

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' MEMORANDUM IN OPPOSITION TO DEFENDANTS'
MOTION FOR PARTIAL SUMMARY JUDGMENT**

Plaintiffs submit this memorandum in opposition to defendants' motion for partial summary judgment. By that motion, defendants seek a ruling that certain plaintiffs in this action should be denied any relief whatsoever from the real estate taxes defendants have assessed and billed for. The motion should be denied.

I. Parties Moving For Summary Judgment Bear A Substantial Burden Of Proof.

To establish entitlement to summary judgment the moving party must demonstrate conclusively that no genuine issue exists as to any material fact, even after all reasonable inferences are drawn in favor of the party opposing the summary judgment. Johnson v. Circle K Corp., 734 So.2d 536 (Fla. 1st DCA

1999). In fact, the party moving for summary judgment " 'must carry the burden of negating the existence of any basis of liability asserted against it.' "

Moultrie v. Consolidated Shores International Corp., 764 So.2d 637, 638 (Fla. 1st DCA 2000), quoting from Department of Transportation v. Spioch, 642 So.2d 788, 791 (Fla. 1st DCA 1994). Any doubts must be resolved in favor of the nonmoving party. Clay Electric Cooperative, Inc. v. Johnson, 873 So.2d 1182, 1185 (Fla. 2003).

Defendants here are required to prove a negative, that is:

"the nonexistence of a genuine issue of material fact," Holl v. Talcott, 191 So.2d 40, 43 (Fla. 1966), *before* "it becomes necessary to determine the legal sufficiency of the affidavits or other evidence submitted by the party moved against." Id.

Candler Holdings Limited I v. Watch Omega Holdings, L.P., 947 So.2d 1231, 1235 (Fla. 1st DCA 2007) (emphasis in original). This Court must, therefore, carefully examine what has been submitted by defendants, keeping in mind that all reasonable doubts must be resolved in favor of the plaintiffs.

II. Defendants Have Submitted No Proof That Any Plaintiff Herein Was A Party To The Prior Class Actions.

In the motion for summary judgment, defendants assert that certain of the plaintiffs in this action were included in the prior class actions. From that premise, defendants then argue that res judicata applies to such plaintiffs, because of the dismissal order in those class action cases. Res judicata requires among other things, that the persons in the prior litigation be identical to those

in the present litigation. Gomez-Ortega v. Dorten, Inc., 670 So.2d 1107 (Fla. 3d DCA 1996). Defendants have furnished no proof of that identity here.

So, in the context of this motion, to obtain summary judgment, as demonstrated by the cases cited above, defendants are required to provide this Court conclusive proof (1) that any plaintiff herein was a member of any of the classes, as they might have been defined in those cases; and (2) the specific name and parcel number of each and every such plaintiff. Without such detail, this Court should decline to dismiss anyone from this case through summary judgment.

The lack of detail is readily apparent. Paragraph 3 of the motion refers to "the majority of the Plaintiffs in the case at bar," and "the class of taxpayers having interests in real property improvements on Navarre Beach." Paragraph 4 refers to "all Plaintiffs who were class members in those cases," and "all Plaintiffs who were members of any one of the referenced class action lawsuits..."

Because defendants' motion did not identify any particular plaintiff or parcel to which the motion was supposed to apply, plaintiffs submitted interrogatories to both defendants. A copy of the first interrogatories to defendant Brown, with his answers, is attached hereto as Exhibit A; and a copy of the interrogatories to defendant McClure, with his answers, is attached as Exhibit B. As can be seen by their responses to the first three interrogatories, defendants did not attempt to identify the particular plaintiffs to which their motion was directed; instead, they referred to a broad category or grouping.

This is totally insufficient to overcome the presumptions in favor of the nonmoving parties.

It is important to note that appraisals by the Property Appraiser, on which the Tax Collector calculates the tax bills, are based upon the property's value as of the first day of the tax year. Fla. Stat. 192.042(1). Since the present lawsuit deals only with the tax assessments and bills for 2006, defendants' reference to the list of plaintiffs with improvements or who leased condominium units in 2006 does not establish which of these plaintiffs were parties to the class action cases that related to tax years 2002-2005. Being leaseholders on January 1, 2006, does not mean these plaintiffs were leaseholders on January 1, 2005, which was the trigger date for the last of the class actions.

Having improvements on Navarre Beach leasehold property on January 1, 2006, does not mean that such improvements existed on January 1, 2005. Even if improvements existed on January 1, 2005, they could have been appraised at no value (resulting in no tax) if the improvements were not substantially completed. Under Section 192.042(1), "substantially completed" is defined to mean "that the improvements or some self-sufficient unit within it can be used for the purpose for which it was constructed." In the opinion of the State Attorney General, a building badly damaged by a hurricane on which repairs have not been substantially completed by January 1 could well fall within the "no value" provision of this status. Fla. AGO 93-46, 1993 WL 839501 (Fla. A.G.). Thus, for example, a single family residence barely begun on January 1, 2004

(and not part of the class action that year) could have been finished that year before Hurricane Ivan struck, but damaged heavily by that storm, putting it back in the condition of being **not** "substantially completed" on January 1, 2005.

Another category of plaintiff leaseholders in this case who would not have been parties to the 2002-2005 cases, are those who obtained their leasehold interests after January 1, 2005, and before January 1, 2006. They would not have been part of any of the class actions. Defendants could, and should, have done the necessary research of each plaintiff to determine the situation regarding leasehold improvements as of January 1 of each of the prior years of 2002-2005, but they did not.

No doubt, defendants would like to have the burden of proof fall on plaintiffs, but that burden is always on the moving party. The obligation of going forward with evidence would not shift to plaintiffs here until **after** movants have met their burden of proving a negative. Defendants must prove that there is no genuine issue of this material fact: that the plaintiffs who had leasehold improvements or leased a condominium unit on January 1, 2006, were doing the same on January 1 of years 2002, 2003, 2004, or 2005. Defendants have failed to meet their burden, and the motion should be denied.

Defendants may argue that their sworn answers to interrogatories should serve as evidence that the plaintiffs here were plaintiffs in the prior cases. But those answers do not make any reference whatsoever to plaintiffs in the 2002-2005 class actions, and there are no assumptions in favor of the moving parties.

Any assumption has to favor the nonmoving parties. Thus, these answers are not competent evidence that any of the 2006 plaintiffs are bound by the agreed judgment in the 2002-2005 cases.

III. Even If Defendants Had Submitted Proof That Any Plaintiff Herein Was A Party to Any Of The Prior Class Actions, Defendants Have Not Negated The Bases for Challenging Assessments For 2006 Allowed In Paragraph 3 Of The Stipulated Judgment of Dismissal.

While plaintiffs do not concede that defendants have proved that any plaintiff herein is bound by the Stipulated Judgment of Dismissal, such proof, if it existed, would still not fulfill the requirements of the summary judgment rule in this setting. That Stipulated Judgment provided, in its third paragraph:

3. This Judgment shall not preclude the Plaintiffs or class representatives from challenging assessments for future years (2006 and beyond) based on changed factual circumstances or subsequent court decisions or statutory changes.

To prevail on this summary judgment motion (if any of the present plaintiffs were proved to be in one of the prior class actions), defendants would have to furnish proof that there has been no change in the factual circumstances, no subsequent court decisions and no statutory changes.

When a defendant moves for summary judgment, "[t]he function of the court is solely to determine whether the appropriate record presented in support of summary judgment conclusively shows that the plaintiff cannot prove the claim alleged as a matter of law."

Cox v. CSX Intermodal, Inc., 732 So.2d 1092, 1095-96 (Fla. 1st DCA 1999)

(quoting Hervey v. Alfonso, 650 So.2d 664, 646 (Fla. 2d DCA 1995)). It is rather evident that, if there has been any one of the enumerated changes, this stipulated order would not keep a plaintiff in any of the prior cases from suing to challenge the 2006 assessments. As pointed out earlier, the party moving for summary judgment must carry the burden of negating the existence of any basis of liability asserted against it. Department of Transportation v. Spioch, 642 So.2d 788, 791 (Fla. 1st DCA 1994); Moultrie v. Consolidated Stores International Corp., 764 So.2d 637, 638 (Fla. 1st DCA 2000). These exceptions to the purported bar to litigation have not been negated in this record.

Defendants' motion should be denied.

IV. Condominium Lessees' Interests Include Land.

The discussion under this point is provided in an abundance of caution to ensure that no one can claim later that plaintiffs waived it. Defendants assert in paragraphs 2 and 4 of the motion for partial summary judgment that lessees of condominium units ("condo lessees") have no leasehold interest in land. Plaintiffs disagree for a number of reasons.

The first reason is simply common sense. Condominium owners of property on the mainland own their individual unit and a proportionate share of the common elements, which typically includes the land under and around the improvements. This is not unlike the owner of a single-family dwelling on the mainland, who owns his or her home and the land beneath and surrounding it, within the parcel of land on which it is constructed. Shifting to beach leaseholds,

defendants concede that those who lease single-family residences lease not only the improvements, but also the land. There is no logic or sensible reasoning for defendants to contend that condo lessees do not lease a proportionate share of the land: land on which the buildings or other improvements are constructed, and land surrounding such improvements on the condominium parcel. No one else has a leasehold interest in that land except the lessees of the condominium units.

Florida Statutes Chapter 718 sets out the framework for the creation of condominiums in this State. For each developed condominium, a "declaration" must first be prepared, which is defined as the instrument or instruments by which a condominium is created, as they are from time to time amended.

"Condominium" is defined as the form of ownership under Chapter 718,

...which is comprised entirely of units that may be owned by one or more persons, and in which there is, appurtenant to each unit, an undivided share in common elements.

Fla. Stat. §718.103(11). Of course, that same relationship exists in the setting of a condominium comprised of leased, rather than owned, property.

"Condominium property" means the lands, leaseholds and personal property that are subjected to condominium ownership, ... and all improvements there and all easements and rights appurtenant thereto intended for use in connection with the condominium. Subsection 718.103(13). A "condominium parcel" means a unit, together with an undivided share in the common elements appurtenant to the unit. A "unit" means a part of the condominium property

which is subject to exclusive ownership. A unit may be in improvements, land, or land and improvements together, as specified in the declaration. Subsection 718.103(27). Among the rights that are implicated if, for example, there is an assignment of the leasehold interest in a condominium unit are these, set out in Fla. Stat. 718.106(2):

There shall pass with a unit, as appurtenances thereto.
(a) An undivided share in the common elements and common surplus.

The term "common elements" means the portions of the condominium property not included in the units. Fla. Stat. 718.103(8).

Plaintiffs' Second Request For Admissions To Defendant Brown, a copy of which is attached as Exhibit C, included request #11, that defendants admit that the common elements of every condominium development on Navarre Beach, Florida, include land. Defendant Brown's response is found in Exhibit D attached hereto:

11. Admitted that an interest in land was submitted to condominium ownership in each Declaration of Condominium, pursuant to Chapter 718, Florida Statutes.

The self-serving reference to "ownership" in this response notwithstanding, defendant did not deny the statement as set forth in the request, so it is deemed admitted pursuant to Fla. R. Civ. P. 1.370. Therefore, it is clear that land is part of the common elements of every condominium development on Navarre Beach.

Further admissions are found in the responses to requests nos. 1-8 (see Exhibits D & E hereto). In those numbered items, plaintiffs asked defendant Brown to admit that specific units of Beachview Condominiums had been demolished before January 1, 2006, and not rebuilt. Defendant did not deny any of these statements. In the subparts "A" and "B" of each item, defendant was requested to admit that, despite having no unit in existence, the Property Appraiser assessed a "building" in each instance, for values of \$260,000 or \$300,000. In his response, defendant Brown admitted that the assessment in each case was based on the value of the "condominium parcel" which included the unit together with an individual share in the common property.

Finally, in response to request no. 16, defendant conceded that, when a condominium building is destroyed, his assessment is of the unit lessee's "undivided share in the common property," which, he admitted in #11, includes land.

Common sense, the condominium statute, and defendant Brown's own admissions lead to the inevitable conclusion that every condo lessee's leasehold interest on Navarre Beach includes land. The fact that defendant Brown did not list "land" as a separate evaluation on his published reports (see Exhibits 1 through 9 attached to Exhibit C hereto) has no weight here, in light of his responses to request for admissions. After all, he listed a value in each case for a "building," where none exists, and admitted that that value actually represents an undivided share in common elements.

In other words, within the common elements, the land value must be considered, even though not separately set out or listed on his report. Therefore, there is no factual or legal basis for defendants to contend that land is not included in the assessments of condominium units on Navarre Beach. Although hidden, the land value is clearly included.

One other point needs to be made here, should the Court conclude any condo lessees in the present case were class members in the prior cases. Defendants assert that plaintiffs whose leaseholds included improvements should have paid the tax for those improvements, to preserve their rights to challenge the tax on the land. Defendant Brown has completely frustrated any such effort for condo lessees by inappropriately concealing his valuation of the land in a number that purports - - in his public record - - to represent only an improvement ("building"). Whatever his motive or purported justification for setting up the record in this manner, it would be a travesty of justice to conclude that condo lessees are rejected from this litigation because the public official did not inform them that what he listed as an improvement (for which, he contends, taxes must be paid because of the prior class actions) actually included their individual interest in the condominium land.

V. Discovery Is Not Complete.

As further grounds for denying defendants' motion for summary judgment, plaintiffs point out that they requested detailed information about how defendant Brown performed his assessments over the past years, to which he

objected. See copies of plaintiffs' second interrogatories to Brown and second request for production to Brown, attached hereto as Exhibits E and F, respectively. As to any condo lessees, this detail will hopefully reveal the information about the land value that is not revealed in defendant's published reports. Moreover, plaintiffs have filed a motion to amend to include Santa Rosa County as a party defendant. If granted, other discovery will be undertaken, which could affect how this Court should deal with the motions for summary judgment.

VI. Conclusion.

For all of the foregoing reasons, defendants' motion for summary judgment should be denied.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing 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 fax and U.S. Mail, this ____ day of April, 2007.

DANNY L. KEPNER
Bar No: 174278
THOMAS J. GILLIAM, JR.
Bar No: 146821
Shell, Fleming, Davis & Menge, P.A.
226 South Palafox Street, 9th Floor
Pensacola, Florida 32502
Telephone 850-434-2411
Attorneys for Plaintiffs