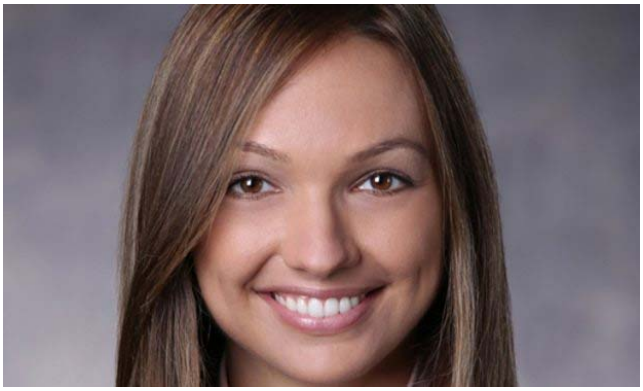
dbr DAILY BUSINESS REVIEW

Association Election 'Shenanigans' Lead to Contentious, Costly Litigation

A case in which a trial court concluded may have involved some association election "shenanigans" is going back to the trial court for further proceedings after the Fifth District Court of Appeal reversed the lower court's order mandating binding arbitration.

By **Nicole R. Kurtz** | April 05, 2019



Nicole R. Kurtz, Siegfried, Rivera, Hyman, Lerner, De La Torre, Mars & Sobel

A case in which a trial court concluded may have involved some association election "shenanigans" is going back to the trial court for further proceedings after the Fifth District Court of Appeal reversed the lower court's order mandating binding arbitration.

"What should have been a rather routine meeting of the association was cloaked with mystery, intrigue and confusion," begins the Fifth DCA's unanimous opinion in the case of *Winter Green at Winter Park HOA v. Richard Ware.* Indeed, mystery, intrigue and confusion seem to be very apropos for describing the set of circumstances that unfolded during the Orlando suburb's annual meeting and election.

It all began when somehow two nearly identical notices were sent out to announce the upcoming annual meeting and election to the homeowners. Both notices included the necessary agenda and accompanying documents, however the notice prepared by the association's property manager set the annual meeting date for Nov. 15, 2017, while the other notice announced the annual meeting was to be held on Nov. 12, 2017.

Fifty-five members of the association attended the Nov. 12 meeting, which was sufficient to establish a quorum, but the owners were surprised to find that neither the property manager nor any of the current board members were present. An owner was even dispatched to the property manager's office to seek clarification on the manager and directors' absence, but he found no one there.

The owners present at the Nov. 12 annual meeting proceeded with the meeting and election. Shortly thereafter, the newly elected board submitted a written request to the prior board and the association's property manager to turn over the association's documents, check book and other banking and financial

records.

When the prior board members and management failed to turn over any of the requested materials, the newly elected board sought and obtained a temporary injunction based on the association's exposure to irreparable harm; specifically, the association, through the new board, argued that its normal functions could not be carried out without the requested documents, which placed property values at risk.

At a subsequent hearing to determine whether the temporary injunction was to stay in place, several homeowners testified that they received the notice of annual meeting and election scheduled for Nov. 12, but they had not received the notice of annual meeting and election scheduled for Nov. 15. As such, the owners testified that they were unaware that the property manager had attempted to schedule the annual meeting and election for the 15th when they attended the meeting on the 12th. Furthermore, at least one homeowner testified that the Nov. 12 meeting notice package contained several empty staple holes in the papers, leading him to conclude that the package may have been tampered with, including being taken apart and re-stapled.

At the same hearing, the property manager testified that she personally prepared and mailed the notice of annual meeting and election scheduled for Nov. 15. She confirmed that several envelopes were returned to her by the post office in sealed condition and marked as undeliverable. Indeed, these sealed envelopes were presented to the court and were found to contain the notice for the Nov. 15 election meeting, and the documents did not contain empty staple holes as were found in the Nov. 12 notices.

The property manager further testified that whoever prepared and distributed the notice of annual meeting and election scheduled for Nov. 12 had not complied with the 14-day advance notice requirement, so in her view the meeting was improperly noticed. According to the evidence presented, neither the property manager nor any member of the previous board had received the notice of annual meeting and election scheduled for Nov. 12, and they remained unaware of that meeting until after it took place.

Based upon the testimony and other evidence presented, the trial court concluded that the circumstances surrounding the notices suggested there had been some "shenanigans" involved with the annual meeting and election. After determining that the 2018 board may not have been properly elected, the trial court dissolved the temporary injunction and ordered the parties to participate in binding arbitration before taking part in any further litigation.

On appeal, the Fifth DCA concluded that the trial court had the inherent authority to reconsider the temporary injunction it had ordered, and it had expressly set the return hearing "to determine whether the temporary injunction should continue." Considering such authority, the Fifth DCA determined that the lower court did not abuse its discretion in dissolving the temporary injunction.

Also on appeal was the question of whether the trial court had jurisdiction to order the parties to take part in binding arbitration. In making its determination, the appellate panel reviewed Section 720.306, Florida Statutes, which governs elections for homeowners associations. Specifically, this statute provides that any election dispute between a member and an association must be submitted to mandatory binding arbitration with the Division of Florida Condominiums, Timeshares, and Mobile Homes in the Department of Business and Professional Regulation. However, the appellate panel also found that the law includes a provision requiring any challenge to the election process to be commenced within 60 days after the election results

are announced. Thereafter, the law provides that the Division does not have the jurisdiction to hear and resolve an election dispute.

The appellate court concluded that the association's prior board did not file an election dispute with the division within the allotted timeframe. As such, to the extent that the intent of the lower court's decision was to require mandatory arbitration before the division, the lower court erred, as the division no longer had jurisdiction to hear and resolve the election dispute.

The Fifth DCA also found the trial court erred in ordering the parties to participate in any other form of binding arbitration. In the absence of any prior contract calling for binding arbitration, it noted that Florida's trial courts only have the authority to order parties to participate in non-binding arbitration.

The appellate opinion remanded the matter for further proceedings before the trial court in accordance with its ruling, which will certainly ensure a prolonged and costly litigation process for the association and its owners.

This case illustrates the importance for community associations to work very closely with highly qualified and experienced legal counsel to oversee their election meeting notice packages and related procedures. It also demonstrates that associations must be vigilant in monitoring for any potential election irregularities that should raise a red flag and require immediate attention. Additionally, to avoid potentially costly litigation, if any election disputes arise they must be presented to the division within the allotted 60-day timeframe.

Nicole R. Kurtz *is an attorney with the South Florida law firm Siegfried Rivera who focuses on community association law and is a frequent contributor to the firm's condo and HOA law blog, www.FloridaHOALawyerBlog.com* (http://www.FloridaHOALawyerBlog.com)*. The firm maintains offices in Miami-Dade, Broward and Palm Beach counties, and it represents more than 800 Florida community associations and also focuses on construction and real estate law.*