

**IN THE CIRCUIT COURT OF THE FOURTEENTH JUDICIAL CIRCUIT
IN AND FOR BAY COUNTY, FLORIDA**

**STEWART BERMAN, AARON KLEIN,
SOLLY HALBERTHAL, and ISERE
HALBERTHAL,**

Plaintiffs,

v.

Case No.: 14-0863-CA

**DEAN LAUTZENHEISER, DENISE
HINDES, JERRY DOW, and ENOCH
HARTMAN,**

Defendants.

**ORDER DENYING DEFENDANTS' MOTION TO DISSOLVE INJUNCTION,
DENYING DEFENDANTS' OBJECTION AND MOTION TO STRIKE,
AND MODIFYING INJUNCTION**

THIS MATTER is before the Court on the Defendants' Motion to Dissolve Temporary Injunction, filed on July 9, 2014, and the Defendants' Objection and Motion to Strike, filed on July 21, 2014. The Court previously granted a temporary injunction on July 7, 2014. On July 16, 2014, the Court conducted a hearing on the Motion to Dissolve Temporary Injunction, at which witnesses testified, and evidence was submitted by the parties. Having considered the Defendants' Motion and Objection, testimony and evidence from the hearing, the Defendants' and the Plaintiffs' written closing arguments, court files and records, and being otherwise fully advised, the Court finds as follows:

The instant case arises out of a disputed recall of certain members of the board of directors (the Board) of the Shores of Panama Condominium Association, Inc. (the Association). On January 6, 2014, the Board was presented with a petition to recall four board members, who are the Plaintiffs in this lawsuit. On January 13, 2014, the Board noticed a meeting to vote on certification of the recall. The meeting was noticed to start at noon, but was delayed until about 3:00 p.m. The Board voted against certification of the recall, relying in part upon the results of a committee report, which was offered into evidence at the July 16, 2014 hearing. The report found irregularities in the recall ballots that would have resulted in the recall petition failing to attain a majority vote.

The Association filed a petition for arbitration with the Department of Business and Professional Regulation, Division of Florida Condominiums, Timeshares and Mobile Homes (the Division). The arbitrator rejected the Plaintiffs' attempts to intervene in the arbitration. On June 25, 2014, the arbitrator issued an order (the Order), which certified the recall. The Order declined

to consider any issue regarding the ballots except their facial validity,¹ because there had not been a duly noticed meeting due to the meeting being delayed from its scheduled start time of noon until about 3:00 p.m. The Order went on to provide that the Defendants replace the Plaintiffs as Board members, "effective immediately for the remainder of the term of the seats they fill." The reconstituted Board of the Association met almost immediately after the Order was issued, and, based upon its agenda and meeting minutes, was prepared to take substantive action on a number of issues related to the governance of the Association.

On July 7, 2014, the Plaintiffs filed their Emergency Petition for Temporary Injunction. That same day, the Court entered its Order Granting Emergency Petition for Temporary Injunction, thereby limiting the ability of the new Board to take any action as a board upon the affairs of the Association until the Court rules upon the issues raised in the Plaintiffs' Complaint for trial de novo. As noted, the Defendants filed a Motion to Dissolve Temporary Injunction, and the Court conducted a hearing on it on July 16, 2014. The Defendants have also filed an Objection.

The Court determines that the Defendants' Motion to Dissolve Temporary Injunction and Objection are due to be denied. The Defendants' argument that the Order Granting Emergency Petition for Temporary Injunction is facially defective under Rule 1.610(a)(2) is meritless, as is their argument concerning lack of proper notice. The Defendants' argument that the Plaintiffs lack standing to file suit is also meritless because even though the Plaintiffs were not parties to the arbitration,² they were clearly impacted by the arbitrator's Order, which certified the recall and ousted them from the Board. *See Alachua County v. Scharps*, 855 So. 2d 195, 198 (Fla. 1st DCA 2003) ("Generally, in order to have standing to bring an action the plaintiff must allege that he has suffered or will suffer a special injury.").

To be sure, as the Defendants further argue, nothing in section 718.1255, Florida Statutes, the statute allowing for a trial de novo in subsection (4)(j), includes recall petitions in the list of disputes subject to arbitration in subsection (1). However, the Court declines to construe this statute in a manner that would deprive the Plaintiffs of their constitutional right of access to courts with respect to their Complaint for a trial de novo. *See* Art. I, § 21, Fla. Const. ("The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."). *See also Kukral v. Mekras*, 679 So. 2d 278, 284 (Fla. 1996) ("[T]he medical malpractice statutory scheme must be interpreted liberally so as not to unduly restrict a Florida citizen's constitutionally guaranteed access to the courts."). Indeed, the Defendants themselves acknowledge that the Plaintiffs are otherwise entitled to challenge the recall under section 718.122(2)(j)7., which itself references section 718.1255:

A board member who has been recalled may file a petition pursuant to s. 718.1255 challenging the validity of the recall. The petition must be filed within 60 days after the recall is deemed certified.

¹The Order found that seven of the ballots were facially invalid.

²As noted, they were not allowed to intervene in the arbitration proceeding.

(Emphasis added.) In short, the Plaintiffs are entitled to challenge the recall in their Complaint for a trial de novo pursuant to section 718.1255, and are therefore entitled to seek a temporary injunction.

On the merits, the Court finds that the Plaintiffs are entitled to a temporary injunction because they have proved the likelihood of irreparable injury, the unavailability of an adequate remedy at law, a substantial likelihood of success on the merits, and that a temporary injunction will serve the public interest, as required under Florida law.³ See *Depuy Orthopaedics, Inc. v. Waxman*, 95 So. 3d 928, 938 (Fla. 1st DCA 2012). See also *Envtl. Servs., Inc. v. Carter*, 9 So. 3d 1258, 1261 (Fla. 5th DCA 2009).

The Plaintiffs have proven the likelihood of an irreparable injury and the unavailability of an adequate remedy at law, because the arbitrator's Order immediately removed them from the Board, and they have established that the new Board intends to take substantial action to change the status quo before judicial review can be completed. Under the instant circumstances, the Court finds that monetary damages are inadequate or unavailable to provide relief in the event that the Plaintiffs prevail in their Complaint for a trial de novo.

The Plaintiffs have proven a substantial likelihood of success on the merits. The merits at issue relate to whether they will be able to ultimately prove that the recall election should not have resulted in their removal as Board members. In light of the affidavits of Janice S. Cartwright and Donna Mierzwinski, there is direct evidence that certain ballots were fraudulent. Moreover, the affidavit of Dianne C. Flores, a handwriting expert, provides opinion evidence that a substantial number of other ballots may have contained forged signatures. Additionally, in light of the testimony of Serge Halberthal at the July 16, 2014 hearing, coupled with the committee report entered into evidence at the hearing, there were substantial irregularities with regard to other ballots, including, among other things, the lack of valid voting certificates. If the challenged ballots were not included in the total, the recall petition would not have succeeded. The Defendants, however, presented no evidence to rebut the Plaintiffs' evidence of irregularities in some of the ballots.

The Court finds that under the instant circumstances, a temporary injunction advances the public interest. See *Depuy Orthopaedics*. The Legislature specifically set forth the procedures for a recall in section 718.112(2)(j), Florida Statutes. This policy of allowing unit owner governance would be undermined if a group of unit owners were allowed to avail themselves of the recall procedures provided by statute to remove members of a Board in a fraudulent or otherwise improper manner.

Finally, the Court is mindful of the concerns of all the parties with respect to the composition of the Board and its ability to make management decisions during the pendency of the

³The Court notes that at the hearing, the Defendants presented evidence regarding overdue bills, maintenance issues, and the illegal divergence of the fire suppression system to fill a swimming pool. However, the Court agrees with the Plaintiffs that these matters are not germane to deciding whether the Plaintiffs are presently entitled to a temporary injunction while their Complaint for a trial de novo, which challenges the propriety of their recall, remains pending.

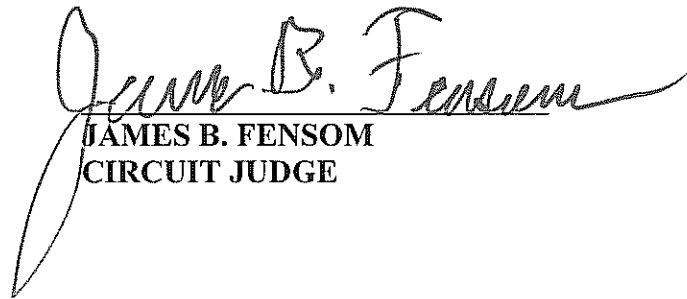
instant action. The Court notes that there are three Board members who were not recalled, while the four named Plaintiffs were subject to the recall that was certified by the arbitrator's Order on June 25, 2014. Accordingly, the Court rejects the arguments advanced in the Defendants' Objection and Motion to Strike, and hereby stays the certification of the recall pending judicial review in the instant case. The Plaintiffs shall remain on the Board until an election can be held in accordance with the Association's bylaws. However, the Court enjoins the Plaintiffs from voting or taking any action as a Board member other than calling and attending board meetings for the purpose of establishing a quorum. Thus, the Board will be able to continue in its function for the Association, with only the three uncontested Board members able to vote. In this way, the status quo will be maintained pending an election, at which time either party may move the Court to lift the stay and dissolve the injunction.

Therefore, it is hereby

ORDERED AND ADJUDGED that the Defendants' Motion to Dissolve Temporary Injunction and the Defendants' Objection and Motion to Strike are hereby **DENIED**. It is further

ORDERED AND ADJUDGED that the Temporary Injunction is **MODIFIED** as follows: The arbitration Order certifying the results of the recall is **STAYED**, pending judicial review. The Plaintiffs shall continue to serve on the Board for the remainder of their terms during the pendency of the instant litigation, but are otherwise **ENJOINED** from voting as Board members except to call Board meetings, and shall only attend Board meetings for the purpose of attaining a quorum.

July **DONE AND ORDERED** in chambers, Bay County, Florida, this 24 day of _____, 2014.


JAMES B. FENSOM
CIRCUIT JUDGE

Copies to: Michael P. Dickey, Esq.
Brian D. Leebrick, Esq.
John Townsend, Esq.