

IN THE CIRCUIT COURT IN AND FOR SANTA ROSA COUNTY, FLORIDA

LEONARD J. ACCARDO and
LYNN M. ACCARDO, et al.,

Plaintiffs

vs.

CASE NO:06001064CA

GREGORY S. BROWN, PROPERTY
APPRAISER FOR SANTA ROSA COUNTY,
FLORIDA, and ROBERT G. McCLURE, TAX
COLLECTOR FOR SANTA ROSA COUNTY,
FLORIDA,

Defendants.

_____/

**PLAINTIFFS' AMENDED RESPONSE TO DEFENDANTS'
MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION**

Plaintiffs serve this response to defendants' motion to dismiss the complaint for lack of subject matter jurisdiction, and show the motion should be denied.

I. ALL WELL-PLEADED FACTS IN THE COMPLAINT ARE ADMITTED

On a motion to dismiss, the movant admits as true all the material facts that are well pleaded. Temples v. Florida Industrial Construction Co., Inc., 310 So.2d 326 (Fla. 2d DCA 1975). This principle applies even where, as here, defendants assert that some pre-suit jurisdictional requirement has not been met. In Chaulsett v. City of Fort Lauderdale, 272 So.2d 163 (Fla. 3d DCA 1973), the defendant city moved to dismiss plaintiff's complaint for lack of a pre-suit notice (required by the statute which partially waives sovereign immunity). The

Third District held that the allegations in defendant's motion were not sufficient to negate allegations contained in the complaint which were assumed to be true for the purpose of determining the validity of the motion.

While plaintiffs do not disagree that Section 194.171(3) requires payment of real estate taxes admitted to be owing, there is no requirement to attach a receipt when the challenge is to the taxability of the property, rather than the amount of the tax. Mikos v. Ringling Bros.-Barnum & Bailey Combined Shows, Inc., 475 So.2d 292 (Fla. 2d DCA 1985).

The defense of res judicata is an affirmative defense which must be supported by allegations of fact. Coulter v. Davin, 373 So.2d 423 (Fla. 2d DCA 1979), *disapproved on other grounds*, Albrecht v. State, 444 So.2d 8, 11 (Fla. 1984). Because of this, it is not appropriate to have it considered as a stand-alone motion to dismiss. Id. As in Chaulsett, merely making allegations in a defensive pleading will not overcome the plaintiffs' allegations deemed admitted by the filing of the motion.

It is important to note that the motion to dismiss is addressed to the complaint only as to **some** of the plaintiffs. See paragraph 9 of the motion. This is further proof, if you will, that defendants do not want to accept the truth of the facts alleged in the complaint, which facts set out no distinctions between the various lessees who are plaintiffs herein. The motion to dismiss should be denied.

II. PLAINTIFFS HAVE FILED A MOTION TO AMEND THE COMPLAINT

Plaintiffs have recently filed a motion to amend the complaint to add Santa Rosa County itself as a defendant. Although the allegations in the proposed First Amended Complaint regarding the Property Appraiser and Tax Collector have not changed, it would certainly be premature for the Court to dismiss a number of the plaintiffs before ruling on the motion to amend and, if granted, considering whether to dismiss any of the plaintiffs in light of the action against the County. The motion should be denied.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply to Affirmative Defenses and Motion to Strike Certain Affirmative Defenses has been furnished to Elliott Messer and Thomas M. Findley, of Messer, Caparello & Self, P.A., 2618 Centennial Place, Tallahassee, FL. 32308, and Roy Andrews, Esquire, Lindsay, Andrews & Leonard, P.A., 5218 Willing Street, Milton, FL. 32570, by U.S. Mail, this ___ day of March, 2007.

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