OA 10-9-85 047

IN THE SUPREME COURT OF THE
STATE OF FLORIDA

CASE NO. 66,385

TORTOISE ISLAND COMMUNITIES, INC. and TORTOISE ISLAND GROUP, LTD.,

Petitioners,

vs.

THE MOORINGS ASSOCIATION, INC., individually and THE MOORINGS ASSOCIATION, INC., a Class Representation,

Respondents.

_____/

PETITIONERS' INITIAL BRIEF

KERRY I. EVANDER, ESQUIRE
REINMAN, HARRELL, SILBERHORN,
MOULE & GRAHAM, P.A.
Attorneys for Petitioners
1825 South Riverview Drive
Post Office Drawer 639
Melbourne, Florida 32901
(305) 724-4450

TABLE OF CONTENTS

LAW OFFICES
1825 SOUTH RIVERVIEW DRIVE REINMAN, HARRELL, SILBERHORN, MOULE & GRAHAM MELBOURNE, FLORIDA 32901
P.O. DRAWER 639 A PROFESSIONAL ASSOCIATION (305) 724-4450

TABLE OF CITATIONS

LAW OFFICES
1825 SOUTH RIVERVIEW DRIVE — REINMAN, HARRELL, SILBERHORN, MOULE & GRAHAM — MELBOURNE, FLORIDA 32901
P.O. DRAWER 639 — A PROFESSIONAL ASSOCIATION — (305) 724-4450

Other Authorities

LAW OFFICES
1825 SOUTH RIVERVIEW DRIVE
P.O. DRAWER 639
REINMAN, HARRELL, SILBERHORN, MOULE & GRAHAM
A PROFESSIONAL ASSOCIATION
MELBOURNE, FLORIDA 32901
(305) 724-4450

STATEMENT OF THE CASE

Respondent, The Moorings Association, Inc., individually, and The Moorings Association, Inc., a class representation, filed an action in the Brevard County Circuit Court seeking injunctive and declaratory relief against Petitioners, Tortoise Island Communities, Inc. and Tortoise Island Group, Ltd. (R. 1 - 6)*. By Order dated March 28, 1983, the trial court dismissed Respondent's second amended complaint with prejudice.[1/] (R. 89). On December 13, 1984, the Fifth District Court of Appeal reversed, finding that Respondent's second amended complaint stated a cause of action against Petitioners. Moorings Association, Inc. v. Tortoise Island Communities, Inc., 460 So.2d 961 (Fla. 5th DCA 1984).

On January 9, 1985, Petitioners timely filed a Notice to Invoke the Discretionary Jurisdiction of this Court to review the decision of the Fifth District Court of Appeal on the basis that such decision expressly and directly conflicted with the decision of another district court of appeal and of that of this

---

* References to the Record will be designated "R. __"

1/ The trial court dismissed the second amended complaint with prejudice after Respondent's counsel advised the court that he could not amend the complaint any further. (R. 108).

LAW OFFICES
1825 SOUTH RIVERVIEW DRIVE REINMAN, HARRELL, SILBERHORN, MOULE & GRAHAM MELBOURNE, FLORIDA 32901
P.O. DRAWER 639 A PROFESSIONAL ASSOCIATION (305) 724-4450

Court on the same question of law. By Order dated May 8, 1985, this Court accepted jurisdiction of this case.

LAW OFFICES
1825 SOUTH RIVERVIEW DRIVE
P.O. DRAWER 639
REINMAN, HARRELL, SILBERHORN, MOULE & GRAHAM
A PROFESSIONAL ASSOCIATION
MELBOURNE, FLORIDA 32901
(305) 724-4450

STATEMENT OF FACTS

Respondent, The Moorings Association, Inc., individually, and The Moorings Association, Inc., a class representation, filed an action seeking injunctive and declaratory relief against Petitioners, Tortoise Island Communities, Inc. and Tortoise Island Group, Ltd. Specifically, Respondents sought to enjoin Petitioners from filling a certain canal known as The Moorings Cut, and to have the court declare that Respondents' members had an easement for ingress and egress through such canal. (A copy of the Second Amended Complaint is set forth in its entirety in Footnote No. 1 to Judge Cowart's dissenting opinion.)[2/]

Assuming the factual allegations of the second amended complaint to be true for purposes of this appeal, Respondent's members purchased their respective Moorings Subdivision lots from T.O.L., Inc. (not a party to this action). (R. 53). The Moorings Subdivision is a residential subdivision located on the east side of a canal known as "The Great Canal." On the west side of such canal is an island, and immediately to the west of such island is the Banana River. In promoting the

---

2/ 460 So.2d at 967 - 969.

LAW OFFICES
1825 SOUTH RIVERVIEW DRIVE REINMAN, HARRELL, SILBERHORN, MOULE & GRAHAM MELBOURNE, FLORIDA 32901
P.O. DRAWER 639 A PROFESSIONAL ASSOCIATION (305) 724-4450

development of The Moorings, T.O.L., Inc., by and through its agents distributed sales brochures representing that T.O.L., Inc. would construct a canal across the aforesaid island so as to provide easier access, by boat, from The Moorings Subdivision to the Banana River. (R. 52 - 55, 70).

This "access" canal (The Moorings Cut) was constructed in 1967, and T.O.L., Inc. subsequently gave thirteen of Respondent's members documents specifically granting an easement in The Moorings Cut. Such easements were recorded in the official records of Brevard County, Florida. (R. 52 - 54). T.O.L., Inc. was further alleged to have conveyed to Petitioners, at some unspecified date, the land on which such canal was located. (R. 56). In 1975, the thirteen aforesaid easement holders filed an action to enjoin Petitioners from filling in the subject canal. This litigation was terminated in the first half of 1982. (R. 54). In July, 1982, Petitioners filled in portions of the canal. (R. 54). The remaining members of Respondent's alleged class of approximately 200 homeowners now allege that they have (or should be found to have) easement rights to use the canal, for navigational purposes, to obtain easier access to the Banana River.

There are no allegations that Petitioners were a party to the representations made on behalf of T.O.L., Inc. or that Petitioners were even aware of such representations. However,

LAW OFFICES
1825 SOUTH RIVERVIEW DRIVE REINMAN, HARRELL, SILBERHORN, MOULE & GRAHAM MELBOURNE, FLORIDA 32901
P.O. DRAWER 639 A PROFESSIONAL ASSOCIATION (305) 724-4450

Petitioners are alleged to have not been bona fide purchasers in that "the easement canal was open and visible." (R. 57 - 58).

Finally, it is alleged that as a result of Petitioners' obstruction of the subject canal, that Respondent's members had been deprived of ingress and egress of their boats through the canal and have suffered a diminution in property value. (R. 55).

The trial court found that the second amended complaint failed to state a cause of action and dismissed the cause with prejudice. The Fifth District Court of Appeal reversed, finding that the second amended complaint sufficiently alleged an easement by implication. 460 So.2d at 962.[3/]

3/ The Fifth District Court of Appeal did agree with the trial court's holding that the complaint failed to state a cause of action for the creation of an easement by express grant. 460 So.2d at 962.

LAW OFFICES
1825 SOUTH RIVERVIEW DRIVE
P.O. DRAWER 639
REINMAN, HARRELL, SILBERHORN, MOULE & GRAHAM
A PROFESSIONAL ASSOCIATION
MELBOURNE, FLORIDA 32901
(305) 724-4450

SUMMARY OF ARGUMENT

The issue before this Court is whether the Fifth District Court of Appeal erred in reversing the lower court's dismissal, with prejudice, of Respondent's second amended complaint. It is Petitioners' contention that the second amended complaint failed to state a cause of action to establish an easement by implication in The Moorings Cut. Specifically, the second amended complaint was defective in that Respondents did not allege sufficient facts to show that its members' intended use of The Moorings Cut was "necessary to the beneficial enjoyment" of their respective lots. (Argument I).

The second amended complaint was also fatally defective in that it purported to be a class action, although questions of fact differed as to each class member. (Argument II).

LAW OFFICES
1825 SOUTH RIVERVIEW DRIVE REINMAN, HARRELL, SILBERHORN, MOULE & GRAHAM MELBOURNE, FLORIDA 32901
P.O. DRAWER 639 A PROFESSIONAL ASSOCIATION (305) 724-4450

ARGUMENT I

THE FIFTH DISTRICT COURT OF APPEAL ERRED IN FINDING THAT THE SECOND AMENDED COMPLAINT ALLEGED SUFFICIENT FACTS TO ESTABLISH THE EXISTENCE OF AN EASEMENT BY IMPLICATION.

Under Florida law, an easement may be created either by express grant, by implication or by prescription. Burdine v. Sewell, 109 So. 648, 652 (Fla. 1926); Canell v. Arcola Housing Corp., 65 So.2d 849, 851 (Fla. 1953).

Respondent made no claim in either of the lower court proceedings that it had obtained a prescriptive easement. (Specifically, Respondent did not allege that its members had used the subject canal for the required prescribed period of twenty years. Downing v. Byrd, 100 So.2d 57 (Fla. 1958)).

Additionally, Respondent's claim that its members had received an easement by express grant was properly rejected by both the trial court and the Fifth District Court of Appeal.

After finding that Respondent's second amended complaint failed to allege an easement by express grant or by prescription,

---

4/ The second amended complaint alleges that thirteen of Respondent's alleged approximately 200 members received written express easements, while the other members received no deeds or other formally executed written grants to use the subject canal. Rather, Respondent's other members are alleged only to have received oral representations and written sales brochures from Petitioners' predecessors, promising an easement in the subject canal to all residents of The Moorings Subdivision. It is well established in Florida that an easement by express grant may be created only where such grant is "drawn and executed with the same formalities as a deed to real estate, an easement being an interest in land." Burdine v. Sewell, 109 So. 648, 653 (Fla. 1926). See also Winthrop v. Wadsworth, 42 So.2d 541 (Fla. 1949). An easement cannot be created by oral representations, Canell v. Arcola Housing Corp., 65 So.2d

LAW OFFICES
1825 SOUTH RIVERVIEW DRIVE REINMAN, HARRELL, SILBERHORN, MOULE & GRAHAM MELBOURNE, FLORIDA 32901
P.O. DRAWER 639 A PROFESSIONAL ASSOCIATION (305) 724-4450

the Fifth District Court of Appeal then went on to hold that Respondent sufficiently alleged an easement by implication. It is this holding that is respectfully submitted to be erroneous.

As stated by Judge Cowart in his dissenting opinion, there are only two possible exceptions to the statement that because of the effect of the statute of frauds[5], easements cannot be granted or conveyed by implication. 460 So.2d at 970. The first exception arises where an easement may be imputed or inferred by construction from the terms and effect of an existing deed. Canell v. Arcola Housing Corp., 65 So.2d 849 (Fla. 1953). In Canell, the plaintiffs alleged that the defendant developer represented, in order to induce plaintiffs to purchase lots in its subdivision, that plaintiffs would have the right to use certain bathing beach facilities to be built within the subdivision. This Court found that mere oral promises and representations could not create the required inference that an easement was intended to be granted by the subject deeds:

> "The plaintiffs are relying upon a mere oral promise to create the easement, which

---

4/ Continued:

849 (Fla. 1983), sales brochures, Owen v. Yount, 198 So.2d 360 (Fla. 2d DCA 1967); Jonita, Inc. v. Lewis, 368 So.2d 114 (Fla. 1st DCA 1979), or other similar promises to create an easement. Thus, Respondent's claim that its members had received an easement by express grant was properly rejected by both lower courts.

5/ §725.01, Fla. Stat. (1975)

LAW OFFICES
1825 SOUTH RIVERVIEW DRIVE REINMAN, HARRELL, SILBERHORN, MOULE & GRAHAM MELBOURNE, FLORIDA 32901
P.O. DRAWER 639 A PROFESSIONAL ASSOCIATION (305) 724-4450

> is clearly within the terms of the statute of frauds and thus cannot be enforced directly or indirectly . . .. If the deed to Plaintiffs did not mention the easement in the description of lands and property rights conveyed, or referred to a plat reflecting same, . . ., then to give any effect to oral promises in respect to other lands or rights therein would amount to an unauthorized reformation of the description in the deed." Canell v. Arcola, supra at 851.

Similarly, no granting of an easement can be inferred from a deed in the present case, where there is no allegation that the deeds given by Petitioner's predecessor to all but thirteen of Respondent's alleged members even mentioned The Moorings Cut.[6/]

The second exception referenced by Judge Cowart was "implication of a way of necessity as a matter of law." 460 So.2d at 971. Specifically, Florida courts have found an easement by implication so as to allow the owner of the dominant estate access over the servient estate where such access is necessary to achieve the beneficial use and enjoyment of the dominant tenement. Roy v. Vastgoed, 404 So.2d 410 (Fla. 4th DCA 1981); Dinkins v. Julian, 122 So.2d 620 (Fla. 2d DCA 1960). (Emphasis added).

After acknowledging that other Florida courts have required that such an easement by implication be "essential to the beneficial enjoyment of the land granted or retained,"[7/] the Fifth

---

6/ Indeed, as noted by Judge Cowart, the fact that Petitioner's predecessor gave thirteen homeowners an express written easement tends to refute a claim for an easement by implication by the other homeowners. 460 So.2d at 973.

7/ 460 So.2d at 963.

LAW OFFICES
1825 SOUTH RIVERVIEW DRIVE REINMAN, HARRELL, SILBERHORN, MOULE & GRAHAM MELBOURNE, FLORIDA 32901
P.O. DRAWER 639 A PROFESSIONAL ASSOCIATION (305) 724-4450

District Court of Appeal then jumped to the unexplained and unsupported position that the creation of an easement by implication

> "Does not require an absolute, but only a reasonable, necessity, such as will contribute to the convenient enjoyment of property, other than mere temporary convenience." 460 So.2d at 964.

In no other case has a Florida appellate court been so liberal in defining the "reasonable necessity" needed to support the establishment of an easement by implication. In Roy v. Vastgoed, 404 So.2d 410 (Fla. 4th DCA 1981), an easement by implication was found where such easement provided the only reasonable means of access to the dominant parcel. In Kirma v. Norton, 102 So.2d 653 (Fla. 2d DCA 1958), an easement by implication was found to allow the owner of the dominant estate to have access for his sewer pipe beneath the servient estate. In Williams Island Country Club, Inc. v. San Simeon At The California Club, Ltd., 454 So.2d 23 (Fla. 3d DCA 1984), an easement by implication was found to enable the owner of the dominant estate to continue to operate an eighteen hole golf course. By contrast, in the present case, an easement by implication is alleged to exist so as to allow certain homeowners a shortcut from their subdivision to the Banana River. There is no allegation that Respondent's members are without ingress or egress to their property, or even that they lack navigational access to the Banana River. Additionally, it is not alleged that use of the canal is necessary to the beneficial use and enjoyment of Re-

LAW OFFICES
1825 SOUTH RIVERVIEW DRIVE REINMAN, HARRELL, SILBERHORN, MOULE & GRAHAM MELBOURNE, FLORIDA 32901
P.O. DRAWER 639 A PROFESSIONAL ASSOCIATION (305) 724-4450

spondent's members' properties. Indeed, as acknowledged in the second amended complaint, some of Respondent's members have apparently never even utilized The Moorings Cut:

> "Since approximately 1967 when said canal was completed, most owners of residential lots in The Moorings having boats or marine vessels have utilized said canal for ingress and egress from The Moorings to the Banana River and the Intracoastal Waterway." (R. 53) (Emphasis added).

In effect, the Fifth District Court of Appeal has found the right to have an easement by implication based on the mere allegation that Respondent's members have suffered a reduction in their property values as a result of being denied a boating shortcut to the Banana River.

It is clear that one of the primary purposes for establishing the easement by implication exception to the general rule that an easement must be granted in conformance with the statute of frauds was to avoid undue hardships. The loss of a navigational shortcut is certainly not the type of "hardship" which should justify a refusal to apply the statute of frauds.

LAW OFFICES
1825 SOUTH RIVERVIEW DRIVE REINMAN, HARRELL, SILBERHORN, MOULE & GRAHAM MELBOURNE, FLORIDA 32901
P.O. DRAWER 689 A PROFESSIONAL ASSOCIATION (305) 724-4450

ARGUMENT II

THE FIFTH DISTRICT COURT OF APPEAL ERRED IN FAILING TO AFFIRM THE TRIAL COURT'S DISMISSAL OF THE SECOND AMENDED COMPLAINT WHERE THE ACTION WAS IMPROPERLY BROUGHT AS A CLASS ACTION.

The Fifth District Court of Appeal also erred in reversing the lower court in that, on its face, the second amended complaint failed to properly allege a class action. The complaint is inherently defective in its class action allegations for at least two reasons. First, pursuant to Florida Rule of Civil Procedure 1.220, a class action is maintainable on behalf of a class by one party or more of the class suing as a representative of all members of the class. However, no where in the second amended complaint is it alleged that the homeowners association actually purchased property from the original subdivider, or that such association otherwise has a claim for an easement in the subject canal. Second, it is clear that, assuming arguendo, an action could be stated for an easement by implication, a class action would be an inappropriate vehicle to determine the validity of the homeowner's individual claims.

In Lance v. Wade, 457 So.2d 1008 (Fla. 1984), this Court held that a class action based on fraud could not be maintained as "fraud claims on separate contracts are inherently diverse."[8/]

8/ Lance v. Wade, supra, at 1011. See also Avila South Condominium Association, Inc. v. Kappa Corp., 347 So.2d 599 (Fla. 1977), and Osceola Groves v. Wiley, 78 So.2d 700 (Fla. 1955).

LAW OFFICES
1825 SOUTH RIVERVIEW DRIVE REINMAN, HARRELL, SILBERHORN, MOULE & GRAHAM MELBOURNE, FLORIDA 32901
P.O. DRAWER 639 A PROFESSIONAL ASSOCIATION (305) 724-4450

As noted in Lance, each of the purported class members has his own separate contract, and factual determinations would have to be made as to each individual in the following respects:

a. The alleged representations made to such individuals;

b. whether such individual considered the representations to be material; and

c. the degree of reliance, if any, on such representations.

In the present case, Respondent's members are, in fact, seeking to enforce a developer's alleged promise to grant each lot owner an easement in The Moorings Cut. As in Lance, the fact finder would have to determine the representations made to each purported class member, the materiality of such representations to each individual[9/], and the degree of reliance on such representations by each individual[10/]. Perhaps more significantly, the lower court would have to make a judicial determination as to whether the alleged easement was "reasonably necessary" to the beneficial enjoyment of a particular individual's lot.

9/ The right to use The Moorings Cut would obviously have varying degrees of importance to the individual homeowners.

10/ At least thirteen of the original homeowners would not have had to rely on the alleged oral representations and sales brochures of the original developer, as they received written, expressed easements which comported with the statute of frauds.

LAW OFFICES
1825 SOUTH RIVERVIEW DRIVE REINMAN, HARRELL, SILBERHORN, MOULE & GRAHAM MELBOURNE, FLORIDA 32901
P.O. DRAWER 639 A PROFESSIONAL ASSOCIATION (305) 724-4450

Petitioners acknowledge that this issue was not presented before the trial court.[11] However, this Court and the Fifth District Court of Appeal have the inherent authority to affirm the dismissal of a complaint on a point not raised at the trial level, where the pleading defect is not curable by amendment. Henderson v. Morton, 147 So. 456, 459 (Fla. 1933); Smith v. Pattishall, 176 So. 568, 577 (Fla. 1937); Marquette v. Hathaway, 76 So.2d 648, 652 (Fla. 1954).

11/ Petitioners would note that such pleading defect could be raised subsequent to a motion to dismiss pursuant to a motion to certify class under Rule 1.220, or as an affirmative defense.

LAW OFFICES
1825 SOUTH RIVERVIEW DRIVE REINMAN, HARRELL, SILBERHORN, MOULE & GRAHAM MELBOURNE, FLORIDA 32901
P.O. DRAWER 639 A PROFESSIONAL ASSOCIATION (305) 724-4450

CONCLUSION

WHEREFORE, Petitioners, Tortoise Island Communities, Inc. and Tortoise Island Group, Ltd., respectfully request this Court reverse the decision of the Fifth District Court of Appeal and reinstate the decision of the trial court.

Respectfully submitted,

REINMAN, HARRELL, SILBERHORN,
MOULE & GRAHAM, P.A.
Attorneys for Petitioners
1825 South Riverview Drive
Post Office Drawer 639
Melbourne, Florida 32901
(305) 724-4450

BY: Kerry I. Evander
KERRY I. EVANDER