Memo To PACC2 Unit Owners Regarding Decision and Order of the Fourth District Court of Appeal on December 14, 2016.

As a result of the Decision and Order of the Fourth District Court of Appeal dated December 14, 2016 the Holdover 2015 Board has **no** authority at this time in respect to Palm Aire Condo Association II affairs. It is my understanding that Judge Haury scheduled the hearing for emergency relief on January 5, 2017 so that the 2016 Board in the interim period before the March 1, 2017 election can have the means to resume their status and the exercise of their responsibilities as the legitimate PACC 2 Board. Judge Haury, I am informed is now on vacation and the status quo that will cause irreparable harm to the Association remains. Notwithstanding, their statement to the contrary in the 2015 Holdover Board's postings they have not previously and cannot now continue to operate lawfully.

Judge Haury's Decision and Order dated December 16, 2016 denies emergency relief without prejudice and does not nor can it negate the Decision and Order of the District Court of Appeal dated December 14, 2016. It is only his order and decision at this point in time not to grant further relief after the District Court of Appeal's vacation of the temporary injunction and his scheduling of a hearing on the issue on January 5, 2017.

I believe in this context should the Holdover Board not cease to act as the Board and be fully cooperative with the rightful 2016 Board, the 2016 Board should seek emergency relief from another Judge (most likely the judge assigned to function as a surrogate in such emergencies) or go back to the Fourth District Court of Appeal for their order to implement their Decision and Order of December 14, 2016. Irreparable harm will occur or is likely to occur without the legitimate Board in the interim period being accepted and recognized as the rightful board.

Attached is the Decision and Order of the Fourth District Court of Appeal dated December 14, 2016. Attached also are postings by the Holdover Board confusing the meaning and implication of the Decision and Order of the Fourth District Court of Appeal. To the extent that these postings reflect the advice and counsel of the Shendell attorneys, they reflect gross legal error as did the Shendells' advice to the 2015 Holdover Board on February 29, 2016 that the Board without the approval of a majority of the voting interests could postpone or cancel the 2016 scheduled annual election of directors. As a result of these gross errors the duly elected and rightful Board should give immediate consideration as to whether the Shendells should in any way be counsel to the Association going forward, and in my judgment terminate the attorney client relationship of the Shendells with the Association.

The duly elected and rightful Board should direct on behalf of the Association that the Shendells turn over all their billing, attorney client communications and memoranda submitted to and received from the Association as well as any on the subject matter of their representation. No privilege is operative with respect to such documents because it is the Association's privilege and that privilege can only be asserted by the 2016 Board. The Shendells should also be advised on behalf of the Association **not** to destroy or discard any documents, even in the normal course.

If the Shendell attorneys believe they gave correct legal advice to the 2015 Holdover Board on February 29, 2016 to postpone or cancel the scheduled election of directors without a majority approval of all the voting interests, they should come forward and publicize for **all** the unit owners their rational and if they believe that the 2015 Holdover Board can continue to exercise lawful authority after the District Court of Appeal's December 14, 2016 Decision and Order they should also submit for **all** the unit owners to see and review their legal reasoning why they think the District Court of Appeal was wrong and the 2016

Board is not the legitimate board. As Justice Louis Brandies stated, "sunlight is the best disinfectant."

The Fourth District Court of Appeal held without qualification that the 2016 Board was voted in on March 2, 2016, the date of the annual meeting. The 2016 Board is the true and rightful board. The February 29, 2016 directors meeting and the action of the 2015 Holdover Board attempting to postpone and/or cancel the March 2, 2016 election was ***ultra vires*** and should not have had or have any legal effect invalidating the 2016 election. The lawful board is the one voted in March 2, 2016. The District Court of Appeal held:

".... {W}e reverse the temporary injunction entered against M&M Property Management LLC, allowing it to continue ***to operate in the service of the board elected March 2..{2016}"*** (Emphasis Added)

Even though the Holdover Board attempted to postpone or cancel the March 2, 2016 election; it did not and could not postpone or cancel the election as a matter of law. As the District Court of Appeal held the Florida Administrative Code provides that "{i}n order to adopt different voting and election procedures in its By-Laws ... **an association must obtain the affirmative vote of a majority of the total voting interest**....Florida Administrative Code. R61-B-23.0021(1) (c)." (Emphasis Added) **No such vote occurred to change the date of the previously scheduled annual election on the date of the annual meeting March 2, 2016 as provided by the By-Laws.**

The Holdover Board did **not** have the authority to postpone or cancel the election by itself as a matter of law and accordingly the election was valid and lawful. By now refusing to turn over the Association's records and accounts to the 2016 legitimate Board, the unlawful 2015 Holdover Board is depriving the Association from conducting the affairs of the Association through the lawful board. They are also risking a contempt citation. The District Court of Appeal's Decision and Order in pertinent part states "{n}ot final until

disposition of timely filed motion for rehearing." A non-final order cannot generally be appealed from until it is deemed final. **However, the order is the "law of the case" and must be obeyed.** Clearly the District Court of Appeal's Decision and Order is being disregarded.

Merely because the Decision and Order cannot yet be appealed does not signify that the 2015 Holdover Board as a matter of law remains in authority. Accordingly, while the Order cannot now be appealed from it governs the conduct of the parties in the case unless and until it is reversed. If the consequence were otherwise, no motion or trial court would have the authority to properly conduct judicial proceedings.

Moreover there is very little possibility of reversal on the issue of what board was duly elected on March 2, 2016 because the Fourth District Court of Appeal relied on the clear text of the Florida Administrative Code that does **not** allow for a postponement of or cancellation of a scheduled annual election on the date set by the By-Laws without the vote of the majority of the voting interests and that is not the Board, but a majority of the unit owners. To do so would be to modify the By-Laws without the proper and required vote.

I respectfully suggest that the 2016 duly elected Board exercise its rightful authority; and that the Shendells, James Martin, and the 2015 Holdover Board must respect the Fourth District Court of Appeal's Decision and Order December 14, 2016; and that emergency relief be sought if the above named persons and group continue to disregard the Decision and Order and operate unlawfully including a citation for contempt.

Norman B. Arnoff

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

M&M PROPERTY MANAGEMENT, LLC,
Appellant,

v.

PALM-AIRE COUNTRY CLUB CONDOMINIUM ASSOCIATION NO. 2, INC.,
Appellee.

No. 4D16-1448

[December 14, 2016]

Appeal of a non-final order from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; William W. Haury, Judge; L.T. Case No. CACE16004720(13).

Bartosz A. Ostrzenski of Ostrzenski & Stricklin, P.A., Boca Raton, and Gerard S. Collins and Jeffrey D. Green of Kaye Bender Rembaum, P.L., Pompano Beach, for appellant.

Tamar Duffner Shendell of Shendell & Associates, P.A., Lighthouse Point, for appellee.

FORST, J.

Against the backdrop of the aphorism that "all politics is local," we address a trial court decision with respect to a challenge to a condominium association's board of directors election. As discussed below, we reverse the temporary injunction entered against Appellant M&M Property Management, LLC, allowing it to continue to operate in service of the board elected on March 2.

Background

On February 29, 2016, the then-Board of Directors of the Appellee condominium association attempted to postpone the annual board election scheduled for March 2, 2016. Although there is some ambiguity as to what exactly occurred at the February 29 meeting, the record could support the conclusion that the Board voted 6-3 in favor of

postponement.[1] However, there is no indication that the actual voting members of the association ever voted to postpone the election. An election was nonetheless ostensibly held on March 2, at which a new board was elected.

The dispute at issue between Appellee (in the form of the first board) and Appellant M&M stems from the latter's refusal to recognize the continued authority of the first board. In seeking an injunction, Appellee claimed that the election was fraudulent because of the vote to postpone and, therefore, that the Board which existed on February 29, 2016, continued to exist and should have been recognized by M&M. Appellee alleged that it was harmed by being cut out of daily operations of the association and by being removed from the association's bank accounts. The trial court granted a preliminary injunction requested by Appellee and ordered M&M to recognize the pre-March 2 "election" Board and provide it the access and control over the association that it sought. M&M challenges that preliminary injunction on appeal.

Analysis

Whether Appellee has demonstrated a substantial likelihood of success on the merits depends on the legal issue of whether the vote to postpone the election was effective. As such, we review this case de novo. *Telemundo Media, LLC v. Mintz*, 194 So. 3d 434, 435 (Fla. 3d DCA 2016).

It is well-established that a temporary injunction lies when the following requirements are proved by the party seeking the injunction: "(1) it will suffer irreparable harm unless the injunction is entered, (2) there is no adequate remedy at law, (3) *there is a substantial likelihood that the party will succeed on the merits*, and (4) that considerations of the public interest support the entry of the injunction." *Concerned Citizens for Judicial Fairness, Inc. v. Yacucci*, 162 So. 3d 68, 72 (Fla. 4th DCA 2014) (emphasis added).

The Florida Administrative Code provides that "[i]n order to adopt different voting and election procedures in its bylaws . . . an association must obtain the affirmative vote of a majority of the *total voting interests* . . . ." Fla. Admin. Code R. 61B-23.0021(1)(c) (emphasis added). The relevant bylaws here state that directors "shall" be elected at a meeting which "shall be held on the first Wednesday in March of each year." March 2 was the first Wednesday in March during 2016. To the extent that Rule

[1] We do not intend this statement to be interpreted as any finding that this vote in fact did or did not occur, should the issue be relevant in further proceedings.

61B-23.0021(1)(c) applies to the postponement here, it commands that the vote to postpone be taken by all of the relevant voting interests, not just the Board, because that change would itself be the adoption of different voting procedures than the rule provides. That was not done. As such, Appellee failed to show it had a "substantial likelihood" of prevailing because it did not provide authority circumventing application of Rule 61B-23.0021(1)(c) to this scenario, nor any other authority supporting the Board's ability to postpone the election.[2]

Conclusion

We therefore reverse because Appellee failed to demonstrate the third requirement of a temporary injunction; namely, that it had a substantial likelihood of succeeding on the merits. In this case, the bylaws set the annual meeting and election date and Appellee did not provide any authority permitting a postponement based solely on a majority vote of the Board.

Reversed.

CIKLIN, C.J. and KLINGENSMITH, J., concur.

* * *

Not final until disposition of timely filed motion for rehearing.

---

[2] We emphasize that the burden in this case was on Appellee to provide authority that would support not applying Rule 61B-23.0021(c)(1). This opinion should not be read as holding anything with regard to the actual application of that rule beyond the simple recognition that its language would seem to indicate that it may apply in this situation. The nuances and exact application of the rule are not the concern of this Court at this time.

Palm Aire Country Club
Condominium Association No. 2, Inc.
2020 West McNab Road, Suite 125, Ft. Lauderdale, FL 33309 - Office 954-597-6026

The Fourth District Court of Appeals has issued a **nonfinal** order reversing the issuance of the preliminary temporary injunction against M&M.

The Association has 15 days in which to file a Motion for Rehearing on this nonfinal order. The Motion for Rehearing gives us the opportunity to point out matters that were not considered by the DCA when rendering their opinion.

Once the Association files its Motion for Rehearing, M&M will have another 10 days to respond.

Thereafter the 4th DCA will make a decision on the Motion for Rehearing and either finalize the order or issue a new order. If the Association does not file a Motion for Rehearing during the 15 day period, the order issued today will be deemed final.

Palm Aire Country Club
Condominium Association No. 2, Inc.

Dear Unit Owner,

As you are all aware, in March 2016 Palm-Aire Country Club Condominium Association No. 2 (PACC2) filed legal action against M&M Property Management to get an injunction to force M&M to give control of the PACC2 Association back to the current Board of Directors. The current Board asserted that M&M improperly gave control of the Association's money and operation to 9 individuals who were not elected at an Association membership meeting. The Honorable Judge Haury entered a temporary injunction in April 2016 against M&M to require M&M to give the documents and finances of the Association to the current Board pending a final resolution of the other matters before the Court and to obtain damages for the Association for M&M's breach of the management contract. Judge Haury has not yet issued any final orders in the case and the Association is in the discovery phase of the lawsuit to obtain further information to demonstrate that M&M intentionally breached the management contract with PACC2.

M&M appealed the temporary injunction issued by Judge Haury with the Fourth District Court of Appeals. Yesterday, The Fourth District Court of Appeals issued a **nonfinal** order reversing the issuance of the preliminary temporary injunction against M&M.

The Association has 15 days in which to file a Motion for Rehearing on this nonfinal order. The Motion for Rehearing gives the Association the opportunity to point out matters that may not have been considered by the DCA when rendering their opinion. Once the Association files its Motion for Rehearing, M&M will have another 10 days to respond. Thereafter the 4th DCA will make a decision on the Motion for Rehearing and either finalize the order or issue a new order.

Even if, after consideration of the Motion for Rehearing, the 4th DCA leaves its current order in place, that does not affect anything at PACC2. The case against M&M will continue until conclusion. **The current Board will continue to fully operate the Association** (in the honest manner which it has been operating).

For now, it is business as usual for the Association and the current Board; the **only** focus is the proper operation of the Association for the benefit of **all** of its members. Please continue to make assessment payments to MY Future. Further, if you have questions or condominium issues, please contact James Martin or Christy Marquez at the Association's management office.

Again, thank you all for your ongoing support.

Your Board of Directors,

Jerry Messina, Jack McCandless, Irwin Salbe, Marie Barnes, Gino Colarossi, Joseph Englese, Dan Weiss (*Joseph O'Neill and Peter Kretz did not approve this communication*)

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL IN CIRCUIT IN AND FOR BROWARD COUNTY FLORIDA

CASE NO.: CACE-16004720
JUDGE: WILLIAM W. HAURY, JR.

PALM-AIRE COUNTRY CLUB CONDOMINIUM ASSOCIATION NO. 2, INC., Plaintiff,

vs.

M&M PROPERTY MANAGEMENT, LLC.
Defendant.
_____/

ORDER DENYING REQUEST FOR EMERGENCY RELIEF

This cause came on for consideration upon Defendant's M & M Property Management, LLC's Request for Emergency Relief served pursuant to certificate of service dated December 14, 2016 and the Court being duly advised in the premises it is

ORDERED and ADJUDGED said Motion is DENIED without Prejudice.

DONE at Fort Lauderdale, Broward County Florida on December ~~15~~ 16, 2016.

/s/ William W. Haury, Jr.
WILLIAM W. HAURY, JR.
Circuit Court Judge

Copies furnished to:

Tamar Duffner Shendell, Esq., Shendell & Associates, P.A., 5340 N. Federal Highway, Suite 201, Lighthouse Point, FL 33064: service@shendell-law.com and Tamar@shendell-law.com

Gerard S. Collins, Esq., Kay Bender Rembaum, P.L., 1200 Park Central Blvd S Pompano Beach, FL 33064: GCollins@KBRLegal.com, Litigation@KBRLegal.com

Bartosz A. Ostrzenski, Esq., Ostrzenski & Stricklin, P.A., 4755 Technology Way, Suite 204, Boca Raton, Florida 33431: bart@oslawyers.com, ostrzenski@oslawyers.com, receptionist@oslawyers.com