IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT

CASE NO.: 4D23-1066

Lower Court Case No.: 50CA2019CA001617XXXXMB

PALM BEACH POLO, INC.

Appellant,

vs.

THE VILLAGE OF WELLINGTON,

Appellee.

REPLY BRIEF OF APPELLANT, PALM BEACH POLO, INC.

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PREFACE

For the purposes of the Reply Brief:

a) Defendant/Appellant, Palm Beach Polo, Inc. shall be referred to as "POLO".

b) Plaintiff/Appellee, Village of Wellington, a municipality in Palm Beach County, shall be referred to as "VOW", or "WELLINGTON".

c) The Record on Appeal shall be referred to as "R. _____".

d) Plaintiff/Appellee's Answer Brief shall be referred to as "AB ____".

e) Wellington's Code of Ordinances will be referred to herein as "the Code".

REPLY TO INTRODUCTION

WELLINGTON begins its Answer Brief with an Introduction that makes two misstatements of fact.

First, WELLINGTON falsely states that "... Palm Beach Polo does not dispute that Wellington fully complied with statutory requirements, . . .". AB. 1. POLO'S entire argument on appeal is that Section 162.09 (3) Fla. Stat., which provides for the right to initiate a foreclosure action three months after an Order Imposing Penalty/Lien is recorded in the public records presents a statutory textual ambiguity with Section 162.09 (2)(c), which allows for the violator to apply to the Special Magistrate for a fine reduction after the violator comes into compliance.

The purpose of POLO'S appeal is to bring to this Court's attention the nature of this statutory textual ambiguity which permits the municipality to request permission from the Special Magistrate to commence foreclosure proceedings 3 months after recording the order assessing fine, while the violator is engaged in the process of coming into compliance and seeking a fine reduction. This is a case of first impression.

To permit WELLINGTON to hide behind the ambiguous language of the statute permitting the foreclosure of a code enforcement lien is to deny the violator's due process rights under Section 162.09(2)(c) to be permitted to request a fine reduction after coming into compliance with the Code.

Since the sole purpose of the Local Government Code Enforcement Act is to provide an alternative method to achieve compliance without relying on the courts, the legislature could not have intended such a result.

The second misstatement of fact is contained in the second paragraph of WELLINGTON'S Introduction, which adds a complete non-sequitur regarding the validity of the fine reduction ruling issued by WELLINGTON'S Special Magistrate, and its reversal by the Circuit Court Appellate Division. AB 1.

The VOW'S narrative is actually consistent with POLO'S argument

concerning the uncertainty of the amount of the fine. Nothing contained in WELLINGTON'S Answer Brief adds to the validity of the lower court's decision to deny POLO'S Motion to Dismiss due to the lack of ripeness, and does not support the validity of the Final Summary Judgment of Foreclosure.

In the circumstances, reversal is warranted.

REPLY IN CLARIFYING STATEMENT OF THE CASE AND FACTS

1. In a contradiction between the second paragraph and fourth paragraph of its Statement of the Case and Facts, WELLINGTON first states that POLO twice challenged the imposition of the fine and then states that POLO did nothing to restore Big Blue, ignoring POLO'S due process right to appeal the decisions of the VOW Special Magistrate both to the Circuit Court Appellate Division and this Court, and its own continuing opposition to POLO obtaining a stay pending the outcome of its appeals.

2. WELLINGTON falsely alleges under subpart B of its Statement of the Case and Facts that POLO came into compliance ". . . with the lien foreclosure well underway, . . .". The facts clearly show that POLO provided a "Notice of Commencement" to WELLINGTON on January 30, 2019, R. 001464, and the first Complaint to Foreclose Lien was filed on February 6, 2019, R. 000011, so that WELLINGTON had notice that POLO'S compliance

was underway BEFORE the lien foreclosure case was brought, and which should have precluded bringing the underlying lien foreclosure action.

3. While stating that POLO'S argument is a "re-hash" of the prior record in the code enforcement case, WELLINGTON takes over two plus pages of its Statement of the Case and Facts to do exactly that; re-hash its own appellate argument concerning the distinction between who has jurisdiction to address the right to a "fine" reduction versus the jurisdiction to address the right to a "lien" reduction. While POLO was not successful in prosecuting its appeal of that issue, and WELLINGTON was, it merely reinforces the question of whether or not the fine or lien was fixed and certain on February 6, 2019, when the lien foreclosure case on appeal here was filed. It is POLO'S contention that it was not.

4. In Part II of the Statement of the Case and Facts WELLINGTON talks about the lien foreclosure case being "recommenced after successive stays pending Palm Beach Polo's pursuits in the Circuit Court Appellate Division and this Court." AB 6.

POLO would point out here that the lower court stayed the case multiple times by agreement of the parties due to the continuing and ongoing fight concerning 1)the amount of the fine/lien, and 2)was the VOW Special

Magistrate's Order reducing the fine/lien in favor of POLO valid. These two issues persisted throughout the prosecution of the lien foreclosure case.

POLO filed its first Motion to Stay on or about April 22, 2019. R. 000079. On or about July 28, 2020, over a year after POLO'S Motion for Stay, the VOW filed a Motion for Stay of Litigation Pending Appeal of Order Requesting Fine Reduction. R. 001661, and on August 12, 2020, the lower court entered an Agreed Order granting a stay. R. 001671. So, after a year and a half of litigation, both sides came to the conclusion that a stay was needed in order to sort out how much was owed in order to satisfy the fine/lien. If WELLINGTON'S sudden desire for a stay of the lien foreclosure case isn't an admission that the amount of the fine had not been fixed and certain from the instant the case was filed, I'm not sure what additional proof would be necessary.

5. In Part II. B., WELLINGTON falsely argues that POLO did not respond to its Motion for Summary Judgment, or otherwise file any evidence in opposition. The false and misleading statement fails to consider POLO'S Affidavit of Glenn Straub filed on May 3, 2020 R. 001424 as record evidence, and further ignores POLO'S Motion for Continuance and Response to Motion for Summary Judgment filed on May 4, 2020. R. 001590.

6. Finally, WELLINGTON addresses the issue of the Motion to Amend by Interlineation, in its attempt to clean up the number of properties, and legal descriptions on which it was attempting to foreclose. Not only was the fine never fixed and certain, but the number of properties, and their legal descriptions was also in a state of flux during the pendency of the lien foreclosure action, since WELLINGTON permitted POLO to sell two of the parcels included in the lien foreclosure case during its pendency.

7. It wasn't until July 20, 2022, almost two years after the entry of the first stay was entered that the underlying stay was lifted and the litigation was permitted to proceed over the objection of POLO.

So to recap, WELLINGTON filed its Complaint on February 6, 2019; Amended its Complaint on April 24, 2019, and finally again on January 10, 2023. The lower court on August 12, 2020, entered An Agreed Order on Motion for Stay of Litigation Pending Appeal of Order on Request for Fine Reduction. R. 001671. On or about October 29, 2020, the parties filed a Joint Status Report asking the lower court for additional time on the stay pending the ongoing appeal.

In the end, this litigation went on for 4 years and consisted of WELLINGTON filing three complaints, two separate summary judgment

motions, and multiple stays, and included the lower court cancelling a pending hearing on the motion for summary judgment to allow POLO to schedule and attend one last procedural “lien” reduction hearing before the VOW village council in February, 2023.

To suggest, at any level, as WELLINGTON has, that POLO in the case below, and the lower court did not address the continuing volatility and ambiguity of the final amount of the fine that was due during the course of 4 years of litigation is disingenuous and without merit.

REPLY SUMMARY

WELLINGTON’S pretend righteous indignation regarding the accumulated fines against POLO fails to appreciate the fact that POLO had the right to appeal. However, once the appeals were satisfied, POLO did come into compliance, and pursuant to Section 162.09(2)(c) Fla. Stat., had the right to apply for a fine reduction. *See POLO’S Appendix to Initial Brief page 035.* POLO did apply for a fine reduction which it received, reducing the overall fine from $6.2 million down to $1.254 million. Thereafter, WELLINGTON appealed the fine reduction arguing that their own Special Magistrate lacked jurisdiction to reduce the amount of the fine because it had become a “lien”, and only the village council had the authority to reduce liens.

POLO argued from the beginning that the amount due was not fixed and certain on the date the lien foreclosure case was filed and that it was not yet ripe for adjudication. WELLINGTON refuses to accept the possibility that its own actions created the unfavorable environment where the amount of the fine remained unresolved from the beginning of the lien foreclosure case and throughout the 4 years that the case was pending.

This was a case that should not have been brought until POLO was permitted to exhaust its due process remedies under the Local Government Code Enforcement Board Act.

REPLY ARGUMENT

1. If this Court accepts WELLINGTON'S argument that it did nothing wrong, and that all of the responsibility falls squarely on the shoulders of POLO, it will confirm that the entire procedure in which WELLINGTON engaged is an acceptable perversion of the procedural due process requirements of the Municipal Code Enforcement Act as enunciated in Section 162.07(3) Fla. Stat., which provides that proceedings under the Local Government Code Enforcement Board Act include the requirement that "**. . . fundamental due process shall govern the proceedings.**" That requirement of fundamental due process includes the underlying foreclosure action that

was authorized by the VOW Special Magistrate pursuant to Section 162.09(3) Fla. Stat.

It is well settled law that if the language of a statute is clear and unambiguous, there is no need to resort to the rules of statutory construction and the statute must be given its plain and obvious meaning. *Miles v. Parrish*, 199 So. 3d 1046 (2016).

However, in this case of first impression, Chapter 162 of the Florida Statutes creates several textual and syntactic ambiguities which preclude a plain and obvious meaning, e.g., the lack of any guidance on several key issues, including when it is appropriate to record an order imposing a fine in the public records; when the violator has exhausted all available statutory remedies, including the right to appeal contained in Section 162.11 Fla. Stat.; when is it appropriate to file a lien foreclosure for non-payment of a recorded order imposing a lien, even though not yet ripe; filing a lien foreclosure action while the violator is in the process of effectuating compliance; and when a violator is entitled to request a fine reduction after coming into compliance pursuant to Section 162.09(2)(c) before it is appropriate to terminate the due process rights granted to a violator.

POLO argued the law and facts in paragraph 5 of its first Answer and

Affirmative Defenses to the Amended Complaint filed on November 1, 2019, R. 000157. Again, on February 13, 2023, contained in paragraphs 1 and 2 of its Answer and Affirmative Defenses to Plaintiff's Second Amended Complaint, almost 4 years to the day that the original complaint was filed. POLO'S last set of Affirmative Defenses were, according to the record, never addressed by WELLINGTON in its second Motion for Summary Judgment. R. 002013.

2. When there is doubt as to the principal amount of a mortgagor's indebtedness, summary judgment of foreclosure is unavailable. *State Road 7 Investment Corp. v. Natcar Limited Partnership*, 82 So. 3d 1013 (Fla. 4th DCA 2011). The doubt about the balance due on the code enforcement fine/lien is analogous to the doubt that existed in *State Road 7 Investment Corp.* above, specifically providing that summary judgment was inappropriate while the amount of the cross-claim on the existing code enforcement lien was pending

REPLY CONCLUSION

POLO respectfully requests that this Honorable Court vacate the Final Judgement of Foreclosure and vacate the summary judgment and grant POLO's Motion to Dismiss Amended Complaint without prejudice.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that Appellants Reply Brief was efiled on December 27, 2023, using the Florida Courts Electronic Filing Portal, with a copy served on Laurie Stilwell Cohen, Esq. Village Attorney, Village of Wellington, 12300 Forest Hill Boulevard, Wellington, Florida 33414, via eservice to lcohen@wellingtonfl.gov and to Elliot B. Kula, Esq., Counsel for Village of Wellington, Kula & Associates, P.A., 11900 Biscayne Boulevard, Suite 310, Miami, Florida 33181, via eservice to elliot@kulalegal.com, and eservice@kulalegal.com this 27th day of December, 2023.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief was computer generated using Arial, 14-point font, and complies with the font requirement of Rule 9.045(b) of the Florida Rules of Appellate Procedure and does not exceed

13,000 words, in compliance with Rule 9.210(a)(2)(B) of the Florida Rules of Appellate Procedure.

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