



DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

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OFFICE OF ADMINISTRATIVE HEARINGS
CONDOMINIUM MANAGEMENT DISPUTE RESOLUTION
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
STATE OF HAWAII

HEARINGS OFFICE

In the Matter of)	CMDR 0910-1
)	
ALAN and HELENE MOSKOWITZ,)	HEARINGS OFFICER'S FINDINGS
)	OF FACT, CONCLUSIONS OF
Petitioner,)	LAW AND DECISION GRANTING
)	RESPONDENT'S MOTION TO
vs.)	DISMISS
)	
KAANAPALI ROYAL BOARD OF)	
DIRECTORS,)	
)	
Respondents.)	
)	

HEARINGS OFFICER'S FINDINGS OF FACT,
CONCLUSIONS OF LAW AND DECISION
GRANTING RESPONDENT'S MOTION TO DISMISS

I. INTRODUCTION

On October 13, 2009, Alan and Helene Moskowitz ("Petitioners") filed a request for administrative hearing to resolve a condominium management dispute pursuant to Hawaii Revised Statutes ("HRS") Chapter 514B. The matter was set for hearing and the Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

The pre-hearing conference on November 16, 2009 was attended by Petitioner Alan Moskowitz and Respondent was represented by Michael G. Kozak, Esq. The parties agreed to postpone the hearing set for December 11, 2009 to February 11, 2010. Respondent indicated that a Motion to Dismiss ("Motion") will be filed, and the parties agreed to have the hearing on the Motion on January 13, 2010 at 9:00 a.m. by telephone conference and that Petitioner would initiate the telephone call to the Office of Administrative Hearings.

On December 22, 2009, Respondent filed its Motion. On January 4, 2010, Petitioners filed their opposition to the Motion. On January 11, 2010, Respondent filed its reply to Petitioners' opposition.

On January 13, 2010, the hearing on the Motion was convened by the undersigned Hearings Officer at 9:16 a.m. Respondent was represented by Mr. Kozak. Petitioners did not appear either in person or through legal counsel, but because the record reflected that Petitioners had actual notice of the hearing, the hearing proceeded as scheduled. After hearing argument from Mr. Kozak, the matter was taken under advisement.

Having reviewed and considered the evidence and arguments presented, together with the entire record of this proceeding, including Petitioners' written opposition to the Motion, the Hearings Officer hereby renders the following findings of fact, conclusions of law and decision.

II. FINDINGS OF FACT

1. By a letter dated September 1, 2009, Respondent was notified by Mediation Services of Maui ("MSM") that Petitioners had contacted their office to invite the Board to a mediation session to "discuss issues surrounding the enclosure of lanais. Exactly who will participate and the exact topics to be discussed will be determined after further discussion with both parties."

2. The letter from the MSM further requests Respondent to contact their office at 244-5744 by Thursday, September 17, 2009 for more information and to let MSM know if the Board would like to participate in the mediation session.

3. Matthew J. Kinney, Respondent's President, received MSM's letter on September 8, 2009. Mr. Kinney called MSM on September 14, 2009 and September 17, 2009 and was unable to speak to anyone at MSM so he left a voicemail message both times. MSM confirmed to Petitioners that Mr. Kinney did leave a voicemail message on September 14, 2009.

4. MSM and Mr. Kinney did not speak to each other regarding this matter. However, on September 17 or 18, 2009, MSM told Petitioners that Respondent never contacted them and so it did not appear that a mediation would take place and that Petitioners' next step would be to file a request for hearing with the Office of Administrative Hearings, Department of Commerce and Consumer Affairs ("OAH").

5. By a letter dated September 22, 2009, to MSM, Mr. Kinney stated that he left two voice messages with them and was writing to advise MSM that Respondent was not declining to participate in mediation, but wanted additional information to make an informed decision.

6. On September 24, 2009, MSM left a voice message for Mr. Kinney stating that Petitioners' mediation request was dismissed because Petitioners had filed a request for hearing with OAH.

7. OAH received Petitioners' request for hearing dated October 7, 2009 on October 13, 2009. In the request for hearing, Petitioners identify the nature of the dispute as:

Incursion issue by some Condo owners, resulting in Legal expenses and other costs being assessed too ALL owners, rather than those owners responsible for the incursion. See: Article III, Section 10, Paragraph 4 of By-Laws.

8. On November 9, 2009, MSM case manager Cheri Nashiwa informed Respondent's counsel that MSM representatives spoke with Petitioners and based on communications with Petitioners only, determined that mediation would be inappropriate because Petitioners did not trust Respondent and the cost of mediation was being paid by the Real Estate Commission. On that basis, MSM made the unilateral decision to dismiss Petitioners' request for mediation with Respondent.

III. CONCLUSIONS OF LAW

The issue to be resolved is whether the OAH has jurisdiction to hear this matter. Hawai'i Revised Statutes ("HRS") § 514B-161(e) provides:

§ 514B-161 Mediation; condominium management dispute resolution; request for hearing.

...

(e) If a dispute is not resolved by mediation as provided in subsection (a), including for the reason that a unit owner or the board of directors refuses to participate in the mediation of a particular dispute, any party to that proposed or terminated mediation may file a request for hearing with the office of administrative hearings of the department of commerce and consumer affairs as follows:

...

Based on the evidence presented in this case, the Hearings Officer finds that Petitioners' actions, which influenced MSM to terminate the mediation, precludes them from filing a request for hearing pursuant to HRS § 514B-161(e). Although the statute allows requests for hearing to be filed when a party "refuses" to participate in the mediation, it cannot be interpreted to allow the party that initiated the mediation to subsequently refuse to mediate and then avail themselves of HRS § 514B-161(e) and file a request for hearing with OAH. Accordingly, the Hearings Officer concludes that the requirements for filing a request for hearing with OAH have not been met and OAH lacks jurisdiction to hear this case.

Having determined that the OAH lacks jurisdiction to hear this matter, it is unnecessary to consider Respondent's alternative request to limit the issues to the issues identified in Petitioners' demand for mediation.

IV. DECISION

Based on the foregoing considerations, the Motion is granted and the Hearings Officer orders that the Petition be and hereby is dismissed. Accordingly, the hearing set for February 11, 2010 has been taken off the calendar.

DATED: Honolulu, Hawaii, _____ JAN 20 2010

/s/ SHERYL LEE A. NAGATA
SHERYL LEE A. NAGATA
Administrative Hearings Officer
Department of Commerce
and Consumer Affairs