State of New Hampshire
Supreme Court

NO. 2014-0777

2015 TERM

JUNE SESSION

East Industrial Park Condominium Association

v.

Charles Blais

RULE 7 APPEAL OF FINAL DECISION OF THE MANCHESTER DISTRICT COURT

BRIEF OF DEFENDANT/APPELLEE, CHARLES BLAIS

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STATEMENT OF FACTS

I. Machinist in a Commercial Condominium

Charles Blais is a machinist, making things out of plastics and metals, using molds and machinery, since 1965. *Trn*. at 30. He has been the owner of a commercial condominium unit in Manchester, New Hampshire, since 1997. *Trn.* at 30, 45.

The commercial condominium is organized under New Hampshire's condominium act, RSA 356-B, and run by its association, the East Industrial Park Condominium Association (EIPCA). The Association contracts with Colliers International to administer its billing and collections. BYLAWS (Pltf. Exh. 2), art. I, § 5, *EIPCA Appx*. at 39; *Trn.* at 10.

Pursuant to its bylaws authority, the Association holds an annual meeting, at which by vote of the owners it establishes a monthly assessment by estimating the coming year's budget and dividing by the number of owners. BYLAWS, art. VI, § 2 ("Common Expenses and Owner Assessments"); *Trn*. at 15-16. During the course of matters here, the monthly assessments were from $125 to $135 per month. *Trn*. at 46. There were also occasional special assessments and capital improvement assessments similarly established. BYLAWS, art. VI, § 3; BYLAWS art. IV, § 8; *Trn*. at 51. Colliers International's accounting department annually sends owners a "coupon book" showing the monthly assessment to aid in its payment: "A coupon book like a little bank book, … you can rip out a little piece and it says, January, X amount due, and they can submit that with their check if they'd like." *Trn.* at 15-16, 58-59.

The Bylaws provide that owners "shall be obligated to pay the assessment or special assessment … in equal monthly installments," and specifies the due date is "on or before the first day of each month." BYLAWS, art. VI, § 4. For late payments, the Bylaws specify that interest will be added "at the rate of twelve percent … per annum," BYLAWS, art. VI, § 6, and that a fine will be levied at the rate of $25 per day. BYLAWS, art. XI, § 2.

II. Charles Blais Concedes He Owes Condo Assessments

Mr. Blais understands he owes all monthly assessments, all special assessments, and all capital improvement assessments. He also accepts that, in the event he pays late, he owes all interest and fines calculated on tardy payment of them. *Trn*. at 37, 46-47, 52; ORDER (Oct. 1, 2014), *EIPCA Appx*. at 25 & *Addendum to Blais Brf.* at 20; PLAINTIFF'S MOTION FOR RECONSIDERATION (Oct. 9, 2014), ¶¶ 27, 29-30, *EIPCA Appx*. at 26.

Mr. Blais readily makes this concession for a variety of reasons. First, the assessments, the interest, and the fines are specified in the Bylaws, which he has studied. *Trn*. at 52, 57, 66-67. Second, as a condominium owner he understands he has a common obligation. *Trn*. at 32, 60. Third, he knows the association has expenses, and it is his duty to contribute his share. *Trn.* at 45-46. Fourth, he appreciates that the purposes of the assessments are laudable and that the board's expenditures are in the welfare of his condo community. *Trn*. at 15, 45-46, 53-54. Mr. Blais realizes the coupon books are merely a convenience and not relevant to his obligation to pay. *Trn*. at 58-59.

Mr. Blais also recognizes, *Trn*. at 52-53, that for late- or non-payment, the Bylaws give the Association authority to record a lien, sue an owner, and recover collection costs:

> Each monthly assessment … and each special assessment, shall be a separate, distinct, and personal debt and obligation of the [o]wner against whom it has been assessed, and shall be collectible as such. Lawsuits to recover money judgments for unpaid … assessments shall be maintainable without foreclosure or waiving the lien securing the same. The amount of any … assessment … which is not paid on its … due date, plus interest … as well as costs of collection including reasonable attorney's fees, shall constitute a lien upon such [o]wner's [u]nit. … [T]he [o]wner shall be liable for the payment of interest on each … assessment from the date of any default, and shall be liable for any costs of collection.

BYLAWS, art. VI, § 6.

III. Lump Sum Record of Payments

Mr. Blais admits he has "a terrible system of accounting." For this reason, from time to time he counts the months, multiplies by the monthly assessment, and pays what he thinks he owes. Thus, rather than small monthly installments, Mr. Blais's record of payments shows large irregular "lump sums," as shown in the accompanying Table of Payments During Entire Period.[1] *Trn*. at 61-62; TENANT LEDGER (Pltf. Exh. 1) (Sept. 24, 2014), *Addendum to Blais Brf*. at 21.

Table of Payments During Entire Period

Dates of Payments	Amounts Paid
June 23, 2008	$3,872
June 4, 2009	$2,700
March 22, 2010	$2,273
December 3, 2010	$1,700
January 20, 2012	$2,000
January 21, 2013	$3,000
December 11, 2013	$2,000
TOTAL	**$17,545**

Although it was his intention to pay forward and not be late, *Trn*. at 62, Mr. Blais is aware he has sometimes been dilatory in payment, ORDER (Oct. 1, 2014), is contrite about it, and "believe[s] that, yeah, maybe I should have done something about this sooner." *Trn.* at 37.

IV. Charles Blais Does Not Owe Charges for Which He Received No Notice

The charges Mr. Blais objects to are legal fees and the interest on them, because he got no notice of their imposition. *Trn*. at 51-52, 62; ORDER (Oct. 1, 2014); PLAINTIFF'S MOTION FOR RECONSIDERATION, ¶¶ 27, 29-30.

The Bylaws provide that:

> All notices mailed pursuant to the provisions of the Declaration, these Bylaws, or the Condominium Rules when directed to any Owner shall be sent by registered or certified mail to the last known address of such Owner on the records of the Association.

BYLAWS, art. XII, § 2(b).

[1]The dates and dollars in all three tables presented herein are either taken *verbatim* from or calculated from the Association's Tenant Ledger exhibit. TENANT LEDGER (Pltf. Exh. 1) (Sept. 24, 2014), *Addendum to Blais Brf*. at 21. For simplicity, all amounts are rounded to the nearest whole dollar.

Mr. Blais asserts that, with rare exception not relevant here,[2] he has never received anything from the Association by registered or certified mail. *Trn*. at 30, 57. The Association concedes that its correspondence to owners has been by standard first-class mail, that it never used registered or certified mail, that this was an oversight, and that for at least the 11 years with which its witness was familiar, it has violated the Bylaws in this regard. *Trn.* at 20-23, 27.

Among the things for which Mr. Blais did not get registered- or certified-mail notice were monthly statements of his account balance, apprisals of attorney's fees levied against him, and other things unknown to Mr. Blais. *Trn.* at 22, 33, 54.

Nonetheless, non-noticed attorney's fees were assessed against Mr. Blais and added to his account 27 times (during the period covered by this lawsuit), totaling $5,568. TENANT LEDGER, *Addendum to Blais Brf*. at 22-26. Similarly, late fees and interest on those attorney's fees accrued 47 times and totaled $1,016. *Id.*

V. Not Including Non-Noticed Attorney's Fees, Charles Blais *Overpaid*

Equally important as the magnitude of these non-noticed bounties was the way in which they were calculated over time, and the way in which the Association applied Mr. Blais's irregular lump-sum payments to his outstanding charges.

As an example, attention is drawn to the period after the March 22, 2010 payment referenced in the chart above, through the December 3, 2010 payment also referenced.[3] This is shown in the accompanying Tenant Ledger of Example Period, March 2010 - December 2010.

According to the Association's Tenant Ledger, at the beginning of that period, Mr. Blais's account had a balance of $332 in the Association's favor. After the very next payment,

[2]Because the record does not focus on the matter it is unclear, but testimony suggests the only registered mail Mr. Blais received was from the Association's lawyer regarding this suit or during its pendency. *Trn*. at 30, 57.

[3]This period was chosen as the example period because it is the shortest period between Mr. Blais's payments, and thus more convenient to list in the accompanying chart than the longer periods.

of $1,700 on December 3, Mr. Blais's alleged arrears more than doubled to $699.

In that period, in addition to the nine condo fees that would be expected, Mr. Blais was charged five late fees, and one "finance charge." He was also charged three legal fees.

In that same period, the sum of those nine $125 condo fees was $1,125. The sum of the five $25 late fees, together with the one finance charge was $141. The sum of the three legal fees was $801.

In December 2010, at the end of the example period, Mr. Blais made his $1,700 payment.

The nine condo fees, five late fees, and the one finance charge total $1,266. In the same period, Mr. Blais paid $434 *more* than that, meaning that without legal fees, he *overpaid* by $434.

Tenant Ledger of Example Period, March 2010 – December 2010

Date	Description	Charges	Payment	Balance
03/22/10	Prior Balance			$332
04/01/10	Condo fee	$125		$457
05/01/10	Condo fee	$125		$582
05/12/10	*Late fee*	*$25*		$607
06/01/10	Condo fee	$125		$732
06/11/10	*Late fee*	*$25*		$757
07/01/10	Condo fee	$125		$882
07/06/10	**LEGAL FEE**	**$121**		$1,003
08/01/10	Condo fee	$125		$1,128
08/10/10	*Late fee*	*$25*		$1,153
08/16/10	**LEGAL FEE**	**$175**		$1,328
09/01/10	Condo fee	$125		$1,453
09/14/10	*Late fee*	*$25*		$1,478
10/01/10	Condo fee	$125		$1,603
10/08/10	*Finance charge*	*$16*		$1,619
10/13/10	*Late fee*	*$25*		$1,644
11/01/10	Condo fee	$125		$1,769
12/01/10	Condo fee	$125		$1,894
12/03/10	**LEGAL FEE**	**$505**		$2,399
12/03/10	Payment		$1,700	$699

Even assuming the starting balance against Mr. Blais of $332, at the end of the period excluding legal fees, he should have been *ahead* by $102 (*i.e.*, $434 - $332 = $102). Instead, because the unnoticed $801 in legal fees, he was as noted, further behind, in the amount of $699,

thus triggering another round of late fees and interest in the subsequent period.

Moreover, this example overstates the late fees and interest for which Mr. Blais is liable, because the starting balance, $332 in the Association's favor, is based on the previous period when legal fees were, as in the example-period, also non-noticed and therefore improperly counted.

This pattern repeats itself for each payment period reflected in the Association's Tenant Ledger.

During the six-year period covered in this lawsuit, condo assessments, late fees, and interest total $12,417, as shown in the accompanying Table of Total Charges During Entire Period; whereas Mr. Blais paid a total of $17,545. As with the example-period, during the period of this suit, Mr. Blais *overpaid*, in the amount of $5,128. *Trn.* at 31.

Table of Total Charges During Entire Period

Type of Charges	Amounts
Total Conceded Charges	**$12,417**
Condo Assessments, special assessments, capital reserves	$11,935
Late fees	$350
Interest	$132
Total Non-Noticed Charges	**$6,584**
Legal fees	$5,568
Late fees	$900
Interest	$116

Over the period of this lawsuit if the non-noticed $5,568 in legal fees are counted as the Association claims, however, as with the example period, Mr. Blais was further behind, in the amount of $1,456 (*i.e.,* $17,545 - $12,417 - $6,584 = $1,456). Nonetheless, the Association's Tenant Ledger shows Mr. Blais even further behind, with an alleged balance of $4,089. *Trn.* at 12, 48; TENANT LEDGER, *Addendum to Blais Brf.* at 26.

Also as with the example period, most of the late fees and finance charges would not have ever accrued had the non-noticed legal fees not been assessed. That is, if legal fees are not counted, Mr. Blais should be able to recover from the Association an overpayment of $5,128. Moreover, if the non-noticed fees are dropped, most of the time Mr. Blais was paying ahead, as he intended, rarely incurring late fees and interest.

STATEMENT OF THE CASE

In a single count the Association sued Mr. Blais for "assessments … in the amount of $4,213.17, plus accrued interest and costs, and legal fees and expenses associated with bringing the within action." WRIT OF SUMMONS (Dec. 6, 2013), *EIPCA Appx*. at 5 (emphasis omitted). The Manchester District Court (*John J. Coughlin*, J.) took testimony of a representative of Colliers International on behalf of the Association, and Mr. Blais, both represented by counsel, at a bench trial in September 2014. *Trn*. at 9-28, 30-69. The court saw several exhibits, including the Bylaws of the condominium, and the Tenant Ledger which purports to be a running record of Mr. Blais's account with the Association. BYLAWS (Pltf. Exh. 2), *EIPCA Appx*. at 39; TENANT LEDGER (Pltf. Exh. 1) (Sept. 24, 2014), *Addendum to Blais Brf.* at 21.

During his testimony, and by pleading, Mr. Blais objected to payment of purported charges for which he did not get notice in accord with the Bylaws' registered- or certified-mail notice provision. DEFENDANT'S REQUEST FOR FINDINGS OF FACTS AND RULINGS OF LAW ¶¶ 13-14 (Sept. 25, 2014) (not ruled on), *EIPCA Appx*. at 15.

Although the Association's Tenant Ledger exhibit begins in 2004 and ends in 2014, given the statute of limitations, it is understood the relevant entries begin on December 28, 2007 (near the bottom of page 2, *Addendum to Blais Brf.* at 22); and given the date Mr. Blais was served, end on December 6, 2013 (about half way down page 6, *Addendum to Blais Brf.* at 26).[4] *Trn*. at 16-17, 33, 49.

In its written order, the court noted:

> [Mr. Blais] testified that he is habitually late in the payment of his monthly condominium assessments and admits that he owes those monthly assessments and late fees. However, [Mr. Blais] also testified that he does not owe the legal

[4]Neither of these dates is made perfectly clear in the record. If they are erroneously understood, no prejudicial concession is intended.

> fee assessments and late fees and interest. [Mr. Blais] admits that he received the coupon book via first-class mail, but only received the "ledger" for assessments via first-class mail approximately twice.

ORDER (Oct. 1, 2014), *EIPCA Appx*. at 25 & *Addendum to Blais Brf.* at 20. The court observed that "[t]he management company sends out notices, *i.e.* assessments for legal fees and interest, also via first-class mail, as well as for late monthly condominium assessments." The court noted that the Bylaws "requires that all notices directed to the association or board or to an owner, 'shall be sent by registered or certified mail.'" *Id*. (ellipses omitted). Thus it held:

> Upon consideration of the testimony and exhibits, the Court finds that the Plaintiff did not comply with Article XII, Section 2(b), and as a result of such non-compliance, violated the specific provision requiring notice by certified/registered mail and; therefore, dismisses the case.

Id.(capitalization altered). The Association moved for reconsideration, which was denied, PLAINTIFF'S MOTION FOR RECONSIDERATION (margin order), *EIPCA Appx*. at 26; CLERK'S NOTICE OF ORDER (Nov. 12, 2014), *EIPCA Appx*. at 38, and the Association appealed.

SUMMARY OF ARGUMENT

Mr. Blais first notes that this Court construes condominium instruments and their notice provisions *de novo*. He then points out that the provision of the EIPCA Bylaws requiring notice by registered or certified mail applies to notices of charges for attorney's fees. Mr. Blais concedes he owes regular condo assessments, but not attorney's fees (or the fines and interest accrued by their non-payment) because he was never given notice in accord with the Bylaws. He concludes that dismissal by the trial court was the proper remedy.

ARGUMENT

Charles Blais is happy to pay the condominium dues he owes. He is not willing, however, to pay bounties, incurred at times and in amounts unknown, surreptitiously tacked to his bill.

I. Construction of Condominium Instruments is Matter of Law Reviewed *De Novo*

A condominium's legal documents are its "constitution," *Schaefer v. Eastman Cmty. Ass'n*, 150 N.H. 187, 191 (2003), which "are a contract that governs the legal rights between the association and property owners." *Barclay Square Condo. Owners' Ass'n v. Grenier*, 153 N.H. 514, 517 (2006) (quotation omitted). "As is the case with any contract," their interpretation "is a question of law, which [this Court] review[s] *de novo*." *Nordic Inn Condo. Owners' Ass'n v. Ventullo*, 151 N.H. 571, 575 (2004). This Court gives the language in a condominium instrument "its reasonable meaning, considering the circumstances and the context" in which the document was created, "and reading the document as a whole. Absent ambiguity, however, the parties' intent will be determined from the plain meaning of the language used." *Carleton v. Edgewood Heights Condominium Owners' Ass'n*, 156 N.H. 407, 408-09 (2007).

Condominium instruments must be construed to ensure the condo's governing body can conduct its business, *Barclay Square*, 153 N.H. at 517, but an Association cannot "act in any way not authorized" by the instruments. *Schaefer v. Eastman Cmty. Ass'n*, 150 N.H. 187, 190 (2003). "[W]hether [an] association's action was within its authority … is a question of law that [this Court] review[s] *de novo*." *Id.* at 190-911.

II. Insufficient Notice is Insufficient Notice

In New Hampshire, the rule is: "A notice fatally defective is in law no notice." *Lyman v. Littleton*, 50 N.H. 42, 48 (1870).

When notice is required by *statute*, this Court has held that the purpose of the enactment is to ensure actual notice, and that if the intended recipient got actual notice, the purpose is fulfilled regardless of compliance with the statute's technicalities. *Town of Newport v. State*, 115 N.H. 506, 507 (1975); *Dupuis v. Smith Properties, Inc.*, 114 N.H. 625, 630 (1974). On the other hand, for statutory notice when there is no actual notice, technical compliance is required. *Fastrack Crushing Servs., Inc. v. Abatement Int'l/Advatex Associates, Inc.*, 149 N.H. 661, 666 (2003) ("[W]e expressly rejected the doctrine of substantial compliance. Our law is well settled that in giving statutory notice the requirements of the statute must be strictly observed.").

For *contractual* notice provisions among private parties, however, this Court does not inject into the instrument a purpose the parties did not state, and therefore parties must comply with the technical terms of their notice provisions. Thus, in *Heaton v. Boulders Properties, Inc.*, 132 N.H. 330, 336 (1989) this Court wrote, "[h]ere, the plaintiffs presented no evidence that the parties intended actual notice to control over the express contractual provision requiring that notice of persons … be given in writing by certified mail," and thus held that lesser notice was not sufficient.

Moreover, by general statute, when parties specify "registered mail," it has meaning. "The words 'registered mail' when used in connection with the requirement for notice by mail shall mean either registered mail or certified mail." RSA 21:32-a.

Finally, when there is a requirement of registered mail to a last known address, and the receipt comes back to the sender as unclaimed, the notice requirement has been complied with. *E.g., Cross v. Linski*, 116 N.H. 128 (1976); *Coleman v. Town of Hooksett*, 111 N.H. 337 (1971).

Here the Association Bylaws specify:

> *All* notices mailed pursuant to the provisions of the Declaration, these Bylaws, or the Condominium Rules when directed to any Owner *shall* be sent by registered or certified mail to the last known address of such Owner on the records of the Association.

BYLAWS, art. XII, § 2(b) (emphasis added). Thus the Bylaws are clear that "all" notices "shall" be sent by registered or certified mail, and there is no purpose expressed by the parties that would justify substantial rather than technical compliance. Accordingly, the technical requirements must be met to constitute adequate notice.

III. Registered and Certified Mail Requirement Applies to Notices Levying Attorney's Fees

New Hampshire's condominium statute contains few provisions regarding notice. It requires, for instance, that 7 or 21 days "notice of the time, place, and purpose" of annual and other meetings be by first-class mail, and that voting proxies have actual notice. RSA 356-B:37; RSA 356-B:39, IV. The statute mandates that notice be given to owners for such items as special assessments, liens, delinquencies, dispositions, and entry into an owner's unit, but the statute is silent as to time and method of notice. *See* RSA 356-B §§ 41, 45, 46, 46-a, 50. Thus the background law leaves the details of notice to individual condominium instruments.

Accordingly, the EIPCA Bylaws specify timing of notice and method of notice for many matters. For instance:

- For board members, notice of board meetings "shall be given in hand or mailed to each member." BYLAWS, art. IV, § 6. If a board member is removed for cause, notice "shall be mailed." BYLAWS, art. IV, § 5.
- For repairs and improvements, there are a variety of notice provisions. If an owner causes need for a repair, notice to the owner must be "written," but no time or mailing method is specified. BYLAWS, art. IV § 8(I). When an owner apprises the Association of damage needing repair, the owner "shall promptly report" the problem, but no method is specified. BYLAWS , art. IV. If an owner makes improvements greater than $1,000, the owner must notify the board, but no time or method is specified. BYLAWS, art. VII § 4(d). When an owner observes utilities problems in common areas, the owner "shall immediately notify a member of the board," but no method of notice is specified. BYLAWS, art. VIII, §4.
- The Bylaws allow for regular and special assessments, but do not specify any notice. BYLAWS, art. VI, §§ 2 & 3. The Bylaws allow for fines of $25 per day for not abiding by condominium instruments, but also do not specify any notice. BYLAWS, art. XI, §1.
- The Association is required to carry insurance, and if it is cancelled, notice must be given to "all the insureds," but no time or method is specified. BYLAWS, art. VII, §3(b). Owners are required to carry certain types of insurance, and the certificate of insurance "shall be filed with the Association," but no time or method is specified. BYLAWS, art. VII, §4(g).
- Because the Association has a right of first refusal, if contemplating a sale, an owner "shall give written notice" to the board, but no time or method is specified. BYLAWS,

art. IX, §1(a). If transferring an ownership interest, the "owner shall give notice to the board," but time and method of delivery is not specified. BYLAWS, art. IX, §8. If an owner mortgages a unit, the "owner shall give notice to the board," by "delivering a conformed copy" of the mortgage, but no time or delivery method is specified. BYLAWS, art. IX, §9.

- The Association is allowed to enter an owner's unit for certain purposes "provided that requests for entry are made in advance in writing," but no method of delivery is specified. BYLAWS, art. VIII, §3. If an owner violates a rule or bylaw, and the Association must enter to remedy it, however, the Bylaws specify that no notice is required. BYLAWS, art. VIII, § 6(a).

From these examples, it is apparent that some Bylaws provisions specify what type of communication constitutes notice, when it must be given, and how it must be delivered. But many provisions conspicuously leave out these details. Accordingly, the Bylaws contain a catch-all default notice provision – the one at issue here – intended to apply to all of them. It is in the last article of the Bylaws, article XII, the heading of which is captioned "miscellaneous,"[5] which contains provisions such as "waiver," "invalidity," and "amendment." As noted, the catch-all default notice provision specifies:

> *All* notices mailed pursuant to the provisions of the Declaration, these Bylaws, or the Condominium Rules when directed to any Owner *shall* be sent by registered or certified mail to the last known address of such Owner on the records of the Association.

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[5]In its brief the Association attempts to denigrate the importance of the catch-all default notice provision by arguing that its appearance in the "miscellaneous" section suggests some lesser importance. EIPCA BRF. at 6, 7, 11, 12. For several reasons, however, it is apparent that no lesser importance is to be attached to the section due to its inclusion under the "miscellaneous" heading. First, the "miscellaneous" article itself includes a section providing that "[t]he captions herein are inserted only as a matter of convenience and for reference, and in no way define, limit, or describe the scope of these Bylaws, or the intent of any provisions herein." BYLAWS, art. XII, § 4. Second, this Court's jurisprudence construing captions in statutes makes clear that "[t]he title of a statute is not conclusive of its interpretation, and where the statutory language is clear and unambiguous this court will not consider the title in determining the meaning of the statute." *In re CNA Ins. Companies*, 143 N.H. 270, 274 (1998). Third, here the caption "miscellaneous," positioned as the final article, indicates only that the provisions therein do not conveniently fit into any other preceding category. *Greenland Conservation Comm'n v. New Hampshire Wetlands Council*, 154 N.H. 529, 534 (2006) ("The title of a statute is not conclusive of its interpretation, but it is a significant indication of the intent of the legislature in enacting a statute.). Accordingly, it cannot be said that the caption "miscellaneous" reduces the importance of the notice clause.

BYLAWS, art. XII, § 2(b) (emphasis added). It is significant that the provision applies to "*all* notices," and not just some; and requires that they "*shall* be sent by registered or certified mail," not may. Whether this catch-all default notice provision applies to, for example, notices to board members, which the Bylaws specify as being allowed by more relaxed regular mail, is not relevant here.

But there is no relaxed notice for levies of lawyer's fees – which is relevant here – anywhere in the Bylaws. Thus such notices are included in the "all notices" which "shall be sent by registered or certified mail."

In addition, the Bylaws contain an addendum further enlightening interpretation of their notice provisions. Following the last regular page of the Bylaws, as part of their adoption process, there is a certification by the "duly elected and acting Secretary" of the Association, who:

> declare[d] as follows: … I caused a copy of the proposed Bylaws of the Association to be mailed to each owner of record by *certified mail* on May 24, 2002.… The return receipts … are available for review at the office of the manager.

BYLAWS, *EIPCA Appx*. at 63 (emphasis added). This indicates that when the Secretary himself attended to an important mailing which required notice to each member, he read and complied with the Bylaws' catch-all default notice provision. When the hired agent, Colliers International, did the mailings however, there was less attention to detail including an 11-year admitted non-compliance, and it appears EIPCA's suit is an effort to excuse that negligence and place liability for it on Mr. Blais.

In any event, it is apparent the "miscellaneous" catch-all default notice provision controls when an owner is to be apprised of charges for attorney's fees, and that any such notices should have been sent to Mr. Blais "by registered or certified mail."

IV. Mr. Blais Does Not Owe Non-Noticed Attorney's Fees, Nor Fines and Interest Accrued by Their Non-Payment

As noted, Mr. Blais does not contest his obligation to pay regular condo assessments, special assessments, and capital funding, because he has a common obligation, the Association has expenses, he appreciates the purposes of the expenditures, and knows he has a duty as an owner. RSA 356-B:15 ("The declarant, the board of directors, every unit owner, and all those entitled to occupy a unit shall comply with all lawful provisions of this chapter and all provisions of the condominium instruments."); *Buchholz v. Waterville Estates Ass'n*, 156 N.H. 172, 174 (2007) ("Each condominium owner finds [his or her] estate both burdened by the assessment obligation and benefitted by the function that the assessments serve (namely, the maintenance and preservation of the common areas, in which the [plaintiffs have] an undivided interest inseparable from [their] interest in the condominium unit itself).") (brackets in original).

Moreover, for these items owners are given *explicit* notice in the condominium instruments. The Bylaws specify the precise time at which the annual meeting is held – "The annual meeting of the Association shall take place on the second Saturday of December of each year at 3 p.m." They also specify what constitutes a quorum, how the vote is conducted, the math to determine the monthly condo fee, and election of the Association Board which can approve special assessments. BYLAWS, art. III, § 2-5; BYLAWS, art. VI, § 3; *see Neumann v. Vill. of Winnipesaukee Timeshare Owners' Ass'n, Inc.*, 147 N.H. 111 (2001) (right of owner to vote at annual meeting). Penalties are likewise precisely specified – $25 fine and 12 percent interest for paying late – as is the exact due date of each payment. BYLAWS, art. VI, § 4; BYLAWS, art. VI, § 6; BYLAWS, art. XI, § 2.

However, the calculation and imposition of attorney's fees is not explicit. While the Bylaws grant the Association general authority to record liens, sue owners, and recover collection

costs, BYLAWS, art. VI, § 6, the Bylaws do not mention either the amount of fees for such actions, nor the method by which they are calculated. Neither that an attorney's fee is owing, nor its amount, is not disclosed to owners in the Bylaws or elsewhere.

The Association made no effort, in compliance with the Bylaws' notice provision, to apprise Mr. Blais of attorney's fees for outstanding condo charges. There was not even an effort to properly notify Mr. Blais that the Association believed he was in arrears. Mr. Blais was thus never notified that he was (allegedly) behind in payments and that an attorney's-fees-generating collections action would commence. Any fines and interest based on the non-notified fees are similarly invalid.

Accordingly, Mr. Blais has no duty to pay non-noticed charges for attorney's fees, nor fines and interest accrued by their non-payment.

V. Dismissal of Suit was Proper Remedy

Holding that the Association did not properly notify Mr. Blais of any charges, the district court dismissed the single-count suit. In its order, the court did not distinguish between those charges Mr. Blais concedes (monthly assessments, special assessments, capital funding, and fines and interest when he was late paying these) and those charges he disputes (attorney's fees, and fines and interest accruing by their non-payment). Rather the court simply dismissed the single count.

As noted, during the period included in this lawsuit, and not including attorney's fees, Mr. Blais overpaid the Association in the amount of $5,128.

The court's dismissal was proper because not only were attorney's fees non-noticed; but also because the amount the Association claimed in its writ of summons, and in the evidence it submitted, is less than the total amount by which Mr. Blais overpaid.

CONCLUSION

Charles Blais is happy to pay what he owes, and has unwittingly overpaid. He is not willing, however, to pay what he does not owe and about which he was not given adequate notice. It is apparent that EIPCA's management agent was careless about compliance with the Bylaws, and the Association now seeks to move liability for its error onto Mr. Blais. This Court should affirm the judgment.

Respectfully submitted,

Charles Blais
By his Attorney,

Law Office of Joshua L. Gordon

Dated: June 24, 2015

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Charles Blais requests that Attorney Joshua L. Gordon be allowed 15 minutes for oral argument because this case presents important questions regarding: 1) notice provisions in condominium instruments, of interest to condominium associations, officers, management agents, and owners throughout the state; and 2) compliance with underlying notice rules before commencing collections actions, of interest to collections attorneys and others involved in all types of collections actions throughout the state.

I hereby certify that the decision being appealed is addended to this brief. I further certify that on June 24, 2015, copies of the foregoing will be forwarded Jason M. Craven, Esq.

Dated: June 24, 2015

Joshua L. Gordon, Esq.

ADDENDUM

ORDER (Oct. 1, 2014). 20

TENANT LEDGER (Pltf. Exh. 1) (Sept. 24, 2014). 21