IN THE CIRCUIT COURT FOR THE
NINETEENTH JUDICIAL CIRCUIT IN AND
FOR ST LUCIE COUNTY, FLORIDA.
APPELLATE DIVISION

Circuit Case No. 16-AP-20
Lower Tribunal No. 15-SC-1894

LILIANA HERNANDEZ,

Appellant,

v.

WINDMILL VILLAGE BY THE SEA CONDOMINIUM NO. 1 ASSOCIATION INC.,

Appellee.
_____/

Not final until time expires for filing motion for rehearing, and if filed, disposed of.

Decision filed December 19, 2017.

Appeal from the County Court for St. Lucie County; Daryl Isenhower, Judge.

Debra Fein, Fort Lauderdale, for appellant.

Michael Dermody, Becker & Poliakoff, Stuart, for appellee.

PER CURIAM.

The Appellant is a unit owner in a condominium complex consisting of RV lots with mobile homes. Some lots have docks in the Indian River, and per the Rules and Regulations of the Windmill Village by the Sea No. 1 Association Inc. ("Association"), each year the owner must supply proof of liability insurance showing coverage for the dock; the Appellant's lot has a dock and is therefore subject to the rule. On January 9, 2014, the Association sent a letter to all of the owners with docks stating that proof of insurance was due no later than February 28, 2014. Five and a half months later, on May 22, 2014, the Association sent a second letter to the Appellant, informing her that she had not complied and her continued noncompliance would result in a fine based on an attached fee schedule. The letter allowed fourteen more days for the Appellant to provide proof of insurance and stated that if she did not, the fine would be imposed on the fifteenth

day. It also notified her that she was entitled to request a hearing with the Grievance Committee; however, she took no action. On June 6, 2014, the Association began assessing a $30.00 per day fine. On August 25, 2014, the fine had reached $1,000.00, the maximum allowable fine under the statute, so the Association again notified her by letter and requested payment. On November 3, 2015, the Association filed a complaint for damages and attorney's fees in small claims court, and the Appellant filed a counterclaim for failing to process her tenant's application. After a two day nonjury trial, the trial court entered a final judgment in favor of the Association for $1,000.00 plus court costs of $195.00 on the damages issue. It also ruled in favor of the Association on the counterclaim.

First, the Appellant argues that the trial court lacked subject matter jurisdiction because the issue litigated was a dispute defined in §718.1255, which required the case to be sent to mandatory nonbinding arbitration before the Division of Condominiums. Pursuant to the arguments of counsel and the record, we find that the trial court had subject matter jurisdiction over the complaint as pled.

Next, the Appellant argues that the trial court erred in finding that the Association afforded the Appellant procedural due process before imposing the fine. The issue of whether a party has been denied procedural due process is reviewed de novo. *Natiello v. Winn-Dixie Stores, Inc.*, 203 So. 3d 209, 210 (Fla. 4th DCA 2016). §718.303(3) outlines the proper procedures for imposing a fine on a unit owner:

> The association may levy reasonable fines for the failure of the owner of the unit or its occupant, licensee, or invitee to comply with any provision of the declaration, the association bylaws, or reasonable rules of the association. A fine may not become a lien against a unit. A fine may be levied on the basis of each day of a continuing violation, with a single notice and opportunity for hearing. However, the fine may not exceed $100 per violation, or $1,000 in the aggregate.
>
> (a) 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 any provision of the declaration, the association bylaws, or reasonable rules of the association. This paragraph 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.

> (b) **A fine or suspension may not be imposed unless the association first provides at least 14 days' written notice and an opportunity for a hearing** to the unit owner and, if applicable, its occupant, licensee, or invitee. The hearing must be held before a committee of other unit owners who are neither board members nor persons residing in a board member's household. If the committee does not agree, the fine or suspension may not be imposed.[1]

(Emphasis added). The statute gives the Association the ability to assess a fine for failure to provide proof of liability insurance for the dock, which is required by the Rules and Regulations of the Association:

> 14: Each year each unit owner must supply proof of liability insurance showing coverage on docks and lifts.

The Association sent the initial letter asking for proof of insurance on January 9, 2014, and it does not mention a fine. It sent the second letter on May 22, 2014, supposedly with a schedule of fines. The letter does not specifically state what the fine amount will be if the Appellant fails to provide the proof of insurance; instead, it stresses "the association has the ability to assess fines for noncompliance (Fine Schedule Enclosed)." It later goes on to state "if you do not remedy this situation or request a hearing with the Grievance Committee within the fourteen (14) day period, fines will commence on the fifteenth (15th) day from the date of this letter." An examination of the fine schedule shows a table with three categories of minor, medium, and major fines with charges of $10.00, $20.00, and $30.00 rates per day listed. Each box has a descriptive list of what is included. The Appellant's infraction of failing to provide proof of insurance is not listed in any of the three boxes. Consequently, the Appellant did not receive proper notice of her fine, as she had no way of knowing if it was accruing at $10.00, $20.00, or $30.00 per day, if at all, since her offense was not listed on the fine schedule.

In her brief, the Appellant raises the issue of whether she was improperly deprived of a hearing. The May 22, 2014 letter notified her that she was entitled to file a written appeal within fourteen days to initiate the grievance process, and it stated "…it is your responsibility to provide us written confirmation that you …wish to file an appeal." It was established through the testimony of the President of the Association that the Appellant did not properly initiate that process by

[1] In 2016, this last sentence was replaced with the following sentence: "The role of the committee is limited to determining whether to confirm or reject the fine or suspension levied by the board. If the committee does not agree, the fine or suspension may not be imposed." However, the above quoted version of the statute was the one in effect at the time of the violation.

August 25, 2014. However, on October 18, 2014, the Association unanimously voted to allow the Appellant to have a hearing, even at that late date. However, at the December 20, 2014 meeting, the Association decided that the Appellant could not have her hearing after all. The President of the Association testified that the reversal of the decision was based on the hearing the Association had for one of the neighbors in a similar situation, and "it got to the point where we couldn't have a meeting without it getting upset so bad that we were trying to put the thing to rest." However, this resulted in a deprivation of the Appellant's procedural due process rights under §718.303(3), which was error.

The Appellant was not given proper notice and opportunity to be heard, as required by §718.303(3)(b). Therefore, the trial court erred when it found that she was afforded procedural due process.

Both parties filed motions for appellate attorney's fees. Appellate attorney's fees can be awarded if authorized by contract or statute. *Brass & Singer, P.A. v. United Auto. Ins. Co.*, 944 So. 2d 252, 254 (Fla. 2006). Pursuant to Fla. R. App. P. 9.400, a party must specify the statutory, contractual, or substantive basis for an award. *Id*. The Appellant's motion points to §718.303(1), which states in relevant part:

> Each unit…and each association, are governed by, and must comply with the provisions of this chapter [and] the governing documents creating the association…Actions for damages or for injunctive relief, or both, for failure to comply with these provisions may be brought by the association…against…a unit owner…The prevailing party in any such action…is entitled to recover reasonable attorney's fees.

Article 12.2 of the Association's Declaration also entitles it to recover attorney's fees:

> In any proceeding arising because of an alleged failure of a unit owner…to comply with the terms of the declaration…or the Regulations…the prevailing party shall be entitle to recover the cost of the proceeding as such reasonable attorney fees as may be awarded by the court.

Finally, the Association's Rules and Regulations also authorize an award of attorney's fees:

> All attorney's fees, filing fees and other expenses incident to the enforcement of these rules and regulations will be paid for by the non-prevailing party.

Therefore, as the prevailing party on appeal, the Appellant is entitled to her appellate attorney's fees. We grant her motion for appellate attorney's fees and remand to the trial court for a determination of amount.

Reversed and remanded with instructions to enter a dismissal with prejudice based on this improper notice.

BUCHANAN, MCNICHOLAS, JJ., and ROBERTS, Acting Circuit Judge, concur.

Copies of above decision
were furnished to the attorneys/parties
of record on the same date
the decision was filed.