OA 10-9-85 OF

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 abd THE MOORINGS ASSOCIATION, INC., a class representation,

Respondents.

_____/

PETITIONERS' REPLY BRIEF

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TABLE OF CITATIONS

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Other Authorities

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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.

In its Answer Brief, Respondent has failed to cite to any Florida case law supporting the Fifth District Court of Appeal's finding that the "necessity" required to support the establishment of an easement by implication is "a reasonable necessity such as will contribute to the convenient enjoyment of property, other than mere temporary convenience." Moorings Association, Inc. v. Tortoise Island Communities, Inc., 460 So.2d 961, 964 (Fla. 5th DCA 1984).[1/]

Respondent attempts to justify the application of "a more liberal interpretation of 'necessity'"[2/] by arguing that the primary factor to be examined in determining whether an easement by implication has been created is the intent of the parties. However, as is implicitly recognized by Florida's adoption of

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1/ Indeed, in its opinion, the Fifth District Court of Appeal acknowledged that other Florida courts have required that an easement by implication be "essential to the beneficial enjoyment of the land granted or retained." 460 So.2d at at 963. See e.g. Roy v. Vastgoed, 404 So.2d 410 (Fla. 4th DCA 1981); Dinkins v. Julian, 122 So.2d 620 (Fla. 2d DCA 1960).

2/ Respondent's Answer Brief, Page 8.

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the statute of frauds[3/], the intent of the parties (with regard to the conveyance of an interest in real property) is best demonstrated by the terms of a writing executed in conformance with the statute of frauds. The purpose behind the statute of frauds is to "intercept the frequency and success of actions based on nothing more than loose verbal statements or mere innuendos." Yates v. Ball, 181 So. 341, 344 (Fla. 1937). Courts should be reluctant to take cases from the statute's protection as the statute is to be strictly construed. Yates v. Ball, 181 So. 341, 344 (Fla. 1937); Tanenbaum v. Biscayne Osteopathic Hospital, Inc., 190 So.2d 777, 779 (1966); Canell v. Arcola Housing Corp., 65 So.2d 849, 851 (Fla. 1953).

The sometimes harsh application of the statute of frauds has been mitigated by the recognition of certain exceptions, including the recognition of easements by implication. However, until the instant case, Florida courts have only permitted such exception where the dominant estate owner would otherwise be deprived of the beneficial use and enjoyment of his property. Roy v. Vastgoed, 404 So.2d 410 (Fla. 4th DCA 1981); Kirma v. Norton, 102 So.2d 653 (Fla. 2d DCA 1958); Williams Island Country Club, Inc. v. San Simeon At The California Club, Ltd.,

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3/ Florida Statute, §725.01 (1975).

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454 So.2d 23 (Fla. 3d DCA 1984). In the present case, Respondent's members cannot (and did not) allege that the use of the subject canal was necessary to the beneficial use and enjoyment of their respective properties. In fact, in its Answer Brief, Respondent did not deny that the subject canal served only as a navigational shortcut from The Moorings Subdivision to the Banana River. Respondent's members still have access to their properties, and still have navigational access to the Banana River.

Respondent next argues that the statute of frauds should not apply as the contracts between the original developer and Respondent's original members were "fully performed." However, as noted by this Court in Miller v. Murray, 68 So.2d 594, 596 (Fla. 1953):

> "The governing principles by which part performance may remove an oral contract for the sale of land from the effect of the statute of frauds are also well settled. In addition to establishing the fact that an oral contract for sale was made, proof must be submitted as to the following: Payment of all or part of the consideration, . . . possession by the alleged vendee; and the making by the vendee of valuable and permanent improvements upon the land with the consent of the vendor - or, in the absence of improvements, the proof of such facts as would make the transaction a fraud upon the purchaser if it were not enforced."

There is no allegation that Respondent's members made any improvements to the disputed canal or that Petitioners were

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parties to any misrepresentations. Absent such allegations, the part performance exception to the statute of frauds is inapplicable. Canell v. Arcola Housing Corp., 65 So.2d 849 (Fla. 1953); Winters v. Alanco, 435 So.2d 326 (Fla. 2d DCA 1983).

Respondent attempts to distinguish Canell by arguing that the original developer "fully performed" by constructing the subject canal as he promised. However, it is clear that the original developer did not "fully perform" as it failed to keep its alleged promise to grant each of Respondent's members a written express easement for such canal. The mere fact that the canal was actually constructed does not prevent the application of the statute of frauds. Jonita v. Lewis, 368 So.2d 114 (Fla. 1st DCA 1979). In Jonita, the plaintiffs-purchasers brought an action against a subdivision developer to establish an easement by implication in a certain access road. In support of its claim, the plaintiffs alleged that in deciding to purchase their property they relied on the developer's map indicating that access to plaintiff's property would be by such road. The First District Court of Appeal found that plaintiffs' claim was barred by the statute of frauds as private easement rights may not be created solely by conversation or by advertising (the map). Such holding was made notwithstanding the fact that plaintiffs had used the disputed "access" road up until defendant closed it off. (No statutory easement existed as plaintiffs had access to their property by another road.)

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Finally, Petitioners would submit that Respondent's reliance on McCoroquodale v. Keyton[4/] and Lefler v. Smith[5/] for the proposition that Petitioners are estopped to deny the existence of an easement by implication is misplaced. In McCoroquodale and Lefler, the developer was found to be estopped to deny that it had granted an easement where the developer had expressly provided for such easement on a recorded subdivision plat. The estoppel doctrine cannot be used to avoid the statute of frauds where, as here, it is alleged that the original developer failed to keep a verbal promise to grant an easement. Canell v. Arcola Housing Corp., 65 So.2d 849 (Fla. 1953).

4/ 63 So.2d 906 (Fla. 1953).

5/ 388 So.2d 261 (Fla. 5th DCA 1980).

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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.

Although the class action issue had not yet been raised at the trial court level, this Court has the inherent authority to affirm the dismissal of the complaint where the pleading defect is not curable by amendment. Henderson v. Morton, 147 So. 456 (Fla. 1933); Smith v. Pattishall, 176 So. 568 (Fla. 1937); Marquette v. Hathaway, 76 So.2d 648 (Fla. 1954). In the present case, each of Respondent's members is seeking to establish an easement appurtenant to his respective property. Assuming arguendo, an action could be stated for an easement by implication, each homeowner would have to prove that the use of the disputed canal was "necessary" to the beneficial use and enjoyment of his property. Obviously, the degree of "necessity" to use such canal would vary with each homeowner. For example, a homeowner who had never used the canal and who did not intend to use the canal in the future would certainly have trouble meeting a "necessity" requirement. The inherent diverseness of each of Respondent's members' claims renders a class action inappropriate to determine the validity of each member's individual claim. Lance v. Wade, 452 So.2d 1008 (Fla. 1984).

The case of Davidson v. Lely Estates, Inc.[6/], relied upon

6/ 330 So.2d 528 (Fla. 2d DCA 1976)

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by Respondent, is distinguishable in that the court was not faced with a situation where one of the essential elements to the cause of action (necessity) would obviously vary as to each alleged class member. Additionally, to the extent Davidson is in conflict with Lance, it must be deemed to have been overruled.

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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,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by Courier to J. Daniel Ennis, Esquire, 261 Merritt Square, Merritt Island, Florida 32952, this 21st day of June, 1985.

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