, Petitioners relied on section 718.1255(4)(m) and argued that, given the language of that section, the SFO is final, binding, and conclusive, and this Court has the power to enforce it. Thus, Respondent was never given the opportunity to address Petitioners' argument regarding the many Division orders and the appellate opinion from the Ninth Circuit. Accordingly, the Court declines to rely on those decisions for purposes of ruling on Petitioners' motion for summary judgment. And, in any event, the Court denies Petitioners' motion for summary judgment for the first three reasons set forth in this Order.

In light of the foregoing, it is hereby ORDERED and ADJUDGED that Petitioners' Joint Motion for Final Summary Judgment as to Count I of Petitioners' Amended Petition is DENIED.

DONE and ORDERED in Chambers at Orlando, Orange County, Florida this 18th day of February, 2022.

Hon. Paetra T. Brownlee
Circuit Judge

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All counsel of record via the E-Portal