IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA
CIVIL DIVISION DIV: "AF"
CASE NO.: 2020CA000251AXX

BOCA VIEW CONDOMINIUM
ASSOCIATION, INC.,

Plaintiff,
vs.

ELEANOR LEPSELTER, and
EDWARD LEPSELTER,

Defendants.
________________________________/

FINAL JUDGMENT FOR DEFENDANTS

THIS MATTER came before the Court on October 6, 2022 for a Final Non-Jury trial. The parties concluded the presentation of all evidence on October 7, 2022, and concluded their presentation of closing arguments on October 11, 2022. The Court, having fully and carefully considered all evidence presented and admitted during the trial, and having fully considered all legal issues as framed by the parties in their pleadings and their presentations at trial, having reviewed the court file and record, having heard final argument of counsel, and after being otherwise fully advised in the premises, finds as follows:

As an initial point, the Court finds that the attorneys who tried this case before the Court performed a superb job for their respective clients. At its core, this is a case involving a statutory request to inspect records made by a member of a condominium association.

Counsel for both the Plaintiff, and the Defendants, agree that *Kahn v. Villas at Eagles Point Condominium Association, Inc.*, 693 So.2d 1029 (Fla. 2d DCA 1997) sets forth the correct governing standard for review for this trial *de novo*, as well as the burden which the Plaintiff must

meet as the party against whom the final Order and award of the arbitrator was entered. That standard of review is as follows:

> In cases involving new motor vehicle arbitration, the arbitration final order is disclosed to the trial court, and the party who files the circuit court action has the burden of persuasion to demonstrate some error in the administrative decision. *Chrysler Corp. v. Pitsirelos*, 689 So. 2d 1132 (Fla. 4th DCA 1997); *Mason v. Porsche Cars of North America*, 621 So. 2d 719 (Fla. 5th DCA), *review denied*, 629 So. 2d 134 (Fla.1993). In such cases, the decision of the arbitrator stands unless reversed by the circuit court.
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> We conclude that the same procedures are appropriate in condominium arbitration. Section 718.1255(4) expressly provides that the final decision of the arbitrator shall be admissible in the circuit court trial *de novo*. Thus, the circuit court was entitled to review the arbitration final judgment and the Kahns had the initial burden of persuasion in circuit court. We do not need to determine which party had the burden of proof on any issue. Unless a circuit court reverses the arbitrator in the trial de novo, the arbitrator's decision remains valid. The party who prevails in the arbitration does not need to file a counterclaim to re-establish the rights it obtained in the earlier order.

Having considered all evidence before the Court (including the Final Order and Order Denying Motion for Rehearing entered by the arbitrator), and having fully considered all claims brought before the Court for review in light of the evidence presented and admitted, the Court finds that the Plaintiff has failed to meet its burden of persuasion. The Court finds that the final decisions of the arbitrator before this Court for review were not erroneous in any respect, and that the arbitrator correctly ruled on all issues presented to him in the mandatory non-binding arbitration initiated by Defendant Eleanor Lepselter which preceded this action for trial *de novo* based on the following:

1. Alleged Improper Purpose Motivation.

Initially, the Court finds that the underlying motivation of Eleanor Lepselter which led her to make her records request through an authorized representative (Jonathan Yellin, Esq.) is irrelevant. The Court finds that the arbitrator's decision on this point adhered to decades of

arbitration precedent holding that a unit owner's motive in seeking access to association records is irrelevant. The Court furthermore finds that the Plaintiff's arguments regarding a "bad faith" purpose, "improper purpose," or a "lack of a proper purpose" completely miss the mark and are not supported by law.

The Court finds that in 2010 Florida Statutes § 617.1606 was enacted by the legislature, and as a result from that point in time forward Florida Statutes § 617.1601 – 617.1605 were not applicable in any respect to a condominium association such as the Plaintiff, as condominium associations governed under Chapter 718, Florida Statutes, were identified in § 617.1606 as part of the classes of not-for-profit corporations to which Florida Statutes § 617.1601 – 617.1605 were no longer applicable. The Court finds that Florida Statutes § 617.1606 was enacted based upon the legislature's reservation of authority to alter, amend, or repeal any part of Chapter 617 at any time, as set forth in Florida Statutes § 617.0102, which was enacted in 1990 and which existed at the time the Plaintiff voluntarily incorporated in 2004 as a Florida not-for-profit corporation. So as a matter of law, no "proper purpose" needed to be established by Eleanor Lepselter in order for her authorized representative, Jonathan Yellin, Esq., to be allowed access to the Plaintiff's records on behalf of Eleanor Lepselter, and the Plaintiff had no legal right to deny access to records to either Eleanor Lepselter or her representative based upon any alleged "bad faith" or "improper purpose."

Moving beyond the lack of legal support for the Plaintiff's argument, the facts in this case would not support the Plaintiff's argument, even if a valid legal basis existed to deny access to Eleanor Lepselter's representative based upon an asserted "bad faith" purpose, "improper purpose", or "lack of proper purpose." The testimony at trial established that the Eleanor Lepselter wanted access to the requested records, and she wanted her representative to inspect and copy them

for her. Her simple desire to have an authorized representative inspect and copy association records for her is, in and of itself, a proper purpose for a request to inspect association records under Florida Statutes Chapter 718. The testimony provided at trial further established that Eleanor Lepselter was not acting on behalf of, or for the benefit of, anyone else, her legal bills were not being paid by anyone else, her lawyer was not selected by anyone else, and she did not ask for access to records through a representative on anyone else's behalf. The testimony of the authorized representative (Jonathan Yellin, Esq,) established that he was solely seeking access to records for Eleanor Lepselter as her authorized representative, that no ulterior purpose existed, and that he was not being paid by anyone else to seek access to the Plaintiff's records for anyone else.

This direct testimony was uncontroverted, with only two pieces of circumstantial evidence offered by the Plaintiff in an attempt discredit or rebut it. The first was that the Plaintiff believed that Jonathan Yellin's February 6, 2019 letter seeking access to records as Eleanor Lepselter's representative was "identical" to prior records request letters the Plaintiff received from other persons who had previously sought access to the Plaintiff's records. Having reviewed and compared all of the records request letters admitted in evidence, the Court finds that they are not identical, as the February 6, 2019 records request letter at issue in this case sought records going back to 2012, which effectively sought access to records for a much more expansive period of time when compared to the other records request letters in evidence.

The Court also finds the testimony of Jonathan Yellin, Esq. to be credible, and the Court believes and credits the testimony provided by Jonathan Yellin, Esq. which specifically discussed any similarities between his February 6, 2019 records request letter and the other records request letters in evidence. His testimony was that any similarity in the records request letters admitted into evidence was due to the fact that when he was retained by Eleanor Lepselter to inspect records

on her behalf, he prepared his February 6, 2019 letter using a form which already existed in his law firm's computer system. This re-use of a common form document does not establish that the February 6, 2019 records inspection request letter was a ruse and that it was sent for the purpose of allowing Jonathan Yellin, Esq. access to records for other persons.

The second piece of circumstantial evidence presented by the Plaintiff was testimony that Eleanor Lepselter was friends with other persons who were (or were previously) Members of the Plaintiff, and who had previously sought access to the Plaintiff's records using Jonathan Yellin, Esq. and his law firm. These pieces of circumstantial evidence carry no weight with the Court, and they are completely insufficient to rebut the direct testimony provided by both Eleanor Lepselter and Jonathan Yellin, Esq.

The Court furthermore finds the Plaintiff's entire premise to be flawed, and to be contradicted by the testimony of the Plaintiff's own witnesses. Had the Plaintiff truly believed that Jonathan Yellin, Esq.'s February 6, 2019 records request letter was sent for a "bad faith" or "improper purpose," or that the request to inspect and copy records was being made to obtain records for dissemination to persons other than Eleanor Lepselter, then the Plaintiff would have denied both Jonathan Yellin, Esq. and Eleanor Lepselter access to the requested records. Instead, the Plaintiff's witnesses testified that Giuseppe Marcigliano (a member of the Plaintiff's Board of Directors) offered to make the subject records available to Eleanor Lepselter directly, but he repeatedly refused to allow Jonathan Yellin, Esq. access to the same records. It makes no logical sense that the Plaintiff could have been concerned about subsequent disclosure or use of the requested records but at the same time was willing to provide the records to Eleanor Lepselter instead of to her authorized representative.

Further highlighting the lack of credibility of the Plaintiff's position, the testimony of Giuseppe Marcigliano established that he alone made the decision to deny Eleanor Lepselter's representative access to the requested records, and that his decision was made based upon a combination of pure conjecture (that Jonathan Yellin, Esq. was seeking access to records some other persons behind the scenes) and his own dislike and distrust of Mr. Yellin, whom Mr. Marcigliano referred to as a "liar" and a "fake lawyer." Mr. Marcigliano also testified that, at the time he decided to deny access to Mr. Yellin, he did not have any specific provision of Florida Statutes Chapters 617 or 718 in mind to support his decision.

Given the totality of the evidence before the Court, the Court finds that there was no error committed by the arbitrator, and that the Plaintiff was not entitled to deny access to Eleanor Lepselter's authorized representative based upon their being some underling "bad faith," "improper purpose," or "lack of proper purpose" in connection with this records inspection request.

2. Alleged Right of Plaintiff to Choose Between Eleanor Lepselter and Authorized Representative.

Second, the Court finds that the language of Florida Statutes § 718.111(12)(c)(1) as it existed in 2019 is clear and unambiguous, and that no grounds exist for the Court to engage in any judicial interpretation of the language of the statute.[1] The statute states:

> The official records of the association are open to inspection by any association member or the authorized representative of such member at all reasonable times. The right to inspect the records includes the right to make or obtain copies, at the reasonable expense, if any, of the member or authorized representative of such member. A renter of a unit has a right to inspect and copy the association's bylaws and rules. The association may adopt reasonable rules regarding the frequency, time, location, notice, and manner of record inspections and copying. The failure of an association to provide the records within 10 working days after receipt of a written request

[1] As stated in *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 454 (Fla. 1992), " It is a fundamental principle of statutory construction that where the language of a statute is plain and unambiguous there is no occasion for judicial interpretation."

> creates a rebuttable presumption that the association willfully failed to comply with this paragraph. A unit owner who is denied access to official records is entitled to the actual damages or minimum damages for the association's willful failure to comply. Minimum damages are $50 per calendar day for up to 10 days, beginning on the 11th working day after receipt of the written request. The failure to permit inspection entitles any person prevailing in an enforcement action to recover reasonable attorney fees from the person in control of the records who, directly or indirectly, knowingly denied access to the records.

The evidence presented at trial established that at all times Eleanor Lepselter made clear that she wanted her representative, Jonathan Yellin, Esq., to be the one to access, inspect, and copy records on her behalf. Jonathan Yellin, Esq. made clear, through his testimony and his February 6, 2019 records request letter, that he was the authorized representative who would be inspecting and copying records on behalf of Eleanor Lepselter. While the Plaintiff argued before the arbitrator, and before this Court, that it was not obligated to make records available to both Eleanor Lepselter and her authorized representative, the argument again misses the mark, and the arbitrator correctly determined that the Plaintiff was not entitled to judgment in its favor based upon the Plaintiff's assertion that it had no obligation to make records available to both the member and the authorized representative.

There was never any question that the instant request to inspect and copy records was one whereby the authorized representative was the person designated by the member to conduct and perform the inspection. There was never a request by Eleanor Lepselter to personally inspect records with her authorized representative Jonathan Yellin, Esq. present as well. While the Court joins the arbitrator in what the Court finds to be a *dicta* comment in his decision that it would make sense that a member might want to have his, her, or its attorney inspect records as well, that is not factually what occurred here. At all times it was the authorized representative who was designated by the member to conduct the inspection. The language of Florida Statutes § 718.111(12)(c)(1) is

clear that the statute grants a member of a condominium association the right to authorize a representative to inspect and copy records on his, her, or its behalf, and that the association's records are open to inspection by the authorized representative at all reasonable times. The statute does not provide a condominium association with any right of choice as to whom records will be open or available, and does not provide a condominium association with the right to disregard or reject a member's authorization of a representative to inspect records on behalf of the member.

Despite the statute's clarity, the Plaintiff argued that the statute provided the Plaintiff with an implied right of choice, whereby it possessed the power to reject a member's authorization of a representative and whereby the Plaintiff could instead decide to make records available only to the member, and not the member's authorized representative. The problem with the Plaintiff's position is that it makes no logical or legal sense where the statute is clearly framed to provide a member with the right to authorize a representative to inspect records on his, her, or its behalf. The Plaintiff's position is contrary to the clear language of the state and is rejected by this Court. The Plaintiff does not possess the right to tell one of its members who the member may choose or not choose as an authorized representative, and after a member has authorized a representative to inspect and copy records for the member, the Plaintiff does not possess the right to reject or disqualify the authorized representative.

While the statute does authorize the Plaintiff to enact <u>reasonable rules</u> governing the frequency, time, location, notice, and manner of records inspections, it does not authorize the enactment of a rule (let alone an impromptu decision by one rogue board member) that would completely bar a member's authorized representative from inspecting and copying association records.

Though not bearing on the Court's decision as to the clear and unambiguous language of the statute and the legal rights conferred (and not conferred) thereby, the Court expressly notes that during trial the Plaintiff's "Rules and Regulations Governing Inspection and Copying of Association Records" were admitted into evidence, and having reviewed those rules and regulations the Court finds that they do not contain any provision which would have provided support for the Plaintiff's determination that it possessed the power to disregard the authorization of a representative by a member and instead demand that the member inspect records directly.

To the contrary, the Plaintiff's Rules speak of the right of a member to select and authorize a representative for purposes of a records inspection. Under the heading "PERSONS ENTITLED TO INSPECT OR COPY," the Plaintiff's Rules state, in part, "No person can actually inspect or copy the records of the Association as an Owner's authorized representative, unless such person delivers to the Association a written document signed and dated by the Owner in which such person is expressly appointed as the Owner's authorized representative for this purpose." (emphasis added). While the Plaintiff did not argue to this Court, or the arbitrator, that any violation of these rules and regulations occurred, or that any violation played a part in the Plaintiff's decision to deny access to Jonathan Yellin, Esq., the Court finds the Plaintiff's own adopted rules and regulations governing records inspections are directly at odds with the Plaintiff's stated position on its believed "right of choice" to disregard a member's authorized representative. In summation, the Court finds that Florida Statutes § 718.111(12)(c)(1) did not give the Plaintiff a right to choose to whom it wanted to make the subject records available, and that after Eleanor Lepselter authorized Jonathan Yellin, Esq. as her representative the Plaintiff was obligated to ensure that the requested records were open to Jonathan Yellin, Esq. at all reasonable times. When the Plaintiff's board member, Giuseppe Marcigliano, made his decision to deny Jonathan Yellin, Esq. access to the Plaintiff's

records, he directly violated Florida Statutes § 718.111(12)(c)(1). The Court finds that the arbitrator correctly determined this issue as brought before him and that no error was committed by the arbitrator on this issue.

3. Alleged Failure of Defendant to Properly Frame the Dispute.

Third, as to the issue of the framing of the specific dispute and the provision of pre-arbitration notice of the dispute to the Plaintiff in conformance with Florida Statutes § 718.1255, the Court finds that the arbitrator committed no error. The dispute at issue in this matter, and the arbitration that preceded this matter, was Jonathan Yellin, Esq.'s request to access, inspect, and copy specifically identified records as the authorized representative of Eleanor Lepselter.

Jonathan Yellin, Esq. provided notice to the Plaintiff on February 6, 2019 that a) he was Eleanor Lepselter's authorized representative; b) his firm represented Eleanor Lepselter in connection with the subject request to inspect and copy records; c) he was seeking to inspect and copy certain records identified in his February 6, 2019 letter; d) that in the event the Plaintiff did not comply with the request to inspect records within the timeframe mandated by Florida Statutes § 718.111(12), did not allow an inspection, did not allow copying of records, or failed to provide all of the requested records, that a petition for arbitration before the Division of Condominiums, Timeshares, and Mobile Homes would be filed; and e) requested that he be contacted directly to schedule the inspection (suggesting February 13, 2019 as a proposed date for the inspection).

This correspondence met all of the requirements of 718.1255, including demonstrating: Advance written notice of the specific nature of the dispute, a demand for relief, and a reasonable opportunity to comply or to provide the relief, and notice of the intention to file an arbitration petition or other legal action in the absence of a resolution of the dispute. The arbitrator reached the same conclusion as this Court, and moreover the arbitrator relied on arbitration precedent

(*Reyes v. Tempo Condominium Association, Inc.*, Case No.: 2015-04-9159) holding that an initial written request to inspect and copy association records can also qualify as the pre-arbitration notice mandated under 718.1255 provided that the written request a) identifies the specific nature of the dispute, b) demands relief in the form of an inspection of association records within the timeframe mandated by 718.111(12)(c), and c) provides notice of an intention to file a petition for arbitration if the demanded relief is not provided by the association. The Court finds that reliance on this arbitration precedent was not error, as the facts before the arbitrator (as are also before this Court based upon the evidence admitted at trial) show that Jonathan Yellin, Esq.'s February 6, 2019 letter fully complied with the requirements of 718.1255.

The Plaintiff took the position that after the February 6, 2019 letter was transmitted, the Plaintiff was free to make a decision at some later point in time to reject and deny Jonathan Yellin, Esq.'s request to inspect the subject records, and only after the Plaintiff made that decision and transmitted notice of the decision to Jonathan Yellin, Esq. would a "dispute" exist which would then require another notice to be provided by Jonathan Yellin, Esq. of the intention to file a petition for arbitration if the Plaintiff did not take action to resolve the dispute by providing the very same access to records that Jonathan Yellin, Esq. requested in his initial February 6, 2019 letter.

Not only does the Court find this position nonsensical, but also the Plaintiff's position ignores the fact that the Plaintiff's agent, Giuseppe Marcigliano, made the decision to deny Jonathan Yellin, Esq.'s request to inspect records at some point prior to February 22, 2019 (the evidence before the Court does not identify when in fact Mr. Marcigliano made this decision), but at 4:07 p.m. on February 22, 2019 the Plaintiff's property manager (Eric Estebanez) transmitted an e-mail to Eleanor Lepselter directly, doing so at Mr. Marcigliano's instruction, which indicated

that Eleanor Lepselter, and only Eleanor Lepselter would be allowed to inspect the requested records at 1:00 p.m. on February 25, 2019 (the Monday following Friday February 22, 2019).

The evidence established that Eleanor Lepselter forwarded this e-mail to Jonathan Yellin, Esq., who then sent an e-mail directly to Mr. Estebanez on Sunday February 24, 2019 at 3:39 p.m., asking "what kind of games" Mr. Estebanez was playing by communicating directly with Eleanor Lepselter and not Mr. Yellin. Mr. Yellin the concluded his e-mail with the following express notice: "Florida Statutes 718.111(12)(c)1 provides that 'the official records of the association are open to inspection by any association member or the authorized representative of such member at all reasonable times. The right to inspect the records includes the right to make or obtain copies, at the reasonable expense, if any, of the member or authorized representative of such member.' You cannot simply disregard our representation of Mrs. Lepselter. My letter clearly stated that I intend to make the inspection on Mrs. Lepselter's behalf. You have no legal authority to disregard Mrs. Lepselter's statutory right to select our firm as her authorized representative for the inspection. To that end, I will see you tomorrow at 1:00 p.m. in your office. If you fail to give me full and complete access to the records tomorrow, be advised that we will take all legal action necessary to obtain access to the records, including a petition with the DBPR and/or court of competent jurisdiction." (emphasis added).

The evidence before the Court established that Mr. Yellin appeared at 1:00 p.m. on February 25, 2019 for the requested inspection of records, and was repeatedly denied access by Giuseppe Marcigliano. During the failed inspection, Mr. Yellin even went so far as to advise Mr. Marcigliano as to the requirements of Florida law under 718.111(12)(c)(1), and that the statute required making records open to an authorized representative of a member of the Plaintiff. The undisputed testimony before the Court showed that Mr. Marcigliano's response to Mr. Yellin's

recitation of Florida law was "That's your law, not my law" (though there is a dispute as to whether or not Mr. Marcigliano included a profane statement in rejecting Mr. Yellin's recitation of Florida law).

Finally, the evidence established that Mr. Yellin left the failed inspection having never received access to the Plaintiff's records, and that as a result a Petition for Arbitration was filed on April 3, 2019 (more than one month later). Given the facts before this Court, the Plaintiff was given proper notice as required by 718.1255, and more than enough time to cure the dispute as created by the Plaintiff when the Plaintiff decided to deny Jonathan Yellin, Esq. access to the Plaintiff's records. This Court finds no error was committed by the arbitrator on this issue as presented to him.

4. Alleged Lack of Jurisdiction of Arbitrator Based on Nature of Dispute.

The Court finds that the dispute before the arbitrator was properly before the arbitrator and that the arbitrator possessed jurisdiction over the dispute. The dispute, as identified above, was Jonathan Yellin, Esq.'s request to inspect and copy records as authorized representative of Eleanor Lepselter, as framed in Mr. Yellin's February 6, 2019 written records inspection letter. This is the exact kind of dispute identified in Florida Statutes § 718.1255(1): "As used in this section, the term "dispute" means any disagreement between two or more parties that involves: … (b) The failure of a governing body, when required by this chapter or an association document, to: … 4. Allow inspection of books and records."

The issue before the arbitrator was not overly complex, had nothing to do with any dispute over title to units or standing of a member of the association to make a records inspection request (as no party in the arbitration, or in this action, ever contended that Eleanor Lepselter was not a member of the Plaintiff and the parties agreed and conceded that she was in fact a member as co-

owner of Unit 2S), and did not address a claim for breach of fiduciary duty, evictions, or interpretation or enforcement of a warranty. On this point the Court finds controlling authority set forth in the case of *Palisades Owners' Ass'n v. Browning*, 247 So. 3d 589, 590-591 (Fla. 1st DCA 2018), wherein the Court held:

> The language of this statute is clear and unambiguous. Section 718.1255 requires that as a condition precedent to filing an action in the trial court, a "dispute" between a condominium owner and the board of the condominium association must be submitted to nonbinding arbitration. § 718.1255(1), Fla. Stat. (2016); *Neate v. Cypress Club Condo., Inc.*, 718 So. 2d 390, 392 (Fla. 4th DCA 1998). The statute defines a "dispute" as a disagreement between two or more parties over the authority of the board of directors to require an owner to take (or not take) an action involving that owner's unit or the authority of the board to alter or add to a common area. § 718.1255(1)(a), Fla. Stat. (2016). The definition of "dispute" also includes a challenge to the governing body's failure to properly conduct elections, to give adequate notice of meetings, to properly conduct meetings, and to allow inspection of its books. § 718.1255(1)(b), Fla. Stat. (2016).
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> However, the Legislature specifically excluded from the statutory definition of "dispute" several categories of more complex disagreements between unit owners and condominium associations including title claims, interpretation or enforcement of a warranty, fee assessments, evictions, *breaches of fiduciary duty*, and claims for damages for failure to maintain common areas. § 718.1255(1), Fla. Stat. (2016).
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> The Association argues that Browning's complaint falls under the statutory definition of a "dispute" because it challenges the authority of the Association to alter or add to the boat dock, which is a common area. However, Browning's complaint does more than raise a garden-variety factual dispute about changes to the common area of the condominium community. Rather, Browning's complaint alleges a breach of fiduciary duty by the Association through the action of two of its board members, conflicts of interest, and violations of the Association's by-laws.

There was no evidence before the arbitrator, and there was no evidence admitted during the trial before this Court, establishing any complexity or claim which would have rendered the instant dispute inappropriate for arbitration or which would have deprived the arbitrator of

jurisdiction over the records inspection request dispute at issue. The Court finds no error was committed by the arbitrator on this issue.

5. Alleged Decision of Association Comported with its Business Judgment.

During the trial, the Plaintiff raised an issue for the first time which was not framed in its Complaint for trial *de novo*, and which was not brought before the arbitrator for consideration, which was the Plaintiff's assertion that the "business judgment rule" precludes this Court from "second guessing" the business judgment of the Plaintiff in denying records access by Jonathon Yellin. The Defendants' counsel strenuously objected to the Plaintiff seeking to interject and try by consent issues that were not brought before the arbitrator and which were not even identified in the Plaintiff's Complaint for trial *de novo*.

Clearly, the arbitrator could not have committed error by failing to enter judgment in favor of the Plaintiff on an issue that was never even raised by the Plaintiff during the arbitration. Therefore, no error was committed by the arbitrator as the "business judgment rule" argument was never presented to the arbitrator.

As presented to this Court, the Court finds that there is absolutely no evidence in the record which substantiates the Plaintiff's "business judgment rule" argument. As an initial point, this is an action for trial *de novo* seeking review of the underlying arbitration decision. The party Plaintiff in this action is Boca View Condominium Association, Inc. There was no individual board member identified in the arbitration, or in this action, who was being sued for any alleged breach of fiduciary duty or other misconduct for which the business judgment rule might typically apply. *See* Florida Statutes § 617.0834 (2009); *see also Hollywood Towers Condo. Ass'n v. Hampton*, 40 So. 3d 784, 787 (Fla. 4th DCA 2010) (business judgment rule has traditionally been applied to protect corporate directors from personal liability). *See* § 607.0831, Fla. Stat. (2009).

In applying the business judgment rule to condominium association decisions, courts have generally limited their review to two issues: (1) whether the association has the contractual or statutory authority to perform the relevant act, and (2) if the authority exists, whether the board's actions are reasonable. *See, e.g. Garcia v. Crescent Plaza Condo. Ass'n*, 813 So. 2d 975 (Fla. 2d DCA 2002). When applying the business judgment rule to the decisions of a property association, the test is: 1) whether the association had the contractual or statutory authority to perform the relevant acts; and 2) if so, whether the board acted reasonably. *Id.* "[C]ourts must give deference to a[n] . . . association's decision if that decision is within the scope of the association's authority and is reasonable—that is, not arbitrary, capricious, or in bad faith." *Id.*

The record evidence before this Court establishes that no business judgment was exercised by the Plaintiff in connection with the decision to disallow Jonathan Yellin, Esq.'s request to inspect and copy records as Eleanor Lepselter's authorized representative. The unrebutted testimony of the Plaintiff's witnesses (Giuseppe Marcigliano and Diana Kuka) established that Mr. Marcigliano, acting as a member of the Plaintiff's Board of Directors, made a unilateral decision to instruct the Plaintiff's property manager to communicate only with Eleanor Lepselter and to ignore Mr. Yellin altogether. Mr. Marcigliano testified that he did not consult the other members of the Plaintiff's Board of Directors about his decision, nor did he consult the other Board members (or even give them advanced notice) about his intention to deny Mr. Yellin access on February 25, 2019.

Ms. Kuka testified that she did not speak with Mr. Marcigliano prior to, or during, the February 25, 2019 inspection about Mr. Marcigliano's intention to deny Mr. Yellin access, or even about Mr. Marcigliano's reason for doing so. Mr. Marcigliano's testimony established that he acted as a rogue member of the Plaintiff's Board of Directors, and he made his decision to deny

Mr. Yellin access to the Plaintiff's records based upon a combination of his own conjecture (that Mr. Yellin was seeking access for persons other than Eleanor Lepselter) and Mr. Marcigliano's distrust and dislike for Mr. Yellin. The evidence established that Mr. Marcigliano referred to Mr. Yellin as a "liar" and a "fake lawyer," and that he had no desire to communicate with Mr. Yellin as he believed Mr. Yellin was only present to do the bidding of "the Shefets." Mr. Marcigliano's decision was not lawfully made or enacted, and his decision to deny Mr. Yellin access to the Plaintiff's records directly violated Florida Statutes § 718.111(12)(c)(1).

Rather than disavow Mr. Marcigliano's decision, the Plaintiff adopted it and asserted that his decision was a lawful one which was made based upon matters that Mr. Marcigliano himself admitted that he never bothered to consider, let alone discuss with his fellow board members or even the Plaintiff's own lawyer. The evidence establishes that Mr. Marcigliano's decision was completely arbitrary and capricious. He took no action to discuss his beliefs about Mr. Yellin with anyone, took no steps to confirm his suspicions, and he never advised Mr. Yellin or Eleanor Lepselter as to the reason he was disallowing Mr. Yellin access on February 25, 2019.

The Court finds that the "business judgment rule" cannot be applied to the evidence before the Court, and the Plaintiff has wholly failed to establish the two required elements for application of the business judgment rule as stated by the Fourth District Court of Appeals in *Hollywood Towers Condo. Ass'n, Inc. v. Hampton*.

6. Allegation that Edward Lepselter was an Indispensable Party.

The Court finds that the arbitrator did not commit any error by finding that Edward Lepselter was not an indispensable party to the underlying arbitration. The Court makes the same finding. The parties agree that as co-owners of Unit 2S, Edward Lepselter and Eleanor Lepselter were free to make requests to inspect records individually or jointly. The evidence before the

Court established that both Edward Lepselter and Eleanor Lepselter signed a letter dated February 6, 2019 that they testified was for the purpose of authorizing Jonathan Yellin, Esq. and his law firm to request access to the Plaintiff's records. Jonathan Yellin, Esq. testified that he sought access to the Plaintiff's records solely on behalf of Eleanor Lepselter, and his February 6, 2019 letter made that representation clear and unambiguous. Nowhere in Yellin's letter is Edward Lepselter ever mentioned.

Moreover, the evidence before this Court established that the Plaintiff never interacted with Edward Lepselter about Jonathan Yellin, Esq.'s February 6, 2019 records inspection request letter, and when Giuseppe Marcigliano instructed Eric Estebanez to send his February 22, 2019 e-mail, the e-mail provided notice to only Eleanor Lepselter that she, and only she, would be allowed access to the requested records. This action does not involve the Defendants' joint title interest in Unit 2S, or some other claim where the rights of both Edward Lepselter and Eleanor Lepselter are so intertwined that the Court could not properly adjudicate the rights of one party without the other being joined in the action. *See Green Emerald Homes, LLC v. 21st Mortgage Corporation*, 300 So. 3d 698, 705 (Fla. 2d DCA 2019) (an indispensable party is one who is 'so essential to a suit that no final decision can be rendered without their joinder'); *Hertz Corp. v. Piccolo*, 453 So. 2d 12, 14 n.3 (Fla. 1984). An indispensable party is one "whose interest will be substantially and directly affected by the outcome of the case" or "whose interest in the subject matter is such that if he is not joined[,] a complete and efficient determination of the equities and rights between the other parties is not possible" *Department of Revenue ex rel. Preston v. Cummings*, 871 So. 2d 1055, 1058 (Fla. 2d DCA 2004). The Court finds no error was committed on this issue, and that Edward Lepselter was not a necessary or indispensable party to the underlying arbitration or to this action.

7. Alleged Flaw in Yellin Letter for 5-Day Review.

The Court finds that the arbitrator committed no error in rejecting the Plaintiff's argument that Jonathan Yellin, Esq.'s February 6, 2019 written records inspection request letter was "fatally flawed" by requesting an inspection be held within five (5) business days of the Plaintiff's receipt of the letter. First, Florida Statutes § 718.111(12)(c)(1) does not require a member or authorized representative to set forth any timeframe for the governing association to make records available for inspection and copying. The statute instead provides that after ten (10) working days, if the association has not made the records available after receipt of a written request then a presumption of a willful denial of access arises. "The failure of an association to provide the records within 10 working days after receipt of a written request creates a rebuttable presumption that the association willfully failed to comply with this paragraph. A unit owner who is denied access to official records is entitled to the actual damages or minimum damages for the association's willful failure to comply. Minimum damages are $50 per calendar day for up to 10 days, beginning on the 11th working day after receipt of the written request." *See* § 718.111(12)(c)(1), Fla. Stat. (2018).

As Mr. Yellin was under no obligation to set forth the applicable response timeframe, his request to have records produced within five business days caused no harm to the Plaintiff, and the Plaintiff ignored the request and instead transmitted notice to Eleanor Lepselter that the records identified in Mr. Yellin's letter would be made available for her review on February 25, 2019.

In addition to having waived this harmless issue, the Plaintiff's own governing "Rules and Regulations Governing Inspection and Copying of Association Records" in effect as of February 6, 2019 stated the following: "Records will be made available for inspection on or before the fifth (5th) working day subsequent to actual receipt by the Association of the written request for

inspection." Given the totality of the foregoing, the Court finds no error was committed by the arbitrator on this issue.

8. Alleged Arbitrator Error in Portion of Holding in Decision.

As to the second paragraph of the holding portion of the arbitrator's Summary Final Order dated October 25, 2019, the Court finds that the arbitrator interjected a scrivener's error wherein the arbitrator stated "to Petitioner and her authorized representative in accordance with Section 718.111(12)", where it is clear that the arbitrator meant to say "Petitioner or her authorized representative…". Throughout the arbitrator's Summary Final Order he recognized and referred to the statutory mandate that the Plaintiff's records are open to inspection by a member **or** their authorized representative. The Court finds no harm or prejudice in this scrivener's error, and this scrivener's error is not a valid basis to vacate or overturn the decision of the arbitrator. The Court upholds the decision of the arbitrator that the Plaintiff must make the subject records available to Eleanor Lepselter's authorized representative pursuant to Florida Statutes § 718.111(12)(c)(1).

9. Alleged Required Signing of Non-Disclosure Agreement.

Next, although it was not a legal or factual issue raised in the Plaintiff's Complaint for trial *de novo*, and was not tied to any legal or factual issue brought before the arbitrator, the Court writes to address a "fact" issue which arose during the testimony of the Plaintiff's President of its Board of Directors, Diana Kuka. During her testimony Ms. Kuka discussed a document referred to as a "non-disclosure agreement," that she claimed the Plaintiff might have required Eleanor Lepselter to sign if she had individually accepted Giuseppe Marcigliano's offer to inspect the Plaintiff's records on February 25, 2019.

The evidence before the Court established that this alleged "non-disclosure agreement" was not discussed or referenced during the arbitration as a fact or issue supporting the defenses

asserted therein by the Plaintiff, and the very first time this "non-disclosure agreement" was identified or discussed in this action was during the trial testimony received by this Court. The purported existence of this document makes no logical sense in light of the Plaintiff's stated position regarding denying Jonathon Yellin, Esq. access to the Plaintiff's records, and makes no sense in consideration of the Plaintiff's stated "concerns" about disclosure of its records to non-members of the Plaintiff.

The Court finds that if the Plaintiff truly did have a non-disclosure agreement drafted by its counsel and readily available, it would have simply provided it to Mr. Yellin prior to the February 25, 2019 inspection and advised him that the Plaintiff required execution of the document as a pre-condition to allowing Mr. Yellin access to the subject records. Instead, given the fact that this "non-disclosure agreement" was never referenced or discussed during February 25, 2019, and was never identified prior to the testimony given before the Court at trial, the Court finds that this "non-disclosure agreement" discussed by Diana Kuka during trial is nothing more than a fabrication made up for trial. The Court finds that there is no such document, and its purported existence was just made up and is simply not true.

10. Allegation of Plaintiff's Lack of Willfulness.

Finally, the Court finds no error with the arbitrator's decision on the issue of willfulness of the Plaintiff's denial of access to records and violation of the requirements of Florida Statutes § 718.111(12)(c)(1). The decision of the Plaintiff to deny Jonathan Yellin, Esq. access to the subject records was at all times willful. The Plaintiff made the erroneous legal decision to deny access to Eleanor Lepselter's authorized representative, and there is no evidence before this Court to rebut this finding of willfulness. The Plaintiff knew full well what it was doing when it adopted and stood behind the decision of Giuseppe Marcigliano to deny Mr. Yellin access to records, and

though the Plaintiff sought to justify its actions, the Plaintiff's justification is legally and factually improper and insufficient. Like the arbitrator, this Court finds no evidence in the record which rebuts the clear willfulness of the Plaintiff's conduct.

Having addressed all issues presented to the Court for trial, and having made the findings of fact and law as set forth above, it is hereby

ORDERED and ADJUDGED that the Court **ENTERS** Final Judgment in favor of the Defendants Eleanor Lepselter and Edward Lepselter. The Court **UPHOLDS and RATIFIES** the Summary Final Order dated October 25, 2019 as entered by arbitrator Mahlon C. Rhaney, Jr. It is further

ORDERED and ADJUDGED that the Plaintiff is **DIRECTED** to comply with the arbitrator's direction for the Plaintiff to pay minimum damages of $500.00 to the Defendants by check made payable to Eleanor Lepselter and Edward Lepselter, and which is to be mailed to the attention of Defendants' counsel of record, and to immediately make available all of the requested records identified in Jonathan Yellin, Esq.'s February 6, 2019 written records inspection letter to Mr. Yellin as Eleanor Lepselter's authorized representative. It is further

ORDERED and ADJUDGED that Eleanor Lepselter and Edward Lepselter are the prevailing parties in this action, and that they are entitled to a recovery of their incurred court costs and reasonable attorney's fees as a result. In order to advance the timely adjudication of the Defendants' prevailing party claim for court costs and attorney's fees, Defendants' counsel is **DIRECTED** to compile and transmit to Plaintiff's counsel all of the Defendants' counsel's supporting cost documentation (such as invoices for depositions, transcript copies, etc.), as well as the Defendants' counsel's timesheets showing the amount of time expended by Defendants' counsel in this matter as well as the amount of attorney's fees which the Defendants have incurred

in connection with this proceeding and the arbitration which preceded this action. This is to be done within twenty (20) days of the date of entry of this Judgment.

After this documentation has been supplied by Defendants' counsel, the Plaintiff shall have thirty (30) days from the date of delivery to file and serve its specific and itemized objections to either a timekeeper's entry, the amount billed, an hourly rate, or to the specified cost or costs incurred by the Defendants. If the Plaintiff intends to seek to introduce evidence, either by attorney testimony or expert testimony, which seeks to compare any time entry or expense to a comparable time entry or expense incurred by the Plaintiff as to any specific billable time entry, item, or cost, then the Plaintiff shall then produce its own counsel's timesheets denoting the entry, item, or cost in question, otherwise such an objection and comparison will be deemed waived. It is further

ORDERED and ADJUDGED that the Court hereby reserves jurisdiction over the parties to enter any such other or further Orders as may be necessary to carry out and enforce this Judgment, including but not limited to jurisdiction over the parties in connection with the adjudication of the Defendants' prevailing party attorney's fees and costs claim, and any post-judgment collection proceedings initiated thereafter.

DONE and ORDERED in Chambers, at West Palm Beach, Palm Beach County, Florida, this ____ day of December, 2022.

502020CA000251XXXXMB 12/02/2022
John S. Kastrenakes
Circuit Judge

JOHN S. KASTRENAKES
Circuit Judge

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