

*Edgewater Isle South Condominium Owners' Association
c/o PML Management Corporation
655 Mariners Island Blvd., Suite 301
San Mateo, CA 94404*

October 30, 2010

Hearing: November 1, 2010, 1:30 p.m.

Superior Court of San Mateo County
Small Claims Division
800 North Humboldt Street
San Mateo, CA 94401

Re: Case Number SCS 122320

Edgewater Isle South Condominium Owners' Association

DEFENDANT'S TRIAL BRIEF

This case is brought by () or "Plaintiff") against the Edgewater Isle South Condominium Owners' Association (the Association"). claims he is entitled to \$2,518 in penalties from the Association as a result of the Association's refusal to take a member vote regarding earthquake insurance and to provide a copy of the Association's earthquake policy has also asked the Court to order the Association to conduct the vote and for the Court to assign a third party to oversee the vote.

For the reasons discussed in this Trial Brief, Plaintiff is not entitled to such amounts because (1) the statutes on which Plaintiff relies do not afford him such relief in Small Claims Court, (2) the Association was in fact *not* asked to take a member vote, (3) the Association did not fail to act on a valid member request to conduct a vote, (4) a member vote is currently in progress, and (5) the Association acted reasonably in providing Plaintiff with a copy of the earthquake insurance policy.

I. BACKGROUND

Association is a California nonprofit mutual benefit corporation formed to provide for management, administration, maintenance, preservation, and architectural control of condominium units and common areas of the Edgewater Isle South condominium project (the "Project") for the benefit of Association members. Members are the owners of units within the Project. is the owner of a unit within the Project and, as such, a member of the Association. There are a total of 100 units in the Project.

Earlier this year, the Association received a document signed by the owners of seven units containing a concept for changing the Bylaws,¹ the effect of which would be to require member approval of Board of Director decisions on maintaining earthquake insurance. (See Exhibit A.) The document did not ask the board to do anything. The Board scheduled a time to meet to discuss whether and how to conduct a vote for such purposes.

¹ "Bylaws" refers to the "Restated Bylaws of Edgewater Isle South Owners' Association" adopted October 21, 1992.

In the meantime, and unbeknownst to the Board, a *non-homeowner* who is on a mission to injure the Association reserved the Association's name when the Association's corporate status was temporarily suspended by the Secretary of State ("SOS"). Its status was suspended because, while certain forms must be filed every two years, the Association's forms had been returned for a minor correction and the Association's status was changed while the forms were being fixed and returned for filing. As a result of the suspension, the Board could take no action or conduct business, including with respect to the document received from these members. The only action the Board could lawfully take was to get the Association's corporate status reinstated. (*Corporations Code* §7140.) As such, the subject matter of the board meeting had to be changed to address the corporate status matter.

In order to reinstate its corporate status, the Association was forced to change its name and amend its Articles of Incorporation ("Articles"). This was accomplished by conducting a vote of the members to adopt the new name and amend the Articles, and by filing further papers with the SOS. By law, votes to amend Articles require a minimum thirty-day balloting period. The ballots were mailed on July 15, 2010 and the deadline to return the ballots was August 14, 2010. The Association opened and tabulated the ballots on August 16, 2010 and the amended Articles were then filed with the SOS. (See Exhibit B.)

The Board then took up the issue of the member document and directed the Association's legal counsel to prepare materials for a member vote on the earthquake insurance bylaw amendment. Those materials were prepared and sent to the members on October 5, 2010 and ballots are due back by November 4th, 2010. Plaintiff filed this action alleging that: (1) the Association received a valid petition requesting a homeowner vote and that the Board did not take steps required of it under the law; (2) that the Association did not timely provide requested documents; and (3) that *Civil Code* section 1363.09 allows penalties for such violations in the amount of up to \$500 per violation; (4) that there were three violations; and (5) that Plaintiff is entitled to be reimbursed \$1,018 for his pro rata share of the earthquake insurance premiums as a result of the vote not being taken. He also requests that the Court order the Association to conduct the vote and for the Court to assign a third party to oversee the vote because the Board lacks credibility.

II. ARGUMENTS

A. Small Claims Court Lacks Jurisdiction Over Plaintiff's Claims

(1) Civil Code section 1363.09 Does Not Permit the Remedy Being Sought

Plaintiff contends that the Association violated the *Civil Code* by refusing to hold a member vote to amend the Bylaws and that *Civil Code* section 1363.09 allows the Small Claims Court to order the Association to pay penalties to Plaintiff. First, Plaintiff never specifies which *Civil Code* statute was violated by the Association. He merely contends that he is entitled to damages under section 1363.09. Since he filed his claim in this Court, we can only assume that he means to say the Association violated subsection (c) of section 1363.09 and, by implication, that the Association violated *Civil Code* section 1363.03. Plaintiff's contention is incorrect. Even *if* the Association violated *Civil Code* section 1363.03 by refusing to conduct the vote (and we contend it did *not*), it is not one of the limited number of claims that may be filed in the Small Claims Court.

With section 1363.03, the legislature introduced new voting *procedural* requirements for *how* members of homeowners associations decide things. Among other things, it requires associations to adopt voting and election rules, requires the use of mailed secret ballots for

certain types of votes, and gives members at least 30 days to return ballots. Section 1363.03 does not require associations to conduct votes, it merely says how certain votes are to be conducted. The issue of taking a member-petitioned vote is governed by the *Corporations Code*. It is only once an association undertakes to conduct a vote on, for example, a bylaw amendment, that section 1363.03's voting procedures and requirements apply.

The Association has not violated the requirements of section 1363.03 but, setting that fact aside for the moment, Plaintiff still cannot bring his claim in this Court. *Civil Code* section 1363.09(c)² describes remedies when an association fails to comply with section 1363.03's provisions for secret balloting elections. With respect to the few types of alleged violations that a Small Claim Court can hear, it reads:

A cause of action under section 1363.03 *with respect to access to association resources by a candidate or member advocating a point of view, the receipt of a ballot by a member, or the counting, tabulation, or reporting of, or access to, ballots for inspection and review after tabulation* may be brought in small claims court if the amount of the demand does not exceed the jurisdiction of that court.

While some section 1363.03 requirements may be enforced in Small Claims Court, all others must be pursued in the Superior Court. As provided above, a member can, under section 1363.09, obtain relief in Small Claims Court for only those claims identified in section 1363.09(c). None of Petitioner's claims are the type identified in section 1363.09(c). This case is not about access to Association resources by a candidate, about the Association conducting a vote in which other members got a ballot but Plaintiff didn't, nor is it about ballot counting issues. As such, section 1363.09 does not afford the type of relief sought by Plaintiff in this Court for failure to hold a vote. The proper court to hear the matters alleged by Plaintiff is the Superior Court, and the Association and its members have the right to a full adjudication of the issues in that Court. Furthermore, nothing in section 1363.09 addresses remedies for failure of the Association to provide a document. That matter is addressed in *Civil Code* section 1365.2(f).

(2) Plaintiff's Remedy Was to Ask the Superior Court to Order the Vote Be Taken

As discussed above, *Civil Code* section 1363.03 is a procedural statute that does not obligate the Association to conduct a vote on member request. *Corporations Code* section 7510 provides that a special meeting of members for any lawful purpose (which can include a vote) may be called by five percent of the members. Upon receipt of such a request, the Association then takes action to provide the members with notice, schedule the meeting, and take other necessary steps following timeframes provided in *Corporations Code* section 7511 and other relevant statutes. When the Association does not comply, the "superior court of the proper county shall summarily order the giving of that notice, after notice to the corporation giving it an opportunity to be heard." (*Corps. Code* §7511(c).) Section 7511(c) further provides:

The court may issue such orders as may be appropriate, including, without limitation, orders designating the time and place of the meeting, the record date for determination of members entitled to vote, and the form of notice.

The "court" referred to above is the Superior Court, not the Small Claims Court. The remedy is equitable relief, not the money damages relief typical of Small Claims Court. As

² A copy of the relevant *Civil Codes* are enclosed as Exhibit C.

such, Plaintiff's remedy was not to sue in Small Claims Court for money but to ask the Superior Court to order that the vote be taken.

B. The Association Did Not Receive a Valid "Petition."

The Association's Bylaws vest in the Board the sole authority for determining if earthquake insurance is necessary to fully protect the interests of the members. (Bylaws §3.3, cf. subsection 3.3.2(f).) The Association has for many years budgeted for and maintained earthquake insurance, as a significant financial protection of its members and to help it rebuild the members' homes in the event of a major earthquake loss. Earthquake insurance premiums are paid using assessments collected from the members by the Association. The Association has virtually no delinquencies in the payment of assessments.

The document signed by seven members (including Plaintiff) is referred to by Plaintiff as "a valid petition requesting a homeowner vote whether to keep earthquake insurance." (See Plaintiff's Claim.) This is a gross mischaracterization of the document. It neither petitions nor formally requests the Board to take a vote of the members. In fact, it does not ask the Board to take any action at all. The "petition" merely discusses a concept for amending the Bylaws and provides that members who sign the document are agreeing among themselves to "have the proposed bylaw amendment placed on the ballot for a vote of the members." (See Ex. A.) Of course, given past events, the Board could surmise what the petitioners sought to achieve through the document. However, it is not reasonable to expect the Board to "fill in the blanks" every time a small group of members chooses to unreasonably petition the Board to take actions. Such requests result in spending the Association's valuable resources and the Board is obligated to consider such costs and likely results in determining how far it will go to read into a document words that aren't on it. It should be pointed out that Plaintiff was part of another small group that just two years ago urged the Board to take a vote on earthquake insurance. Seventy-five members would have needed to vote yes to approve that measure. It came no where near passage.

Members cannot be asked to vote on a *concept*. In order to conduct a proper member vote on a proposed amendment, members must be sent the exact text of what is being proposed. The "petition" only generally describes what Plaintiff's goals would be, yet the issue is of vast complexity and, with millions of dollars of property at risk, goes to the heart of members' financial protection. In order for a vote to be conducted, the Association's legal counsel would have to be engaged to prepare the text of an amendment and to determine its proper placement in the Bylaws and knowledgeably determine whether any other provisions would be affected. It is manifestly apparent that this was not a simple case of receiving the document and then sending it out with a ballot to each member to vote. On all these bases, the Board was well justified in not moving forward with a concept proposal, even if it had been expressed as a request, which it was not.

C. A Member Vote on the Same Issue Taken in 2008 Failed

In 2008, the Board received a similar document from some of the same members. Pursuant to that document, the Board conducted a member vote on whether to amend the CC&Rs to authorize the owners to vote on earthquake insurance. The membership did not support the proposal and the vote failed to garner enough yes votes. In considering whether to move forward with a vote on a proposed Bylaw amendment, the Board considered many factors.

The Association enjoys nearly perfect assessment participation by the members, indicating both a willingness and ability to pay for earthquake insurance premiums through assessments. The condominium project sits virtually atop the San Andreas fault, on soil that is believed might fail and shift dramatically in the event of a large earthquake. In both 2008 and now, it is believed that for most of the members, their condominium units are the single largest investment they have made and the basis for future financial security. Since the 2008 vote was taken, very few units have changed ownership (in 2009, we understand that real estate information shows as few as three or four). There is no suggestion of new, widespread support for member approval of Board decisions on maintaining earthquake insurance or of any change in the members' unwillingness to jeopardize the current insurance and financial protections set in place by the board. These factors support a likelihood that another vote on the same issue is also likely to fail. As such, the Board concluded that taking such a vote was not feasible.

D. The Association Is In the Process of Conducting the Vote

After the Association's corporate status was revived, the Board then examined anew the issue of the document presented to it. After considering various choices, it decided that the best way to show that the membership had not changed its mind was to ask whether the members would in fact support a Bylaw amendment. Although the Board had no reason to believe that the membership is any more interested in approving the issue now than it was two years ago, the Board concluded that it would be less problematic to conduct the vote.

Legal counsel was directed to prepare a Bylaw amendment and voting materials. Those materials were prepared and then mailed to all members on October 5th. (See Exhibit D.) As of today, the Association has received only 51 ballots. The deadline for returning ballots is in three days. Approving this amendment will require at least 67 yes votes. Even if it could be assumed that all 51 ballots were marked "yes" (which they are not), the vote still falls significantly short of the required approval percentage. The insufficient number of ballots received to date only emphasizes the Association's assertion that the membership does not support the proposed changes.

E. Plaintiff's Damages are Speculative

Plaintiff claims that, as a result of the Association failing to conduct the vote, the Association should reimburse him his pro rata share of the earthquake insurance premiums in the amount of \$1,018. These damages are extremely speculative and Plaintiff is not entitled to such relief.

Plaintiff's Claim that he is entitled to be reimbursed for his portion of the premium assumes that the vote to amend the Bylaws will pass. Not only that, but his Claim also assumes a successful outcome in the member vote that would follow - a vote to ascertain whether the members supported the Board's decision to renew the insurance policy. This is a very optimistic outlook since passage of the current vote takes 67 members to vote "yes." This is very unlikely to happen especially given the failure of a near identical vote just two years ago; and, perhaps even more revealing, only 51 ballots have been sent in so far with only a few days left to vote.

The result of a failed vote means the status quo will (at least for the time being) be maintained, the earthquake coverage will remain in place and the premiums paid. As such, Plaintiff cannot show any actual damages and is not entitled to relief based on such speculation.

F. Association Acted Reasonably in Providing the Earthquake Insurance Policy

Plaintiff claims he is entitled to receive an award of \$500 for the Association's failure to timely provide him with a copy of the Association's earthquake insurance policy. Presumably, he makes this claim based on Civil Code section 1365.2(f) which provides:

(f) A member of an association may bring an action to enforce the member's right to inspect and copy the association records. ***If a court finds that the association unreasonably withheld access to the association records, the court shall award the member reasonable costs and expenses, including reasonable attorney's fees, and may assess a civil penalty of up to five hundred dollars (\$500) for the denial of each separate written request.*** A cause of action under this section may be brought in small claims court if the amount of the demand does not exceed the jurisdiction of that court. A prevailing association may recover any costs if the court finds the action to be frivolous, unreasonable, or without foundation.

Plaintiff was provided with a copy of the policy within 24 hours of the Association receiving it from the broker. Upon receiving Plaintiff's request, the Association's broker was contacted by Mr. D'Agostino, the Association's property manager, to request a copy of the policy. The broker informed Mr. D'Agostino that they did not yet have a copy of the policy and it could take several weeks to get a hard copy. Plaintiff was informed that as soon as the Association received the policy, he would get a copy. When the policy arrived, Mr. D'Agostino hand-delivered a copy to Plaintiff at Plaintiff's home so that he would not have to wait for it to arrive in the mail.

This is not "*unreasonably withholding access to association records.*" The Association made attempts to get the policy. The insurer's delay in getting it to the Association was not through any fault of the Association. When it did receive the policy, it was delivered to Plaintiff within 24 hours.

III. CONCLUSION

As discussed above, the statutes on which Plaintiff relies to demand the relief sought do not afford him the right to sue for such relief in the Small Claims Court. His claims should have been filed with the Superior Court. Notwithstanding the jurisdiction issue, Plaintiff's contention that the Association received a valid petition and should have conducted a homeowner vote is not accurate. It in fact did not receive a petition at all and the document does not ask the Board to do anything. The Association acted reasonably with respect to the document received by the members. Admittedly, there were delays owing to the Association's corporate status issue and the Board's conclusion that the vote was not feasible. There were, however, delays owing to the fact that the document received was not a petition at all and did not actually provide a Bylaw amendment to be voted on. Plaintiff's request that this Court order the vote is moot given that a vote is currently being taken.

Plaintiff was provided a copy of the earthquake insurance policy virtually at the Association's earliest opportunity. That the Board caused it to be hand-delivered to Plaintiff's home was going above and beyond the call of duty. The Association was not unreasonable with respect to Plaintiff's request and, as such, he is not entitled to an award of damages regardless of amount.

The Board has not acted unreasonably with respect to these matters. The Board is made up of volunteer members and they took a reasonable and fair approach in the face of some very difficult and challenging issues facing their homeowners association. Plaintiff was not damaged in any way by the Board's actions and is not entitled to the relief sought or the costs of bringing his Claim. As such, the Association asks this Court to find in favor of it and award nothing to Plaintiff.

Sincerely,

EDGEWATER ISLE SOUTH CONDOMINIUM OWNERS' ASSOCIATION

By: James F. Newell Lynn Hahlon
James Newell, *President* Lynn Hahlon, *Vice President*

List of Exhibits

- Exhibit A - Document concerning earthquake insurance bylaw amendment
- Exhibit B - Certificate of Amendment of Articles of Incorporation
- Exhibit C - Relevant Civil Code provisions
- Exhibit D - Proposed Bylaw Amendment and Voting Package