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IN THE SUPREME COURT OF THE STATE OF FLORIDA

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CLERK, SUPREME COURT

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CASE NO. 67,682

WILLIAM MARKHAM,
et al.,

Petitioners,

vs.

NEPTUNE HOLLYWOOD
BEACH CLUB, etc.,

Respondents.

_____ /

On Discretionary Review to the Fourth District
Court of Appeal of Florida, Case Number 84-720.

RESPONDENTS' ANSWER BRIEF ON THE MERITS

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
INTRODUCTORY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	3
SUMMARY OF ARGUMENT	8
ARGUMENT	
THE 60-DAY NON-CLAIM PROVISION OF SECTION 194.171(2) AND (3) FLA. STAT. (1983), IS INAPPLICABLE WHERE THE CHALLENGED ASSESSMENT IS CLAIMED TO BE ILLEGAL, VOID, AND LEVIED PURSUANT TO STATUTES THAT ARE UNCONSTITUTIONAL.	9
CONCLUSION	14
CERTIFICATE OF SERVICE	15
APPENDIX	16

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>Cape Cove Corp. v. Lowe</u> , 411 So.2d 887 (Fla.2DCA 1982) Review Denied 418 So.2d 1280 (Fla.1982)	10
<u>Coe v. ITT Community Development Corp.</u> , 362 S.2nd 8 (Fla.1978)	10, 11
<u>Florida East Coast Railway Company v. Reid</u> , 281 So.2d 77 (Fla. 4DCA 1973)	13
<u>Gulfside Interval Vacations, Inc. v. Schultz</u> , 479 So.2d 776 (Fla.2DCA 1985)	11
<u>Hackney v. McKenney</u> , 113 Fla. 176, 151 So.2d 524 (1933)	12, 13
<u>Hansen v. Port Everglades Steel Corporation</u> , 155 So.2d 387 (Fla.2DCA 1963)	12, 13
<u>Lake Worth Towers, Inc. v. Gerstung</u> , 262 So.2d 1 (Fla.1972)	11, 12, 13
<u>Miller v. Nolte</u> , 453 So.2d 397 (Fla.1984)	9, 10, 11
<u>Rudisill v. City of Tampa</u> , 151 Fla.284, 9 So.2d 380 (1942)	10
<u>Williams v. Law</u> , 368 So.2d 1285 (Fla.1979)	10
 <u>STATUTES</u>	
192.037 Fla. Stat. (1983)	3, 4, 5, 6
192.21 Fla. Stat. (1967)	11
193.122 Fla. Stat. (1983)	9
194.171 Fla. Stat. (1983)	8, 9, 10, 11, 13, 14
197.055 Fla. Stat. (1983)	5
 <u>FLORIDA CONSTITUTION</u>	
Article I, Section 10	3

INTRODUCTORY STATEMENT

Respondents herein are the NEPTUNE HOLLYWOOD BEACH CLUB, INC., a Florida corporation, NEPTUNE HOLLYWOOD BEACH CLUB CONDOMINIUM, INC., a Florida corporation, HOLLYWOOD ISLE DEVELOPMENT, INC., a Florida corporation, ENCHANTED ISLE RESORT CONDOMINIUM ASSOCIATION, INC., a Florida corporation, ISAAC GAMEL and LOCO TRADE OF FLORIDA, INC., D/B/A HOLLYWOOD INTERNATIONAL, a Florida general partnership, HOLLYWOOD BEACH HOTEL & TOWERS ASSOCIATION, INC., a Florida corporation, DRIFTWOOD BEACH CLUB, INC., a Virginia corporation, DRIFTWOOD BEACH CLUB ASSOCIATION, INC., a Florida corporation, CANDELIGHT INN OF DEERFIELD BEACH, LTD., a Florida limited partnership, AVALON CONDOMINIUM ASSOCIATION, INC., a Florida corporation, TRANSCO FINANCIAL GROUP, LTD., a Florida limited partnership, and LACOSTA BEACH CLUB RESORT CONDOMINIUM ASSOCIATION, INC., a Florida non-profit corporation, all of which will be referred to collectively as "Respondents".

Of the Respondents, CANDELIGHT INN OF DEERFIELD BEACH, LTD., AVALON CONDOMINIUM ASSOCIATION, INC., TRANSCO FINANCIAL GROUP, LTD., and LACOSTA BEACH CLUB RESORT CONDOMINIUM ASSOCIATION, INC. were Intervenorers in the Circuit Court. These four parties will be referred to collectively as "Intervenorers".

WILLIAM MARKHAM as Property Appraiser for Broward County will be referred to as "Petitioner".

References to the record on appeal will be denominated (R.)

References to the transcript of the hearing held in the Circuit Court on April 2, 1984 and which was filed in the District Court of Appeals will be referred to as (T.). The transcript is attached hereto as part of the appendix. References to the Appendix will be denominated (Appx.).

STATEMENT OF THE CASE AND OF THE FACTS

Respondents filed a complaint in the 17th Judicial Circuit in and for Broward County, Florida, seeking to have Section 192.037 Fla. Stat. (1983) declared unconstitutional and have tax assessments rendered against timeshare projects in which Respondents have ownership interests and/or are the condominium associations for the respective projects declared void.

All Respondents who are also unit owners, filed their respective declarations of condominium, committing their developments to condominium or joint use ownership, and entered into purchase agreements with the other timeshare unit owners, and formed their respective condominium associations, prior to Florida Statute, Section 192.037 Fla. Stat. (1983) becoming effective on January 1, 1983.

Respondent's contend that Florida Statute, Section 192.037 Fla. Stat. (1983) is unconstitutional as applied to Respondents in that it constitutes an impairment of the obligation of contract by imposing new obligations and duties upon Respondents as unit owners and condominium associations, that did not exist at the time of their entering into their respective contracts and declarations, thereby violating Article I, Section 10 of the Constitution of the State of Florida.

Specifically, Respondents claimed Florida Statute, Section 192.037 Fla. Stat. (1983) impaired the contract between Respondents as developers, the condominium associations, and other unit owners, pursuant to the purchase and sale agreements and respective declarations of condominium in the following ways:

a. By obligating the condominium associations and developers/unit owners and other unit owners to pay the unpaid ad valorem taxes of other timeshare unit owners.

b. By obligating the condominium associations to act as the agent for all unit owners for receiving tax notices and tax bills and collecting said taxes, for paying the unpaid taxes of the unit owners, and requiring the association to assess the unit owners amounts necessary to satisfy the unpaid taxes of unit owners for their property taxes, all of which is done at the expense of the condominium association.

c. By subjecting the developers/unit owners and all unit owners to assessments by the association for payment of their own unpaid taxes or the unpaid taxes of another timeshare unit owner.

d. By subjecting the developers/unit owners and all other unit owners to liens by the association for non-payment of their taxes or non-payment of any amount assessed against them to pay the unpaid taxes of another timeshare unit owner.

e. By subjecting developers/unit owners and all other unit owners to their property being liened and/or sold as a result of non-payment of taxes and/or the non-payment of assessments for unpaid taxes by other timeshare unit owners.

Respondents claim the above-stated obligations and duties constitute new obligations and duties and impair the obligation of contract to the detriment of Respondents.

Respondents further claim that Section 192.037 Fla. Stat. (1983) is an unconstitutional denial of due process and equal protection in that the statute subjects a property owner to loss of his property, despite the fact that his property taxes were paid, if another property owner in the timeshare development has failed to pay his taxes.

Respondents further allege that Section 192.037 Fla. Stat. (1983) deprived Respondents of their ability to receive a discount pursuant to Section 197.055, Fla. Stat. (1983), when all other property owners in Florida are entitled to take advantage of a discount by paying their taxes early, notwithstanding and not dependent upon when ad valorem taxes are paid by other property owners.

In addition to declaratory relief, Respondents sought an injunction against the Tax Collector, prohibiting him from issuing tax warrants, advertising delinquencies, issuing tax deeds or selling tax certificates with respect to the ad valorem taxes challenged by Respondents pendente lite and permanently thereafter from collecting said ad valorem property taxes on Respondents' property.

Petitioner's Motion to Dismiss was granted on April 2, 1984 (R.281). On appeal the 4th District Court of Appeal reversed. (Appx.1) This Court exercised its discretionary jurisdiction and dispensed with oral argument on March 4, 1986.

Respondents disagree with the following portions of the Statement of The Case and of the Facts contained in Petitioner's Initial Brief:

1. Petitioner has gone to great length to describe in detail the various tax bills which are attached to the complaint as exhibits in an effort to show that the Respondents do not have standing to prosecute this lawsuit. These facts do not support Petitioner's argument and only serve to confuse the issues in this case. Petitioner did not raise the issue of lack of standing in the Circuit Court. Further, the complaint and the other exhibits attached thereto clearly alleged that the property is timeshare property and that the tax was levied pursuant to Section 192.037 Fla. Stat. (1983) (R.1-10, 85-247).

2. The hearing held on April 2, 1984 must be placed in proper context. A copy of the transcript of that hearing is attached hereto as part of the Appendix. (Appx.4) The April 2, 1984 hearing was set for ten minutes. It was initially noticed by counsel for Intervenor on their Motion to Intervene and Motion for Temporary Injunction (R.258-251, T.5). The Motion to Dismiss filed by Petitioner was noticed for the same hearing but subsequent to Intervenor's Notice of Hearing.(T.11). At the hearing the Motion to Intervene was granted (T.7) and Intervenor's adopted the allegations in the other Respondents' complaint. The Motion to Dismiss was granted with prejudice (T.10-11).

Although the order initially entered by the Circuit Court dismissed the complaint with leave to amend (R.273), this order was corrected nunc pro tunc to be a dismissal with prejudice in

conformance with the Judge's verbal ruling at the hearing (T.11, R.281). See pages 9-13 of the transcript of the April 17, 1984 Circuit Court hearing, a copy of which is attached as part of the Appendix. (Appx.5) Thus, the order appealed from was a final order.

SUMMARY OF ARGUMENT

The 60-day non-claim provision of Section 194.171(2) and (3) Fla. Stat. (1983) does not apply to a lawsuit that challenges an assessment as void on the basis that the assessment is levied pursuant to statutes that are unconstitutional. Section 194.171 Fla. Stat. (1983) applies to challenges to the amount of an assessment and not to claims that the assessment is void. An assessment that does not properly value the property is merely voidable while an assessment that is levied pursuant to an unconstitutional statute is void. Challenges to void assessments are not subject to the 60-day non-claim provision of Section 194.171 Fla. Stat. (1983).

ARGUMENT

THE 60-DAY NON-CLAIM PROVISION OF SECTION 194.171(2) AND (3) FLA. STAT. (1983) , IS INAPPLICABLE WHERE THE CHALLENGED ASSESSMENT IS CLAIMED TO BE ILLEGAL, VOID, AND LEVIED PURSUANT TO STATUTES THAT ARE UNCONSTITUTIONAL.

Petitioner's primary argument is that Respondents were required under Section 194.171(2) and (3) Fla. Stat. (1983) to make a good faith deposit of the taxes alleged to be owed and to file their complaint within sixty days from the date the assessment being contested was certified for collection under Section 193.122(2) Fla. Stat. (1983) , or after sixty days from the date a decision was rendered concerning such assessment by the Property Appraisal Adjustment Board. Petitioner argues that the failure to comply with these sections bars the action under Section 194.171(6) Fla. Stat. (1983). The basis for this argument is that the legislature adopted Section 194.171(6) Fla. Stat. (1983) following this Court's decision in Miller v. Nolte, 453 So.2d 397 (Fla.1984) in order to nullify that decision. This followed a series of decisions in this Court and in the District Courts of Appeal concerning the issue of whether Section 194.171(2) Fla. Stat.

(1983) was a jurisdictional statute of non-claim or a statute of limitations. See Rudisill v. City of Tampa, 151 Fla.284, 9 So.2d 380 (1942); Coe v. ITT Community Development Corp., 362 So.2d 8 (Fla.1978); Williams v. Law, 368 So.2d 1285 (Fla.1979); Cape Cove Corp. v. Lowe, 411 So.2d 887 (Fla.2DCA 1982), review denied 418 So.2d 1280 (Fla.1982); Miller v. Nolte, supra.

While the addition of Section 194.171(6) Fla. Stat. (1983) clearly established that Section 194.171(2) Fla. Stat. (1983) is a jurisdictional statute of non-claim and not a statute of limitations, the amendment does not affect the legal analysis that governs this case.

The analysis that is germane to this case is whether the jurisdictional statute of non-claim is applicable to a complaint that challenges an assessment as being void on the basis that the assessment is levied pursuant to statutes that are unconstitutional. The cases that considered the issue of statute of limitations versus statute of non-claim, supra, do not overrule those cases dealing with the issue of whether an assessment that is void is subject to the sixty day limitation period. All of these cases deal with challenges to the amount of the assessment, not to the validity of the underlying statute. This case is determined by deciding whether the assessment is void or merely voidable. An assessment that improperly values the property is voidable, not void, and is therefore subject to Section 194.171 Fla. Stat. (1983). In fact, both Coe v. ITT Community Development Corp., 362 So.2d 8 (Fla.1978), and Miller v. Nolte, 453 So.2d 397 (Fla.1984), which came down on different sides of the statute of

limitations/statute of non-claim argument, cited the case of Lake Worth Towers, Inc. v. Gerstung, 262 So.2d 1 (Fla.1972) which deals with the void/voidable distinction. Both Coe and Miller remarked on the inartful use of the term "statute of limitations" in Lake Worth Towers, but they did not overrule the holding of that case that an assessment that is void is not subject to the 60-day period set forth in Section 192.21(2) Fla. Stat. (1967) the predecessor to Section 194.171 Fla. Stat. (1983).

Petitioner does not urge this Court to overrule the void/voidable cases, including Lake Worth Towers and, in fact, recognizes the continuing validity of this analysis.

Thus, this case is not determined by analyzing Section 194.171 Fla. Stat. (1983). Rather, this case is determined by analyzing the complaint under the void/voidable line of cases. It is the void/voidable analysis that distinguishes the decision of the 4th District Court of Appeal in this case, (Appx.1) from the decision in Gulfside Interval Vacations, Inc. v. Schultz, 479 So.2d 776 (Fla.2DCA 1985). The 2nd District Court of Appeal decided Gulfside under the statute of non-claim vs. statute of limitations analysis after erroneously deciding that Section 194.171 Fla. Stat. (1983) applied to both void and voidable assessments. The 4th District Court of Appeal's decision below was based on its determination that the assessment was challenged as void and that Section 194.171 Fla. Stat. (1983) therefore did not apply. This is the correct analysis of the issue. The 4th District Court of Appeal properly concluded that the complaint attacking the constitutionality of the assessment is not subject to the 60-day limitation.

In Lake Worth Towers, 262 So.2d 1 (Fla.1972), (cited by the court below), this Court was presented with a case similar to the one at bar. There, the tax collector argued that the taxpayer had failed to contest an assessment in a timely manner, maintaining that because the assessment was merely voidable and not void, the taxpayer's failure to exhaust his administrative remedies and bring suit within sixty days barred him from challenging the assessment. In its decision, this Court stated the general rule that a void assessment is one "... not authorized by law, where the property is not subject to the tax assessed, or where the tax roll is illegal due to some affirmative wrongdoing by the taxing official." The challenge was permitted.

The Court below also relied on Hansen v. Port Everglades Steel Corporation, 155 So.2d 387 (Fla.2DCA 1963) for its decision. In Hansen, a challenge to an assessment on imported goods made after the expiration of the 60-day period of limitations was held to have been brought in a timely manner where the assessment was based on an unconstitutional and thus void statute.

Lake Worth Towers and Hansen cited Hackney v. McKenney, 113 Fla. 176, 151 So.2d 524 (1933) as the leading case on the issue of whether a tax assessment is void as opposed to voidable. In Hackney, this Court first enunciated two of the ways an assessment could be found void: "... or where a tax levy as made is not authorized by a valid law; or where though a tax levy be duly authorized by law, the illegality of the tax roll because of affirmative wrongdoing by the taxing officials, and not mere incorrectness or specific instances of unfairness in the assessment

as made is duly shown." (emphasis added) Hackney, 151 So.2d 524, 528. It is from Hackney that Lake Worth Towers and Hansen derive their three tests for voidness. See Florida East Coast Railway Company v. Reid, 281 So.2d 77 (Fla. 4DCA 1973). But Hackney did not limit the test for voidness to just those methods stated above. Instead, this Court said on page 528: "There may be other instances in which a tax levy is void and relief from it may be had at any time when the right to redress has not been waived or otherwise lost."

Hansen and Hackney, when read together, stand for the proposition that assessments made under an unconstitutional statute are void. Thus, they are in complete harmony with the decision below and correctly state the rule of law in this state.

Respondents' complaint challenged this assessment as void because it was levied pursuant to an invalid statute. The 60-day limitation period of 194.171 does not apply. The decision of the 4th District Court of Appeal should be affirmed.

CONCLUSION

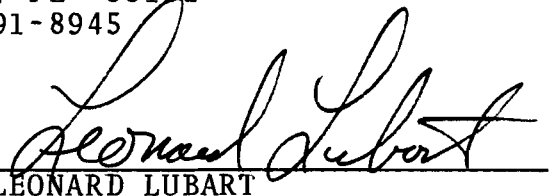
The 4th District Court of Appeal ruled that a challenge to an assessment on constitutional grounds is to challenge it as being void. Such challenges are not governed by the 60-day limitation period in Section 194.171 Fla. Stat. (1983). This is not based on the statute of non-claim versus statute of limitations which has been settled by the addition of Section 194.171(6) Fla. Stat. (1983). Rather, it is based upon the void/voidable analysis adopted by this Court as set forth in the cases cited by the Court below and in this brief.

The case should be remanded to the Circuit Court with instructions to deny the motion to dismiss and to proceed with an adjudication of the merits of the case.

Respectfully submitted,

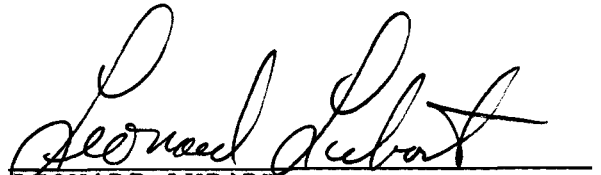
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Respondents' Answer Brief was mailed to Gaylord A. Wood, Jr., Esq., 304 S.W. 12th Street, Fort Lauderdale, FL 33315; Susan Delegal, General Counsel of Broward County, 115 S. Andrews Avenue, Suite 423, Fort Lauderdale, FL 33301, and J. Terrell Williams, Assistant Attorney General, Tax Section, Capitol Building, Tallahassee, FL 32301, this 11 day of April, 1986.


LEONARD LUBART