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IN THE SUPREME COURT OF FLORIDA

PARKER TAMPA TWO, INC.,)
)
 PETITIONER,)
)
 vs.)
)
 SOMERSET DEVELOPMENT CORPORATION,)
)
 RESPONDENT.)

CASE NO. 72,295

FILED

SID J. WHITE

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ON APPEAL FROM THE SECOND DISTRICT COURT OF
APPEAL CASE NOS. 87-892 AND 87-1554

Initial Brief of Petitioner

John H. Rains, III, Esquire
Annis, Mitchell, Cockey,
Edwards & Roehn, P.A.
Post Office Box 3433
Tampa, Florida 33601

Attorneys for Petitioner

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INTRODUCTION

This appeal involves the certified question: Are the damages which are recoverable for wrongfully obtaining an injunction bond limited to the amount of the injunction bond? References to "R" are to the page of the record of appeal and "App." to the Appendix to this brief.

STATEMENT OF THE CASE

On December 13, 1985, Respondent Somerset Development Corporation ("Somerset") obtained, without notice to Petitioner Parker Tampa Two, Inc. ("Parker"), an injunction restraining Hillsborough County from issuing certain building permits. The injunction provided that no building permits would be issued "to any applicant that presently has a DER wastewater collection system permit for sewer service for, but that is presently unconnected to, the River Oaks treatment facility or the Tampa Suburban treatment facility, except Plaintiff, Somerset Development Corporation, and assignees of Colony Investment, Ltd., that enjoy the same priority as Plaintiff, Somerset Development Corporation, under the contractual agreements that were introduced into evidence." (R-43-45)(App.-1). There was no finding as required by Rule 1.610 of the Florida Rules of Civil Procedure as to why this injunction would be issued without notice to parties such as Petitioner.

Somerset posted an injunction bond in the amount of \$10,000 without Parker having the opportunity to be heard on the sufficiency of the amount of the bond. Interestingly, however, the condition of the bond (signed by Somerset) was that "Somerset Development Corporation will pay all costs and damages that may be incurred or suffered by any party who may be found to be wrongfully restrained" (R-250-52)(App.-2).

On January 7, 1986, Petitioner Parker Tampa Two, Inc. ("Parker") moved to intervene in the action and also concurrently moved to increase the amount of the injunction bond. (R-46-52). Both of these motions were denied. (R-53). On January 16, Parker filed a second motion to intervene as a party defendant, grounded on Parker's status as an assignee of a predecessor of Colony Investment Ltd. (R-54-67)(App.-3, Summary of Chain of Title). This motion was granted, with Parker allowed to intervene as a party plaintiff. (R-68). The Court, in response to Parker's motion, dissolved the temporary injunction on March 4. (R-69).

On February 24, Parker filed a crossclaim against Somerset for wrongful injunction, alleging that Somerset knew or should have known that the injunction would prejudice Parker's rights, but that Somerset did not notify Parker and allow Parker an opportunity to be heard on whether the temporary injunction was proper. (R-70-75). The court denied Somerset's motion to dismiss, (R-76-77) and Somerset then answered and asserted various affirmative defenses. (R-78-80).

The court granted partial summary judgment in favor of Somerset on September 26, limiting the amount Parker could receive to \$10,000, the penal sum of the injunction bond. This order was not immediately appealable. (R-142).

Somerset stipulated that Parker's damages exceeded \$10,000. (R-143). The court then received briefs based on the record, which included transcripts of various evidentiary hearings held in connection with the second motion to intervene and motion to dissolve the temporary injunction.

On March 2, 1987, the court granted final judgment on the crossclaim in favor of Parker against Somerset and Fidelity and Deposit Company of Maryland, Somerset's surety. The amount of the judgment was \$11,433.40, the penal sum of the bond (\$10,000) plus prejudgment interest. (R-12). Rehearing was denied on May 7, 1987.

On March 18, 1988, the Second District Court of Appeal affirmed noting:

Although we are following the majority view, we recognize that the argument on the other side is persuasive. (App.-4, p. 3).

The court then certified the following question as being of great public importance:

Are the damages which are recoverable for wrongfully obtaining an injunction bond limited to the amount of the injunction bond?

On April 13, 1988, Parker filed is notice to involve discretionary jurisdiction and on April 14, Somerset filed its cross-notice.

STATEMENT OF THE FACTS

Petitioner Parker Tampa Two, Inc. ("Parker") fell within the class enjoined from obtaining building permits. Parker had previously obtained a DER wastewater collection system permit for 355 sewer connections. (R-177). Parker was not an assignee of Colony Investment, Ltd. Although building permits had been approved for the construction of 355 apartment units, these permits were not released to Parker because of the temporary injunction. (R-49-50).

Parker had no notice of the temporary injunction prior to its entry on December 13, 1985. On December 23, Parker's counsel on learning of the temporary injunction advised Somerset's counsel that Hillsborough County refused to issue the building permits to Parker because of the temporary injunction. Somerset's counsel was further notified that Parker, as a substantially affected party, had no notice nor opportunity to appear at the hearing which resulted in the temporary injunction; that the \$10,000 injunction bond was clearly insufficient; and that Parker had rights arising out of the 1972 sewer tap agreement between Hillsborough County and Intervest, Inc. (R-83-85). This is the same agreement from which Colony Investment, Somerset's assignor, allegedly derived its rights (App.-3).

Somerset did not execute the proposed stipulation excluding Parker from the injunction. On January 3, 1986, Parker again contacted Somerset, demanding relief from the temporary injunction. Enclosed with this demand were draft copies of a motion to

intervene, motion to increase bond, motion to dissolve temporary injunction, answer and affirmative defenses which outlined in detail Parker's rights, a proposed counterclaim for wrongful injunction, and a draft affidavit with attachments showing the chain from Intervest to Parker Tampa Two with respect to the assignment of sewer connections from Intervest to Parker. (R-87-141). Despite this demand, Somerset again refused to execute the stipulation excluding Parker from the temporary injunction, ignoring Parker's warning that it would seek recovery based on wrongful injunction.

Parker then filed a motion to intervene as a party defendant, together with a copy of its proposed answer, affirmative defenses and counterclaim, as well as its motions to increase bond and to dissolve the temporary injunction. (R-46-52). At the hearing on these motions, Somerset's counsel argued that Parker was "not one of the priority status holders that Somerset Development Corporation is," and also argued that "the only reason we [Somerset] can't get a permit is because there [sic] they [Parker] got the permit that we should have gotten." (R-149-150). The court denied Parker's motions. (R-53).

Parker then filed a second motion to intervene, accompanied by the affidavit of Robert R. Smith, Vice President of the Chase Manhattan Bank, N.A. Mr. Smith stated: "I clearly recall that after Parker took title to the property, that Walter Wright [predecessor to Colony Investments, Ltd.] repeatedly acknowledged that the multi-family hookups previously transferred by Intervest, Inc. to Bayport Colony Development Corporation, were still

committed to Hillsborough Mat [predecessor of Parker] and then to Parker." (R-54-67). Somerset continued to resist Parker's intervention despite the second motion to intervene and the accompanying exhibits.

On February 4, the Court heard Parker's second motion to intervene. Somerset continued to oppose intervention, even after the court noted that "it appears to me that Parker Tampa Two based on these documents is in a position of priority equal to Somerset and Colony." (R-152). At the same hearing, the court heard the testimony of Roger P. Stewart, head of the Hillsborough Environmental Protection Commission. Mr. Stewart testified that there was no more capacity at the plants, and that even if the court prohibited developers such as Parker from hooking up to the plant, then Somerset still could not get a general permit from the DER. (R-153-177). Mr. Stewart's testimony was directly contrary to indications made to the court by Somerset at the original temporary injunction hearing that "you're going to free up additional capacity that would be available for Somerset and other Colony assignees." (R-147).

The court permitted Parker to intervene, but as a party plaintiff rather than as a party defendant. (R-68). Despite this order and the testimony of Mr. Stewart, Somerset continued its opposition to the motion to modify or dissolve the temporary injunction.

On February 28, the court heard the motion to dissolve the temporary injunction. Mr. Kenneth A. Bryant testified that as of the date of the hearing, Somerset had not even used 36 permitted

sewer connections from DER and EPC. (R-179). More significantly, the court learned for the first time that Somerset's assignment from Colony Investment was, on its face, nonrecourse. The assignment states: "it is further understood that delivery of the sewer connections is within the sole control of Hillsborough County and you shall hold us harmless for any damage to you occasioned by the County's delay or refusal to deliver such sewer connections. It is further understood and agreed that the County's delay or refusal to deliver such connections, shall not relieve you of the obligation to pay the total sum of \$102,064 due and owing." (R-180). The court then dissolved the temporary injunction. (R-69).

SUMMARY OF ARGUMENT

Petitioner Parker should recover all damages caused by Respondent Somerset's wrongful injunction. The injunction was granted and the penal sum of the bond was set without notice to Parker. As a result, the trial court should not have limited Parker's remedy to the penal sum. Consequently, this Court should reverse the judgment below and remand this cause for a determination of Parker's full damages.

ARGUMENT

THE TRIAL COURT IMPROPERLY LIMITED PARKER'S DAMAGES TO THE \$10,000 PENAL SUM OF THE INJUNCTION BOND, WHICH WAS SET WITHOUT PARKER HAVING AN OPPORTUNITY TO BE HEARD.

In certifying this case as involving a question of great public importance, the Second District Court of Appeal in affirming observed there was a split of authority, see Annotation, Recovery of Damages Resulting from Wrongful Issuance of Injunction as Limited to Amount of Bond, 30 ALR 4th 273 (1984).

The court below then observed:

In opposition to so limiting the recovery are arguments that an application for a temporary injunction is (as was the case here with respect to Parker) frequently heard without the participation of the party restrained thereby (although in this case Hillsborough County which was directly affected by the injunction did so participate) and the party obtaining the injunction should not under those circumstances be permitted to influence a limitation upon the amount of damages to which it may be exposed. Although we are following the majority view, we recognize the argument on the other side is persuasive (App.-4, p. 3) (emphasis added) (citations omitted).

Parker would refine the question certified as follows:

Are the damages which are recoverable for wrongfully obtaining an injunction without notice limited to the amount of the injunction bond?

- A. PARKER WAS DENIED DUE PROCESS OF LAW BECAUSE IT WAS NOT GIVEN NOTICE NOR AN OPPORTUNITY TO BE HEARD PRIOR TO THE GRANTING OF THE INJUNCTION AND THE SETTING OF THE AMOUNT OF THE INJUNCTION BOND.

Parker received neither notice nor an opportunity to raise objections prior to the entry of a temporary injunction which substantially affected its property rights. Consequently, Parker never received an opportunity to contest the amount of the injunction bond set by the trial court.

The concepts of due process, notice, and an opportunity to be heard when a party's rights are adversely affected are fundamental rights under both Florida law, Art. I, § 9, Fla. Const., and the Constitution of the United States of America, U.S. Const. Amend. V, XIV.

[D]ue process safeguards will vest anytime there is a deprivation of any significant property interest The right to be heard has little value if one is not informed that a matter is pending. Due process requires that interested parties be apprised of the pendency of an action through a procedure

reasonably calculated to convey the required information. Phillips v. Guin & Hunt, Inc., 344 So.2d 568, 572 (Fla. 1977).

The Florida Supreme Court has held that the legislature may determine the procedure for assertion of legal rights "provided that the procedure adopted affords reasonable notice and a fair opportunity to be heard before rights are decided." Peoples Bank of Indian River County v. State, 395 So.2d 521, 524 (Fla. 1981).

Although styled as a restraint against Hillsborough County, the County could not have been damaged by the temporary injunction. The real parties affected were Parker and those similarly situated, i.e., those holding DER permits but not building permits. There was no finding, in the temporary injunctions, as required by Rule 1.610 of Florida Rules of Civil Procedure, as to why no notice was given to parties such as Parker. Somerset would have had no difficulty in notifying Parker because Parker's project is located only about one-half mile from Somerset's project, on the same street. (R-71). Furthermore, there was no immediate harm to Somerset, which had not even used all of its permitted connections. Finally, Somerset could not get a general permit from DER, which is a condition precedent to obtaining a building permit from Hillsborough County.

Parker was denied due process, and should not be bound by the ex parte determination of the bond amount, because it was not notified and allowed to object.

B. DAMAGES AGAINST A PARTY OBTAINING A WRONGFUL INJUNCTION WITHOUT NOTICE SHOULD NOT BE LIMITED TO THE AMOUNT OF THE INJUNCTION BOND.

Although as the court below noted the "majority view" is otherwise, courts in several jurisdictions have adopted the view that the recovery of damages from a principal is not restricted to the amount of the injunction bond. The court reached this conclusion in Smith v. Coronado Foothills Estates Homeowners Assoc., 117 Ariz. 171, 571 P.2d 668 (1977). The Smith court held that allowing the penal sum to be a limitation on damages against the party securing a temporary injunction

ignores the procedures usually involved in obtaining a temporary restraining order at the commencement of a lawsuit. The application is usually made ex parte and the court has no opportunity to hear from the person being enjoined or restrained To give a party what, in actual practice, amounts to the right to limit the amount of damages that may be recovered against him is too great a temptation even to the most fair-minded. Having caused the injury in the first place, we see no injustice in allowing a recovery for actual damages against the party who asked for and obtained the wrongful issuance of the injunction. Id. at 670 (emphasis added).

A similar result was reached in Howard D. Johnson Co. v. Parkside Development Corp., 169 Ind. App. 379, 348 N.E.2d 656 (1976). The court observed that

the trial court in establishing the amount of the security must, of necessity, do so on a conjectural basis, guided by divergent estimates of damages offered by the opponents before the court and by the trial judge's own experience and knowledge. The trial court's most diligent efforts in this respect may ultimately be wide of the mark. . . . Because of the purpose of the security and the unavoidable inexactitude by which it is fixed, no one, save the surety, should be bound by the amount thereof. Id. at 663.

See also Davis v. Poitevant & Favre Lumber Co., 15 La. App. 657, 132 So. 790 (1931); Miller Surfacing Co. v. Bridgers, 269 S.W. 838 (Tex. Civ. App. 1924) (allowing damages "resulting from the wrongful issuance of the injunction whether maliciously sued out or not"); Houghton v. Grimes, 103 Vt. 54, 151 A. 642 (1930); and Mitchell v. Riegel Textile, Inc., 259 F.2d 954 (D.C. Cir. 1958).

The foregoing cases support the proposition that the recovery of damages for wrongful injunction from the principal will not be limited to the amount of the bond regardless of other circumstances in the case. Other jurisdictions limit recovery to

the amount of the bond absent a showing of malice or bad faith. For example, in Tracy v. Capozzi, 642 P.2d 591 (Nev. 1982), the court held:

we will not sanction an award of damages in excess of the bond where, as here, appellants obtained the restraint in good faith and the respondents failed to protect themselves from an inadequate bond with the means available to them. Id. at 595.

See also Coyne-Delany Co. v. Capital Dev. Bd., 717 F.2d 385 (7th Cir. 1983) (bond under Fed. R. Civ. P. 65(c) is limit for wrongful injunction, provided plaintiff was acting in good faith).

In the present case, because of the substantial evidence of Somerset's bad faith this stricter view of limitation of damages should not be applied. The court below nonetheless agreed with Somerset's contention "that the trial court implicitly found good faith on the basis of sufficient evidence in that regard." (App.-4, p. 2). The issue of Somerset's "good faith" was not based on a trial with "findings," but rather by a grant of a partial summary judgment which made no "finding" on that issue (R-142).

Clearly, there were disputed issues of fact on the question of Somerset's good faith. For example, Somerset failed to notify interested parties of its application for a temporary injunction. It refused to exclude Parker from the injunction, even after learning that Parker held equal sewer connection rights and after

receiving warnings that Parker was suffering substantial harm due to the injunction. Somerset failed to inform the trial court that even if developers such as Parker were prohibited from hooking up to plants, Somerset still could not get a general permit from the DER. Somerset failed to inform the court that it had not used all of its permitted connections from the DER, and failed to inform the court that its sewer connection assignment from Colony Investment, Ltd. was nonrecourse.

The fact that Somerset could not obtain a DER permit even if Parker was denied access to the plant is a significant indication of bad faith. Florida Rule of Civil Procedure 1.610(a)(1)(A), governing temporary injunctions, requires a showing that "immediate and irreparable" injury will result.

In addition, Parker promptly acted to protect itself by moving to increase the bond after determining that Somerset would not stipulate to exclude Parker from the terms of the temporary injunction. On the facts of this case, Parker should recover its full damages, regardless of the amount of the injunction bond, under either view of wrongful injunction damages.

As the court below noted, one Florida case contains language to the effect that a separate action at law where a jury trial is demanded on the bond is the only way a claim may be asserted for "the wrongful, but good faith, suing out of an injunction." Lane v. Clein, 151 So.2d 677 (Fla. 3d DCA 1963). However, the court in Lane was addressing the issue of whether one party was required to bring a separate action for damages under the bond where the opposition requested a jury trial. The court did not

consider the question of limitation of damages to the penal sum of the bond. Furthermore, there is no indication in the opinion that the injunction and bond amount were set without notice. Therefore, Lane is inapposite to the situation at hand Somerset obtained an injunction wrongfully without not Parker.

Although no Florida precedent directly addresses the fact situation here, there are substantial indications in Florida law that Parker should not be bound by the terms of a clearly insufficient bond, established without notice to Parker. Florida Rule of Civil Procedure 1.610(b) does not expressly limit the movant's liability to the bond. Since the purpose of the Rule is to protect the injured party from wrongful injunction, the judge's preliminary determination should not limit liability. Also, Rule 1.610(b) allows the court to dispense with bond where a government entity requests a temporary injunction. If damages for wrongful injunction are limited to the injunction bond, logic would dictate that a government entity would always be immune from damages if the court did not require bond in a particular case.

One Florida court, emphasizing the importance of the injunction bond, remarked that:

[W]hen a person's conduct is restrained . . . the protection which such bonds afford should not be lightly dispensed with, but should be jealously guarded and uniformly enforced by the courts. Such orders . . . may have serious and far-reaching effects on a person's liberty of

action and his property or business. The party who initiates such drastic writs should be made to place himself in a position of accountability. Belk's Dept. Store, Miami, Inc. v. Scherman, 117 So.2d 845, 848 (Fla. 3d DCA 1960).

In Glusman v. Warren, 413 So.2d 857 (Fla. 4th DCA 1982), the plaintiff filed a complaint seeking equitable relief and recorded a lis pendens. The defendant moved for an emergency hearing to dissolve the lis pendens or require to plaintiff to post a \$7,000,000 bond. Counsel for plaintiff had less than 24 hours notice of the hearing. The trial court took no evidence as to the amount and terms of a reasonable bond and accepted the defendant's argument. The court ordered the cause remanded for hearing on the plaintiff's actual damages and costs, holding:

the petitioners in this case did not have adequate notice to present evidence on the amount and terms of a reasonable bond . . . setting this bond without any evidentiary basis was a departure from the essential requirements of the law. Id. at 858.

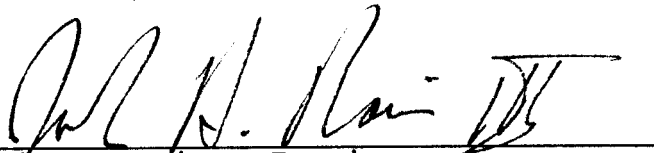
In Minimatic Components, Inc. v. Westinghouse Electric Corp., 494 So.2d 303 (Fla. 4th DCA 1986), the appellate court held that a nominal bond established by the trial court without notice to the opposing party was "grossly inadequate." See also Marston v. Gainesville Sun Publishing Co., 314 So.2d 257 (Fla.

1st DCA 1975). Clearly, Somerset should not be allowed to escape liability for its wrongful conduct in improperly obtaining an injunction without notice to Parker.

CONCLUSION

For these reasons, the Partial Summary Judgment of the trial court, as well as the Final Judgment insofar as it limits the amount of Parker's damages, should be reversed. This cause should be remanded on the limited issue of determining Parker's actual damages.

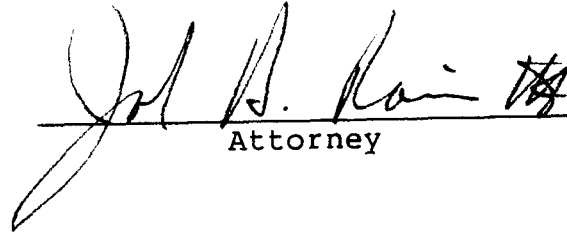
Respectfully submitted,



John H. Rains, Esquire
Annis, Mitchell, Cockey,
Edwards & Roehn, P.A.
Post Office Box 3433
Tampa, Florida 33601
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand this 16th day of May, 1988, on Samuel R. Mandelbaum, Esquire, 100 S. Ashley Drive, Tampa, Florida 33602.



Attorney

045-08-1722-030