IN THE SUPREME COURT OF FLORIDA

CASE NO. 65,620

STORER CABLE T.V. OF FLORIDA, INC.,
a Florida corporation,

Appellant,

v.

SUMMERWINDS APARTMENTS ASSOCIATES, LTD.,
a Florida limited partnership,

Appellee.

ON APPEAL FROM THE THIRD DISTRICT COURT
OF APPEAL OF FLORIDA

APPELLEE'S ANSWER BRIEF

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STATEMENT OF THE CASE AND FACTS

Appellant, Storer Cable T.V. of Florida, filed its Amended Complaint seeking an injunction to enforce "its rights" under Fla. Stat. § 83.66 and the Code of Metropolitan Dade County § 8A-132(b). Appellant alleged that it had the right to "enter upon the premises of Summerwinds Apartments [Appellee] for the purposes of installing and maintaining a CATV system on said premises." R. 7. The enactments upon which Appellant relied, authorized the CATV company to install its CATV equipment upon the landlord's property without providing compensation to the landlord. Appellee, Summerwinds Apartments, in its answer to the amended complaint, raised the affirmative defense that the enactments upon which Plaintiff relied constitute an unconstitutional taking without compensation. Additionally, the landlord asserted

that the CATV company does not have standing under the statute. R. 12. Summerwind Apartments then moved for a judgment on the pleadings.

The Honorable Richard S. Hickey reviewed the pleadings and memoranda of law and entered judgment for the Defendant, holding that the statute and ordinance upon which the Plaintiff relied to support its claim were unconstitutional on their faces as a taking of property without just compensation or due process of law. R. 75. Appellant, Storer Cable, appealed that final judgment to the Third District Court of Appeal. The Third District affirmed, striking the statute and ordinance as an unconstitutional taking per se without compensation. That opinion may be found at 451 So.2d 1034.

ARGUMENT

I. THE TRIAL AND APPELLATE COURTS PROPERLY DECLARED A STATUTE AND ORDINANCE UNCONSTITUTIONAL WHERE THE ENACTMENTS AUTHORIZED THE PHYSICAL INVASION OF A LANDOWNER'S PROPERTY WITHOUT COMPENSATION AND DESTROYED THE LANDOWNER'S RIGHT TO EXCLUDE THIRD PARTIES FROM HIS PROPERTY.

Recently, the Supreme Court of the United States in Lorretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), examined a New York Statute, enacted "to facilitate tenant access to CATV, " id. at 423, which provided that a landlord may not "interfere with the installation of cable television facilities upon his property or premises" and may not demand payment from any tenant for permitting CATV, or demand payment for any CATV Company "in excess of any amount which the [State Commission on Cable Television] shall, by regulation, determined to be reasonable." New York Exec. Law § 828 (McKinney Supp 1981-1982). The Court, applying well-established principles of due process, held that the statute was unconstitutional since it denied the landlord his right to exclude and "authorized the permanent occupation of the landlord's property by a third party." Id. at 440.

The Florida Statute under scrutiny in the present case, tracing the essence of the unconstitutional New York Statute, provides:

> No tenant having a tenancy of 1 year or greater shall unreasonably be denied access to any available franchised or licensed cable television service, nor shall such tenant or cable television service be required to pay anything of value in order to obtain or provide such service except those charges normally paid for like services by residents of, or provides such services to, single family homes within the same franchised or licensed area and except for installation charges as such charges may be agreed to between such tenant and the providers of such services.

Fla. Stat. 83.66 (1982). Thus, the Florida Statute, like the unconstitutional New York Statute, authorizes the physical occupation of the landlord's property without compensation and usurps his right to exclude the third party cable TV company. The Statute, in fact, authorizes a "taking" without compensation and was therefore property stricken as unconstitutional by the lower court.

The principles underlying the Courts' decision in Lorretto apply equally in the present case. The Court first noted that the New York Statute took the landlords right to exclude, "one of the most essential sticks in the bundle of rights that are commonly characterized as property." Id. at 433, quoting Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979). Secondly, the Court reasoned that "an owner suffers a special kind of injury when a stranger directly invades and occupies the owner's property." 458 U.S. at 436 (emphasis in original). Explaining that "property law has long protected an owner's expectation that he will be relatively undisturbed at least in the

possession of his property," the Court concluded that: "[t]o require, as well, that the owner permit another to exercise complete domination literally adds insult to injury." Id. The statute sub judice works the same madness. It authorizes the permanent physical invasion of the landlord's property by an "uninvited" third party. Like the Plaintiff/Appellant in the present case, a cable TV company can, under the statute, force itself on the owner's property despite the owner's wishes. "Such an appropriation is perhaps the most serious form of invasion of an owner's property interests." Id. at 435. In authorizing this appropriation, the state "does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand." Id., citing Andrus v. Allard, 444 U.S. 51, 65-66 (1979).

Appellant's attempt to distinguish the New York statute's language "no landlord shall", from the Florida statute's "no tenant shall be denied" amounts to nothing more than a sophistic game of semantics. The statutes are, in fact, mirror-images of each other. The New York statute is couched in terms of the landlord's duty. The Florida statute, on the other hand, provides the reciprocal rights of the tenant. Attempting to distinguish the two statutes, Appellant suggests that the Florida statute only applies to the period of the tenancy by its own terms. Appellant's brief at 4-5. This distinction begs the question of whether the unconstitutional New York statute "no

landlord shall . . ." applies to some period other than the tenancy. One must ask: "Is a landlord a landlord without a tenant?" The obvious answer lies in the fact that the landlord-tenant relationship is created by contract and thus there is no landlord without a tenant. See Butler v. Maney, 200 So. 226, 228 (Fla. 1941) (contract creates the relation of landlord and tenant). The answer, of course, further supports the fact that the unconstitutional New York statute's creation of the landlord's duty merely mirrors the Florida statute's creation of the tenant's reciprocal right. Both statutes, denying the landlord the right to exclude, are equally repugnant to the Constitution.[1/]

Additionally, Appellant's argument that since the statute is couched in terms of the tenant's rights, the occupation is limited to the period of tenancy and is therefore constitutional was squarely rejected by the Supreme Court in Lorretto. The Court explained:

> It is true that the landlord could avoid the requirements of § 820 by ceasing to rent the building to tenants. But a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation.

1/ The Dade County Ordinance, as Appellant correctly points out, has the same effect as the Florida Statute and thus is also unconstitutional.

458 U.S. at 439, n. 17. As long as the landlord rents his property, he is subject to an invasion by a third party, the cable television company; the Lorretto Court clearly defined this contingency as a permanent physical invasion and held it an unconstitutional taking per se. Id. Thus, Appellant's argument that since the occupation is linked to the tenancy, it is not a permanent physical occupation is without merit.

Furthermore, Appellant's assertion that Section 83.66 of the Florida Statutes merely codifies existing common law and is therefore constitutional is similarly ill-conceived. In fact, the Supreme Court addressed this very issue in Lorretto and reached the opposite conclusion. Although the Court noted that the New York statute does not, on its face, create the express right in the tenant, the Court reasoned:

> Of course, Teleprompter [the CATV company], not Appellant's tenants, actually owns the installation. Moreover, the government does not have unlimited power to redefine property rights. See Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164 (1980) ("a State, by ipse dixit, may not transform private property into public property without compensation").

458 U.S. AT 439 (emphasis added). The instant Florida statute does just what the United States Supreme Court prohibits. Although the language of the statute seems to create a right in tenants to require landlords to permit CATV company access to the landlord's property, the CATV company, not the tenant, owns the

property which is now physically invading the landlord's property. As the Supreme Court announced: "[A]n owner suffers a special kind of injury when a stranger directly invades and occupies the owner's property." Id. at 36 (emphasis in original). The Florida statute, in fact, forces the owner to accept onto his property, without compensation, the "stranger" and his machinery. This authorized intrusion is a redefinition of property rights which is, per se, unconstitutional.

Appellant, attempting to somehow distinguish the New York and Florida statutes, further asserts that: "The rights of use transferred include all parts of the premises that are 'reasonably essential to the enjoyment of the leased premises . . . unless specifically reserved'." Appellant's Initial Brief at 5, citing S.S. Jacobs v. Weyrick, 164 So.2d 246 (Fla. 1st DCA 1964) (emphasis added). However, the dispositive question remains: "did the government authorize the permanent occupation of the landlord's property by a third party." Lorretto, 458 U.S. at 440. If so, the Supreme Court reasoned, the statute is unconstitutional as a taking per se. Thus, Appellant's assertion that the Florida statute merely codifies existing property law, in that the statute permits the tenant to use all parts reasonably essential to his enjoyment, is unfounded. The statute authorizes an invasion of the landlord's property by third parties. It strips away the landlord's power to exclude, "one of the most treasured strands in the owner's bundle of property rights." Id.

at 435. The lower court was therefore correct in striking the statute as unconstitutional.[2/]

Appellants attempt to draw an analogy between the present case and the Broward County's Circuit Court opinion in Coconut Creek Cable T.V., Inc. v. Wynmore Ltd. Partnership, Case No. 81-145304 CL (17th Jud. Cir. Broward Cnty., July 9, 1982), aff'd 437 So.2d 903 (Fla. 4th DCA) (per curiam), review dismissed 436 So.2d 903 (Fla. 1983), app. dismissed ___ U.S. ___ (1984). However, Coconut Creek is inapposite by its own terms. Coconut Creek involved the application of Fla. Stat. § 718.1232 to a group of condominium unit owners. The statute provides:

> **718.1232 Cable television service; resident's right to access without extra charge.**--No resident of any condominium dwelling unit, whether tenant or owner, shall be denied access to any available franchised or licensed cable television service, nor shall such resident or cable television service be required to pay anything of value in order to obtain or provide such service except those charges normally paid for like services by residents of, or providers of such services to, single-family homes within the same franchised or licensed area and except for installation charges as such charges may be agreed to between such resident and the provider of such services.

[2/] It is also clear that the space outside the apartment, on the roof, and up and down the outside walls of the building is not a space reasonably essential to the tenant's use. Additionally, the Fourth District recently indicated that boring holes into the exterior wall of a building is not (Continued)

Fla. Stat. § 718.1232 (1983). The Circuit Court found the Lorretto opinion to be inapplicable under the given facts, specifically noting that section 718.1232 expressly provides the landowners with the right to request cable television. The Court explained:

> In this regard the Court takes special note of the recent decision of the United States Supreme Court in Lorretto . . . . Such decision is not dispositive of the instant case or its issues and does not require an invalidation of Section 718.1232, Florida Statutes.
>
> The New York statute and the subject Florida statute are not comparable either as to subject matter or approach. The New York statute attempts to dictate to a landlord/property owner that his property shall be occupied permanently and physically by a stranger, i.e., a cable television company, for the benefit of the former's tenants. By contrast, Section 718.1232, F.S., pronounces no such specific mandate, but expressly announces as public policy the right of property owners (condominium unit owners) to have unfettered access to available cable television service. Thus, the decision of the U.S. Supreme Court in Lorretto is distinguishable from the instant case, both factually and substantively, and does not require this Court, either directly or by implication, to invalidate the Florida Statute. (Emphasis supplied).

Thus, under the facts presented in Coconut Creek, section 718.1232 did not constitute a taking per se since it merely affirmed a landowner's ("condominium unit owner's") right to

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reasonable use of the tenancy. See Multach v. Adams, 418 So.2d 1254, 1255 (Fla. 4th DCA 1982).

permit or exclude third parties from their property.[3/] The present statue, section 83.66, on the other hand, expressly compels the landowner to forego his right to permit or exclude third parties. As the Coconut Creek Court recognized, this "attempt to dictate to a landlord/property owner that his property shall be occupied permanently and physically by a stranger, i.e., a cable television company, for the benefit of the former's tenants," amounts to a taking per se and is thus unconstitutional.[4/]

Appellant's argument that the instant statute provides for compensation for the taking because the statute provides for an award of damages due to the tenant's "waste" is ill-conceived. See Appellant's Brief at 10. Although the statute does provide for damages to the landowner if, and only if, the installation causes property damage incurred "during the installation, repair or removal of the cable," this provision is not a grant of compensation for the use and occupation of the landlord's property. The Supreme Court in Lorretto expressly required compensation for the use and occupation of the premises,

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[3/] A court's inquiry as to the constitutionality of a statute is limited to a given set of facts involved in the particular dispute before the court. See State v. Ecker, 311 So. 2d 104 (Fla. 1975). Thus, the Coconut Creek upheld section 718.1232 only as applied to unit owners.

[4/] Additionally, the plaintiff in Coconut Creek raised and the Court acknowledged that the defendants did not "have proper standing to raise such constitutional challenges anyway." Slip op. at 7. It is perhaps for this reason that the Fourth District affirmed per curiam.

separate and apart from any award for property damage. Moreover, the Florida legislature's intent, as evidenced in the language of the statute, is entirely contrary to Appellant's contention. The Statute provides: "nor shall such tenant or cable television service be required to pay anything of value in order to obtain or provide such service . . ." Fla. Stat. § 83.66(1). Clearly, the legislative intent was that neither tenant nor cable television company shall pay for the use of the property. Any attempt to construe the statute as requiring compensation for the taking would be a gross misconstruction. Thus, the statute as permitting a taking without compensation was properly stricken.

It is in this regard, that Appellant's reliance on Princeton Cablevision, Inc. v. Union Valley Corp., Docket No. D-356-83 (Sup. Ct. N. J. Dec. 29, 1983) is entirely misplaced. In fact, the holding of Princeton supports the position that the instant Florida Statute is unconstitutional. The New Jersey statute under scrutiny in Princeton utilized language quite different from that on Florida's statute. The New Jersey court explained:

> In early language, Section 49 prohibits an owner from demanding or accepting payment for permitting installation of cable service. It is plain from the context that the principal focus is on payment from tenants. In later language, Section 49 requires the franchised company
>
> > to indemnify the owner . . . for any damage caused by the installation operation or removal of [cable] facilities . . .

> A generous reading of those words would include an obligation to pay damages for the taking of the owner's property. Such a reading is necessary to save Section 49 from invalidation and will therefore be made.

Id. at 9 (emphasis supplied). Thus, as the court pointed out, the New Jersey statute could be read to authorize compensation (from the cable television company) for the occupation of the landlord's property. Furthermore, New Jersey had propounded for an agency, the Florida statute, on the other hand, unequivocally forbids any compensation from both tenant or cable television company: "nor shall tenant or cable television service be required to pay anything . . ." Fla. Stat. 83.66(1)(e.s.). Indeed, the New Jersey court in Princeton explained, that if the New Jersey statute had expressly forbidden compensation from the cable television company, the statute would be properly stricken as unconstitutional. Id. at 9. It is therefore clear that the Third District was eminently correct in holding the statute unconstitutional.

As previously noted, supra at 2-6, Appellant's conclusion that the instant statute is merely regulatory and does not amount to a taking is erroneous. The statute permits the cable television company to come on to Appellee's property and install cable television equipment upon the property. This invasion was exactly the type of occupation forbidden by Lorretto. As the Supreme Court reasoned:

> Few would disagree that if the State required landlords to permit third parties to install swimming pools on the landlords' rooftops for the convenience of the tenants, the requirement would be a taking. If the cable installation here occupied as much space, again, few would disagree that the occupation would be a taking.

Id. at 3176-77. Thus, the present statute, which, in essence, "requires landlords to permit third parties to install swimming pools on the landlords' rooftops for the convenience of the tenants (albeit in the form of a cable installation)," is a taking per se and is thus unconstitutional. Section 83.66, authorizing such a taking, was properly stricken.

II. JUDGMENT ON THE PLEADINGS WAS PROPER WHERE PLAINTIFF/APPELLANT'S COMPLAINT SOUGHT RELIEF UNDER THE STATUTE WHICH WOULD CONSTITUTE A DENIAL OF DEFENDANT/APPELLEE'S CONSTITUTIONAL RIGHTS AND WHERE THE STATUTE WAS UNCONSTITUTIONAL ON ITS FACE.

Appellant erroneously asserts that a judgment on the pleadings was improper. However, relying upon Fla. Stat. § 83.66 and the Code of Metropolitan Dade County § 8A-132(b), Appellant alleged in its complaint that it "sought to enter upon the premises of Summerwinds Apartments for the purpose of installing and maintaining a CATV system on said premises." Amended Complaint for Injunctive Relief, ¶ 6. R. 8. Thus, Appellant sought an injunction, enjoining Appellee from denying Appellant access to the Appellee's property to "install and maintain" the CATV system.

The allegations of the complaint establish Appellee's right to a judgment on the pleadings since, under Rule 1.140(c), Fla. R. Civ. P. (motion for judgment on the pleadings), all material allegations of the opposing party's pleading are to be taken as true. Kreiger v. Ocean Properties, Ltd., 387 So.2d 1012, 1013 (Fla. 4th DCA 1980); Butts v. State Farm Mutual Automobile Ins. Co., 207 So.2d 73 (Fla. 3d DCA 1968). Thus, the only question on a motion for judgment on the pleadings is whether the defendant is entitled to a judgment as a matter of law based upon the plaintiff's allegations. In the present case, based upon Plaintiff/Appellant's allegations in its complaint seeking to install and maintain CATV equipment on Appellee's property, the trial court properly granted judgment on the pleadings since the relief sought under the statute (allegedly creating the right) constitutes a clear violation of the Takings Clause, as discussed supra.

Moreover, the statute is unconstitutional on its face since it authorizes a "physical intrusion by third parties without compensation." See Lorretto, 458 U.S. at 439. A motion for judgment on the pleadings is indeed the proper vehicle to challenge such a statute as applied to the factual allegations of the complaint. See Keene v. Smith, 569 F.Supp. 1513, 1519 (E.D. Calif. 1983) (applying the analogous Federal Rule of Civil Procedure, the court stated that "an appropriate vehicle to obtain an adjudication of the constitutionality of a statute . . . [is] a

motion for judgment on the pleading once a response has been filed, Aldabe v. Aldabe, 616 F.2d 1089 (9th Cir. 1980), or in the alternative a motion for summary judgment.").

Based upon the allegations of the complaint and the facial invalidity of the subject statute, the trial court was correct in granting the motion for judgment on the pleadings.

CONCLUSION

The Appellee, Summerwinds Apartments Associates, Ltd., respectfully submit that the judgment and opinion below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail to LOUISE H. McMURRAY, ESQ., Daniels & Hicks, P.A., 1414 duPont Building, 169 East Flagler Street, Miami, Florida 33131, this 11th day of October, 1984.

Lawrence S. Gordon

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