

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR MANATEE COUNTY, FLORIDA
CIVIL DIVISION

CASE NO.: 08 CA 11315

MARY LOU SMITH, an individual, and)
SHARON DENSON, an individual,)
)
Plaintiffs,)
)
vs.)
)
TRAILER ESTATES PARK AND)
RECREATION DISTRICT, an independent)
special taxing district,)
JANET JONES, an individual,)
JOHN VANDERMOLEN, an individual,)
JOSEPH SALERNO, an individual, and)
MARY LOU MCNULTY, an individual,)
)
Defendants.)
_____)

DEPOSITION OF MARK P. BARNEBEY, ESQ.

TAKEN BY: Plaintiffs Herein
DATE: Friday, April 17, 2009
TIME: Commencing at 10:14 a.m.
PLACE: Kirk Pinkerton, P.A.
1301 Sixth Avenue West, Suite 401
Bradenton, Florida 34205
REPORTED BY: Laura S. Eder, RMR
Notary Public
State of Florida at Large

1 were looking to have approved at the special meeting?

2 A. No.

3 Q. You didn't have any knowledge of that, or they
4 did or did not have someone selected to replace him?

5 A. I have no knowledge that they had anyone
6 selected to fill that spot.

7 Q. Okay.

8 MR. HENNESSY: Let's go ahead and have this
9 marked as Exhibit 4 to the deposition.

10 (Exhibit Number 4 marked for identification.)

11 MR. SHULTS: What I have is an eight-page
12 document.

13 MR. HENNESSY: Really?

14 MS. COWAN: Because they attached this. I
15 mean, those are duplicate pages. They were the
16 last two pages of the e-mail.

17 MR. HENNESSY: You can tear off the last two
18 pages, which seem to be just cover e-mails. So
19 everyone should just have a six-page document,
20 similar to my six-page document, a cover e-mail
21 with a -- then the second page being a memo from
22 John Vander Molen, and a mediated settlement
23 agreement attached to that.

24 BY MR. HENNESSY:

25 Q. Is that what is in front of you, Mr. Barnebey?

1 A. Yes.

2 Q. Do you recall receiving this e-mail?

3 A. No.

4 Q. Do you know who Daniella Latkovich is?

5 A. She was my secretary.

6 Q. All right. Do you know who

7 bsmith426@tampabay.rr.com is?

8 A. I believe that's Bruce Smith.

9 Q. And who was Bruce Smith?

10 A. He was a trustee for Trailer Estates Park and
11 Recreation District.

12 Q. Do you know why Mr. Smith was receiving a copy
13 of the mediated settlement agreement from your
14 assistant?

15 A. I believe he requested it.

16 Q. Do you recall -- you were present for the
17 deposition of Mr. Vander Molen yesterday?

18 A. Yes, most of it.

19 Q. Okay. Were you present during the discussion
20 that was -- he had with regard to the mediated
21 settlement agreement?

22 A. No.

23 Q. Oh, okay. Do you recall Mr. Vander Molen --
24 or you providing Mr. Vander Molen with advice concerning
25 the need to release a mediated settlement agreement to

1 other board members since the document was a public
2 record?

3 A. Yes.

4 Q. Did you provide a fax to him and to the board
5 with that opinion?

6 A. I don't recall.

7 Q. Okay. Did you have any involvement in
8 preparing the memo from Mr. Vander Molen to the Trailer
9 Estates trustees that is page 4?

10 A. No.

11 Q. Exhibit 4?

12 A. No.

13 Q. Did you have any part in preparing the
14 mediated settlement agreement that's attached to
15 Exhibit 4?

16 A. No. That matter was handled by the prior
17 counsel to the District.

18 Q. Okay. Who was that?

19 A. I believe that was Mr. -- Mr. Gaskill. I
20 believe he's with Mr. Gill's firm.

21 Q. Did you have any involvement in approving the
22 mediated settlement agreement?

23 A. No, other than I was at the board meeting when
24 it was approved by the board.

25 Q. Okay. Did you see Mr. Vander Molen's memo at

1 that time?

2 A. At that time?

3 Q. Yes, sir, or prior to that time.

4 A. I don't recall.

5 Q. When it was considered by the board, was it
6 considered in a public meeting or an executive session
7 or shade session of the board?

8 A. Public meeting.

9 Q. And did you provide any advice to the District
10 with regard to the -- well, prior to it being considered
11 at the board meeting for approval, had you provided any
12 advice to the board concerning the process for
13 considering a settlement?

14 A. I had informed them that it needed to be done
15 at a public meeting, and that the documents were public
16 record.

17 Q. Okay. Now, Mr. Vander Molen discussed
18 yesterday that he was also of the understanding that it
19 was not appropriate for him to make any recommendations
20 to the board concerning approval or rejection of the
21 settlement proposal --

22 MR. SHULTS: Object to form.

23 MR. CARROLL: Form.

24 BY MR. HENNESSY:

25 Q. -- prior to the public meeting. Were you

1 **present for that statement?**

2 A. No.

3 MR. SHULTS: Object to form.

4 MR. CARROLL: Form.

5 A. No.

6 BY MR. HENNESSY:

7 **Q. Did you provide Mr. Vander Molen any advice**
8 **concerning that restriction on his duties, I guess, as**
9 **the District representative at the settlement or**
10 **mediation?**

11 MR. SHULTS: I'll object to form. I'll also
12 invoke the attorney-client privilege unless that
13 advice was provided in a public forum or contained
14 in a public document.

15 A. I don't recall that discussion one way or the
16 other.

17 BY MR. HENNESSY:

18 **Q. Well, have you advised the board or the board**
19 **members in any public setting that in their written**
20 **communications to one another, it is not -- it would be**
21 **a violation for them to advocate their positions?**

22 MR. CARROLL: Object to form.

23 MR. SHULTS: And I'll object to form, too.

24 A. I don't recall if I have or not asked that
25 specific question.

1 BY MR. HENNESSY:

2 Q. Is it your understanding, though, that the --
3 that public officials, such as the trustees, are not --
4 it would be a violation of the Sunshine for them to
5 communicate in written form to each other advocating
6 their position on an issue that would be coming before
7 the board?

8 MR. CARROLL: Object to form.

9 MR. SHULTS: We are -- I'll object to the form
10 of that question and also invoke the
11 attorney-client privilege, because you're getting
12 into his thought process now as attorney for the
13 District, what his thought process is concerning
14 the law.

15 In addition to that, he is a fact witness.
16 He's not an expert witness, nor have you
17 noticed him as an expert witness, and he
18 couldn't be an expert and testify to you on
19 that subject because it would be privileged
20 anyway.

21 So he will decline to answer that
22 question.

23 MR. HENNESSY: So you're instructing him not
24 to answer?

25 MR. SHULTS: We're invoking the

1 attorney-client privilege.

2 BY MR. HENNESSY:

3 **Q. Are you accepting advice of counsel?**

4 A. I'm accepting advice of counsel, yes, I am.

5 **Q. All right.**

6 MR. HENNESSY: Go ahead and have this marked
7 Exhibit 5.

8 (Exhibit Number 5 marked for identification.)

9 MR. SHULTS: Before we go any further, it's my
10 understanding Mr. Barnebey needs to be someplace at
11 noon. Is that still the case?

12 THE WITNESS: Yes.

13 MR. SHULTS: So that's -- we're going to have
14 to stop at shortly before noon.

15 MR. HENNESSY: Okay. I was not aware of that.

16 MR. SHULTS: It's now ten minutes after 11:00,
17 approximately.

18 BY MR. HENNESSY:

19 **Q. Okay. You have in front of you what's been**
20 **marked Exhibit 5, a memo from Scott Rudacille, through**
21 **you, to a Mr. Bernie Dent. Do you recognize Exhibit 5?**

22 A. Yes.

23 **Q. Have you seen it before?**

24 A. Yes.

25 **Q. Mr. Rudacille's an attorney with your firm?**

1 the memorandum before it went to Trailer Estates Board
2 of Trustees?

3 A. It constituted my review of the memo.

4 Q. Okay. Well, is it correct that upon your
5 signing this document, it was forwarded to the Trailer
6 Estates Board of Trustees?

7 A. Yes.

8 Q. It's got a -- some handwriting on it that says
9 "copy to trustees." Is that your handwriting?

10 A. No.

11 Q. Do you know whose handwriting it is?

12 A. No.

13 Q. The first sentence of this memorandum says,
14 "It has recently come to our attention that the
15 Architectural Review Committee has been approving permit
16 applications from compliance with the Deed Restrictions
17 by review of a single member of the committee." Do you
18 see that?

19 A. Yes.

20 Q. How did that information come to your
21 attention?

22 A. John Vander Molen told me.

23 Q. Okay. Upon learning that information, was
24 it -- did you see that as a violation of the Sunshine
25 Law?

1 MR. SHULTS: I'm going to object to that to
2 the extent it's asking him for information that's
3 not contained in this -- in this document or in
4 another document or not conveyed publicly to the
5 board.

6 A. I viewed it as a violation of their deed
7 restrictions.

8 BY MR. HENNESSY:

9 Q. Have you -- in previous memos that we've
10 looked at, you advised the board that committee meetings
11 are a delegated action of the board and must be held in
12 public; is that correct?

13 A. Yes.

14 Q. And that they need to follow the obligations
15 of public meetings by being publicly noticed and having
16 minutes taken?

17 A. Yes.

18 Q. Okay. Did you investigate whether the
19 meetings with the architectural review committee --
20 well, let me step back.

21 Would the architectural review committee
22 be one of those committees that would need to
23 have -- be followed -- follow the public meeting
24 guidelines that we've just discussed?

25 A. I believe so.

1 Q. Okay. Did it come to your attention that the
2 architectural review committee, in performing their
3 duties through the actions of a single member of the
4 committee, were not being done in conformance with a
5 public meeting, that public meeting criteria?

6 A. I didn't reach that conclusion. Didn't need
7 to.

8 Q. Okay. Were you -- you didn't need to. And
9 why is that?

10 A. Because that was a violation of their deed
11 restrictions. It wasn't allowed under that.

12 Q. So you did not inquire as to whether or not
13 the ARC committee meetings had been publicly noticed?

14 A. No, not specifically.

15 Q. And did you not inquire as to whether the ARC
16 committee meetings had been -- whether minutes had been
17 taken at those meetings?

18 A. No, not in regard to this issue.

19 Q. But the actions of the single individual
20 acting in the fashion described in this memo would
21 require conformance with those public meeting
22 requirements?

23 A. I haven't made a conclusion on that.

24 Q. Okay. It was your recommendation that that
25 action cease though?

1 A. Yes.

2 Q. And, in fact, you've indicated in this memo,
3 "Because the ARC is appointed by the board and is
4 theoretically exercising the power of the board, the ARC
5 must meet in noticed public meetings"?

6 A. Yes.

7 Q. There's also a discussion of an issue of the
8 fact that there was a trustee on the ARC as well as a
9 trustee liaison for that committee.

10 A. Yes.

11 Q. Did that raise a concern for you that you
12 advised the board on?

13 A. Yes.

14 Q. And what was that concern?

15 A. The concern was that if there were matters
16 that possibly could come up during the ARC that
17 reasonably were foreseeable or would be something that
18 could be discussed by the Board of Trustees, that those
19 matters needed to be in a Sunshine meeting.

20 Q. Okay. To your knowledge, are there matters
21 that could come before the ARC committee that could end
22 up in front of the Board of Trustees?

23 A. I don't know.

24 Q. Okay. Have you been present in any board
25 meetings -- do you attend the trustees' meetings?

1 A. Sometimes. Not often lately.

2 **Q. Okay. At those trustee meetings, have there**
3 **been discussions concerning the ARC committee?**

4 A. Occasionally.

5 **Q. Okay. So certainly the prospect of matters**
6 **that occur before the ARC committee, there is the**
7 **prospect those matters could come before the board?**

8 MR. GILL: Objection. That's not what he
9 said.

10 MR. SHULTS: Object to form.

11 MR. CARROLL: Join.

12 A. I don't recall any discussion of matters that
13 would be for board action. The discussions in front of
14 the board, to my recollection, have all been informative
15 matters.

16 MR. HENNESSY: Let's have this marked
17 Exhibit 8.

18 (Exhibit Number 8 marked for identification.)

19 BY MR. HENNESSY:

20 **Q. Mr. Barnebey, Exhibit 8 is a memorandum from**
21 **you to the Trailer Estates Board?**

22 A. Uh-huh.

23 **Q. Do you recognize this document?**

24 A. Yes.

25 **Q. Did you prepare it?**

Mark Barnebey

From: Daniella Latkovich
Sent: Friday, June 01, 2007 3:27 PM
To: 'bsmith426@tampabay.rr.com'
Cc: Mark Barnebey
Subject: Trailer Estates
Attachments: Mediated Settlement Agreement.pdf

Dear Mr. Smith:

Attached is the Mediated Settlement Agreement for your review.

Lera Castleman for Daniella Latkovich


Daniella L. Latkovich

*Legal Secretary to Mark P. Barnebey, Esq.
Kirk Pinkerton, P.A.
1301 6th Avenue West
Suite 401
Bradenton, Florida 34205
Tel: (941)-364-2493
Fax: (941)-744-9691
Email: dlatkovich@kirkpinkerton.com*

1/8/2009

EXHIBIT

4 Barnebey/E
4-17-09

TO: Trailer Estates Trustees
FROM: John C. Vander Molen 
SUBJECT: McNeil Fence Case of 6626 New Jersey, Mediated Settlement Agreement
DATE: June 4, 2007

Attached find a copy of the results of the confidential and privileged court ordered mediation session conducted by Mr. Edwin L. Ford, P.A. an Attorney at Law and a Certified Mediator on May 24, 2007. I was in attendance along with Mr. Gaskill our attorney, and Mr. and Mrs. McNeil and their attorney.

In my own terms this is what I understand the agreement contains.

1. This agreement is subject to approval by Board of Trustee Agreement which is anticipated by June 4, 2007 or as soon thereafter as possible and the parties will stipulate to the dismissal of this action, with prejudice (usually considered an adjudication upon the merits and will act as a bar to future action).
2. Mr. McNeil must move the fence in question on the south side of his property outside the four-foot setback no later than September 30, 2007.
3. Each party will bear its own costs and fees.
4. This is a court enforceable agreement.
5. If Mr. McNeil fails to move the fence as stated he would be subject to payments of all of our fees and costs to enforce the above action plus pay to us the sum of \$10,000 in attorney fees and costs that we have already incurred.
6. The agreement becomes a valid and binding agreement under the laws of the State of Florida.
7. If this agreement is not accepted by the Board the agreement will be null and void *ab initio*. (We go back to square one and none of this agreement can be or will be used in the future action).
8. We would then anticipate going to trial on or about September 19, 2007.
9. Our attorney estimated that our legal fees could approach \$25,000 if we go to trial.

Based on the agreement, I was assured that this settlement reconfirms the fact that the Board had the power to enforce deed restrictions and must continue to enforce the restrictions as written without exception. It was said that failure to do so could result in the Board being accused of "selective enforcement" and perhaps lose the ability to enforce restrictions. It was noted that Homeowner Associations and Governing Boards rarely if ever succeed in collection of attorney fees, as it is "just the cost of doing business". However, as written in this agreement is would be "court ordered" that we collect fees and costs if Mr. McNeil fails to move the fence as stipulated. I believe this agreement will achieve our major goal of:

MOVING THE FENCE.

Therefore, I strongly recommend that the Board of Trustees vote to accept this agreement.

Enclosure: McNeil Mediated Settlement Agreement

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR MANATEE COUNTY, FLORIDA, CIVIL DIVISION

TRAILER ESTATES PARK &
RECREATION DISTRICT,

Plaintiff,

vs.

CASE NO.: 2006-CA-1678

ROBERT W. McNEIL and
BARBARA M. McNEIL,

Defendants.

MEDIATED SETTLEMENT AGREEMENT

May 24, 2007

Having engaged in a confidential and privileged mediation conference on the above-referenced date, the parties hereto agree as follows:

1. **TERMS OF SETTLEMENT.** As consideration for this Mediated Settlement Agreement and conditioned upon approval of this Mediated Settlement Agreement by the Board of Trustees of Plaintiff, Defendants will, by no later than September 30, 2007, move the fence presently situated on the south side of Defendants' property so that it is situated outside the four foot setback. The parties stipulate that, as of the date of this Mediated Settlement Agreement, the only known encroachment into the applicable setbacks on the Defendants' property is the fence on the south side of Defendants' property.

Within ten (10) days of the date of approval of this Mediated Settlement Agreement by the Board of Trustees of Plaintiff which said approval is anticipated by June 4, 2007 or as soon thereafter as possible, the parties will stipulate to the dismissal of this action, with prejudice, each

party to bear its own costs and fees and the court will be requested to retain jurisdiction of this matter solely for the purpose of enforcing the terms of this Mediated Settlement Agreement.

In the event that the Board of Trustees declines to approve this Mediated Settlement Agreement, then this Mediated Settlement Agreement will be null and void *ab initio*.

2. **ENFORCEMENT/PREVAILING PARTY FEES.** In the event that any party hereto seeks to enforce this Mediated Settlement Agreement in a court of law or equity, the prevailing party shall be entitled to recover from the non-prevailing party its reasonable attorneys' fees and court costs, including paralegal fees, incurred in enforcing this Mediated Settlement Agreement through all appeals. If, in any such enforcement action, Plaintiff is deemed to be the prevailing party, then Plaintiff will also be entitled to collect from Defendants the sum of \$10,000.00 in attorneys fees and costs which Plaintiff has expended as of the date of this Mediated Settlement Agreement in addition to any award of attorneys fees and costs for enforcing this Mediated Settlement Agreement.

3. **COMPLETE AGREEMENT.** This Mediated Settlement Agreement represents the full and complete agreement of the parties hereto relative to the matters addressed herein and may not be modified or altered except by an instrument in writing signed by all parties hereto.

4. **FURTHER ACTION/COOPERATION.** The parties hereto and their legal counsel agree to cooperate with one another and to assist one another to effectuate the intention of this Mediated Settlement Agreement particularly with regard to the prompt preparation of all reasonably necessary instruments and documents.

5. **BINDING AGREEMENT.** This Mediated Settlement Agreement is

intended to be a valid and binding agreement under the laws of the State of Florida, effective upon its execution despite the need for any further documentation. By executing this Mediated Settlement Agreement, each party hereto acknowledges that they have read and understand this Mediated Settlement Agreement; that they have freely and voluntarily entered into this Mediated Settlement Agreement; and, that they have been represented in this matter by legal counsel of their own selection or have voluntarily declined said representation.

6. **NO ADMISSIONS.** By executing this Mediated Settlement Agreement, the parties hereto expressly deny liability and acknowledge that this Mediated Settlement Agreement constitutes a good faith compromise of disputed claims and termination of the controversies which have given rise to this Mediated Settlement Agreement.

7. **MISCELLANEOUS.** This Mediated Settlement Agreement shall be interpreted and governed by Florida law. No provision of this Mediated Settlement Agreement shall be construed against a party because of draftsmanship of such provision. Headings herein are for convenience of reference only and shall not effect the interpretation hereof. Genders shall be interchangeable as the context so requires.

8. **COUNTERPARTS/FACSIMILE SIGNATURES.** This Mediated Settlement Agreement may be executed in any number of counterparts, each of which shall be deemed an original, but all of which together shall constitute a single instrument. Facsimile signatures shall suffice to bind the parties.

9. **MEDIATION FEE.** Mediation fees shall be divided equally between Plaintiff (50%) and Defendant (50%).

TRAILER ESTATES PARK &
RECREATION DISTRICT

By: John Vander Molen
John Vander Molen, authorized
representative of the Board of
Trustees

Jason T. Gaskill
Jason T. Gaskill, Esquire
Attorney for Plaintiff

Robert W. McNeil
Robert W. McNeil

Barbara M. McNeil
Barbara M. McNeil

James J. Spanolios
James J. Spanolios, Esquire
Attorney for Defendants

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