IN THE SUPREME COURT OF FLORIDA

PARKER TAMPA TWO, INC.,

PETITIONER,

vs.

SOMERSET DEVELOPMENT CORPORATION,

RESPONDENT.

CASE NO. 72,295

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

Reply and Cross-Answer 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/
Cross-Respondent

TABLE OF CONTENTS

TABLE OF CITATIONS

SUPPLEMENTAL STATEMENT OF THE CASE AND FACTS

A. OVERVIEW

Somerset's Statement of the Case and Facts does not comply with Rule 9.210(c) of the Rules of Appellate Procedure. The twenty-one (21) pages of Statement of the Case and Facts are repetitive and in large part contain matters not relevant to the present appeal. For example, Somerset's discussion of its "win" of a summary judgment against the County (Respondent's Brief, 13-14) in its action at law against the County is not relevant to this appeal. It does establish, however, that Somerset had an adequate remedy of law and never should have sought a temporary injunction without notice to real parties in interest, such as Parker.

Further, much of Somerset's "argument" is contained in its Statement of the Case and Facts. The pertinent points are addressed in Parker's Reply Argument and Cross-Answer Argument.

B. AREAS OF DISAGREEMENT WITH SOMERSET'S STATEMENT OF THE CASE AND FACTS

1. Somerset states:

> It is important to note that the County did not raise the affirmative defense of Somerset's failure to join other "indispensable parties" (R-145-146) (Brief of Respondent at 3).

The reference to the record (R-144-147) shows that in fact the County did raise the point that there were other potential users of the sewer capacity who should have been parties to the action before the Court would grant a temporary injunction. In fact,

Somerset acknowledged that this issue had been raised by arguing (incorrectly) that the County had waived the defense by not raising it in its motion to dismiss.[1]

2. The next inaccuracy in Somerset's Statement is that Parker "had already been issued a building permit by the County for the 335 multi-family units." (Respondent's Brief 7). This is incorrect. It is only when Parker went to pick up the building permits on December 20, 1985 that Parker found that an injunction had been issued prohibiting the County from issuing any building permits to Parker. (R-49-51).

3. Parker disagrees with the following statement by Somerset:

> However, Judge Cheatwood that day granted a similar motion to intervene as Party-Plaintiff filed by Colony, another developer (Respondent's Brief 8) (emphasis added).

There is nothing in the Record to suggest that Colony, the party that sold Somerset its non-recourse sewer connection assignment (R-180), was in a "similar" position as Parker. Indeed, the Record is clear that Colony's "ox" was not being gored because it was specifically excepted from the terms of the temporary injunction prohibiting the County from issuing building permits. (R-43-45 ¶2(a). To the extent Somerset is attempting to draw the inference that it fairly and freely allowed other parties to intervene from

---

[1] Rule 1.140(h)(2) provides: "The defense of failure to state a cause of action for a legal defense or to join an indispensable party may be raised by motion for judgment on the pleadings or at the trial on the merits in addition to being raised in either a motion under subdivision (b) or in the answer or reply."

the example of Colony, this is not supported by the Record. Likewise, the discussion of Colony's "similar motion for temporary injunction" (Brief 8, 9) is irrelevant because there is no indication in the Record that the motion was ever heard or granted (and in fact, it was not).

4. On page 11 of Respondent's Brief, Somerset states:

> Finally, Somerset's attorney noted that in view of the Court's indication that Parker enjoys equal standing as to Somerset, that the injunction by its terms would not apply to Parker (R-368).

Somerset's summary of its counsel's statement at the February 4, 1986 hearing is inaccurate and leaves out a very important word: "if."

> Mr. Williams [Somerset's Counsel]: Your Honor, may I make my objection as to Mr. Templeton as well. If the Court determines that Parker Tampa Two should be in the lawsuit or has the same standing as Somerset, then the injunction by its own terms does not apply to Parker Tampa Two, so this testimony coming in now as to the injunction is really -- it may not be necessary if the Court rules as you indicated you were inclined to rule, that Parker Tampa Two enjoys equal standing. (R-367-368) (emphasis added).

Parker's counsel offered to stipulate to the fact that Parker and Somerset had equal priorities so the injunction did not apply. It is obvious from the balance of the dialogue, Somerset declined to enter into that stipulation. (R-368-370). Indeed, Somerset's

counsel at the conclusion of that hearing did not agree to the modification of the injunction so that Parker on February 4 could obtain its building permits. Instead, he requested that the status quo be preserved and that the temporary injunction remain in place as to Parker (R-472-473) (TR-143-44, 2/4/86 Hearing). The temporary injunction was not dissolved until March 4, 1986 (R-69).

5. Somerset is correct that the court order granting Parker's intervention had Parker intervene as a Plaintiff (R-68), but Somerset neglects to mention that Parker moved to intervene as a Defendant (R-46-47, 54-67). The trial court specifically noted in a later order as follows:

> Parker Tampa Two was permitted to intervene as a Plaintiff in this action by this Court's order of February 7, 1986. This Court dissolved the temporary injunction by order dated March 4, 1986. Therefore, Parker Tampa Two, Inc. was a party to this lawsuit during the period while the injunction was still in effect. Parker Tampa Two originally moved to intervene in this cause on January 10, 1986. That motion as well as Parker Tampa Two, Inc.'s second motion to intervene moved the Court to allow it to intervene as a Party Defendant in the case. However, for purposes of convenience, the Court ordered that Parker Tampa Two, Inc. intervene as a Party Plaintiff. (R-76) (emphasis added).

6. Somerset chooses to "argue" in its "Statement of the Case and Facts" that Parker did not file an interlocutory appeal from

the temporary injunction or the denial of the bond increase (Respondent's Brief 8, 29).[2] Initially, Parker could not, at the time of that denial of its first motion to intervene, appeal from the temporary injunction because it was not a party. Second, Parker, once it was allowed to intervene, did again request the Court to increase the bond should the injunction not be dissolved to $2,128,000.00 (R-579, TR-103, 2-28-86 Hearing). The trial court did not rule on that request because it dissolved the injunction. Obviously, any appeal of an order denying an increase in the bond would have taken longer than the two months it took to dissolve the injunction.

7. Somerset next "argues" in its Statement of the Case and Facts that the claim for damages in excess of $10,000 is waived because Parker did not "immediately appeal" the entry of the partial summary judgment of September 26, 1986, limiting Parker's damages claim to no more than $10,000. (Respondent's Brief 19).[3] That order, was not appealable under Rule 9.110(k) because it did not "totally dispose" of the wrongful injunction claim against Somerset. Parker still had to prove its entitlement to damages at least in the amount of $10,000. Somerset did not stipulate to

---

[2] The "areas of factual disagreement" in Respondent's Brief (17-21) are in reality nothing more than legal argument. Most of these points are dealt with in Parker's Reply Argument and Cross-Answer Argument.

[3] In Respondent's Brief at 19 Respondent states that Parker "erroneously states as fact" that the summary judgment was not "immediately appealable." That statement was not made in the Statement of Facts, but rather the Statement of the Case (Initial Brief, p. 3).

those damages until February 4, 1987, some five months later (R-143).

8. Somerset's next argument in its "Statement of the Case and Facts" is that the plain terms of the bond are only to the benefit of the "party defendant then in the case, i.e., Hillsborough County." Parker attached as part of its appendix to its Initial Brief, a copy of that bond and stands by its argument as to the clear terms of the bond.

9. As part of its Statement of Case and Facts, Somerset also moves this Court to "strike" that portion of Parker's Initial Brief (p. 6) discussion pages 149-50 of the Record (Respondent's Brief 20-21). Somerset never objected in its Trial Brief (R-315-20) nor raised as an objection in its motion for rehearing (R-323) this alleged improper Record. Furthermore, Somerset never made this request of the Second District Court of Appeals. In addition, it is clear that the "unidentified speaker" is Somerset's counsel, which Somerset does not deny. Furthermore, pages R-149 and 150 are just an earlier indication of Somerset's consistent refusal to modify the temporary injunction as to Parker at not only the January 9, 1986 hearing on Parker's first motion to intervene (R-148-150), but also at the February 4, 1986 Hearing on Parker's second motion to intervene (R-472-473, TR-143-144) and the February 28, 1986 Hearing on the motion to dissolve the temporary injunction. (See transcript of contested hearing, R-478-617).

10. In its Argument (Respondent's Brief 29), Somerset states Parker merely alleged an action of "wrongful injunction and declaratory relief." This is incorrect. The Complaint and

Crossclaim in Count II, ¶12(a)-(j) and ¶13, alleged intent tantamount to bad faith and that Somerset's actions were "willful." (R-1-6).

SUMMARY OF ARGUMENT

Parker should be entitled to recover all damages caused by Somerset's wrongful injunction. This is particularly true where the injunction was granted without notice to Parker. As a result, this Court should reverse the summary judgment, which made no "finding of good faith," limiting Parker's remedy to the penal sum of the bond on the judgment below and remand this case for determination of Parker's full damages.

With respect to Somerset's cross-appeal, the trial court's findings that Parker could recover $10,000 on its claim for wrongful injunction are clearly supported by the record and should not be reweighed on appeal. Furthermore, Parker as a real party in interest, should be permitted to recover under the injunction bond. This is particularly true where the injunction bond on its face runs to the benefit of "the defendants in the above case" and the bond on its face was not limited to the party defendants at the time the bond was posted. Parker became a party (and had requested to become a party defendant) after the posting of the bond and clearly suffered damages and fell within the condition of the bond as "any party who may be found to be wrongfully restrained thereby." (R-250).

ARGUMENT

REPLY ARGUMENT

I. UNDER DUE PROCESS PRINCIPLES, PARKER SHOULD NOT BE BOUND BY THE EX PARTE DETERMINATION OF THE PENAL SUM OF THE BOND.

Somerset chooses to label as "minority" out of state authority dealing with ex parte restraining orders and temporary injunctions where claims have been allowed in excess of the penal sum. Somerset chooses to discuss a series of Florida cases, none of which involve an ex parte application for temporary injunction without the adversely affected party having an opportunity to be heard on the penal sum of the injunction bond.

There is no Florida authority from this Court addressing this issue. Strong public policy considerations, recognized by the Second District Court of Appeal, call for this Court to extend liability of a party obtaining temporary injunction without notice which causes damages in excess of the penal sum of the injunction bond and be responsible for those damages. This is particularly true where the party obtaining the temporary injunction acted in circumstances which at the very least give rise to strong inferences of bad faith. Clearly, summary judgment limiting the sum to $10,000 on this issue was error.

The wording and condition of the injunction bond in the present case (R-250), on its face does not limit recovery to $10,000. Rather, it states:

> Now, therefore, if said 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 thereby, then this obligation shall be void, otherwise to remain in full force and virtue. (R-250, App-1).

The injunction bond thus was conditioned on the failure of Somerset to "pay all costs and damages." If Somerset failed to "pay all costs and damages," then the injunction bond would apply.

CROSS-ANSWER ARGUMENT

II. THE TRIAL COURT'S FINDING THAT PARKER SHOULD RECOVER $10,000 ON ITS CLAIM FOR WRONGFUL INJUNCTION IS SUPPORTED BY THE EVIDENCE.

A. THE TRIAL COURT'S FACTUAL FINDING SHOULD NOT BE REWEIGHED ON APPEAL.

Conspicuously absent from Somerset's cross-appeal brief is any discussion of the standard of appellate review. It is fundamental in Florida that appellate courts should not reweigh the evidence and should not substitute their judgment for that of the trier of fact. Cripe v. Atlantic First National Bank, 422 So.2d 820 (Fla. 1982). The standard of appellate review, as outlined by this Court in Cripe is that an appellate court may only reject the findings of the trier of fact where they are manifestly unreasonable and clearly against the weight of the evidence. Id. at 821.

Judge Cheatwood heard two days of testimony, February 4, 1986 (R-360) and February 28, 1986 (R-478). Many of the predicate facts for the wrongful injunction action were established at the hearings permitting Parker's intervention and dissolving the temporary injunction. The final judgment recites that Judge Cheatwood not only relied on the Memoranda of Law submitted by the parties, but carefully reviewed the record, including prior oral testimony that had been submitted as well as the various affidavits and other undisputed facts. (R-12).

In arguing the facts, Somerset repeats a number of times in its Brief, a "defense" that Parker's counsel, prior to seeking

intervention "failed to verify" to Somerset's counsel that Parker's claims were equal to Somerset's (Brief of Respondent 19, 20, 21). Initially, this argument was **NEVER** made to Judge Cheatwood. Somerset's trial brief makes no reference to this "defense" (R-315-20), nor is it raised in Somerset's motion for rehearing (R-323). As a result, Somerset is not only asking this Court to "reweigh" the evidence, but is asking this Court to reverse Judge Cheatwood on a factual issue that was **NEVER** raised.

In contrast, the record before this Court demonstrates that Parker first found out about the December 13, 1985 Temporary Injunction on December 20, 1985 (a Friday) and by hand-delivery the following Monday, December 23, 1985, confirmed the factual representations made to Somerset's counsel in a detailed letter describing Parker's rights and the basis for those rights. (R-83-85). The facts contained in that letter were proved at the evidentiary hearings. On January 3, 1986, the demand was repeated. The reference to "in light of the holidays" only referred to the fact that the draft affidavit could not be executed because of the intervening Christmas and New Year's Day holidays. (R-87). The January 3, 1986 letter also warned Somerset that if the injunction was not modified, then Parker "will seek substantial damages including attorneys' fees, from Somerset." (R-87-88). Included in the January 3, 1986 package were the exhibits ultimately introduced in evidence (R-102-38), as well as an executed affidavit detailing the substantial damages Parker was suffering as a result of Somerset's wrongful injunction (R-139-41).

B. THE TRIAL COURT'S AWARD TO PARKER FOR WRONGFUL INJUNCTION IS AMPLY SUPPORTED BY THE RECORD.

Somerset argues there must be some evidence of malice or lack of good faith for the temporary injunction to be "wrongful." There is substantial evidence in the record on that issue. This is exactly what was argued to the trial court below. (R-15-23). It is clear that Somerset either knew or should have known prior to seeking the temporary injunction that parties such as Parker, an adjoining land owner with construction that was visible, would be adversely affected by the temporary injunction without notice to Parker.

Somerset's counsel represented at the temporary injunction hearing that the temporary injunction which would prohibit parties with general DER permits such as Parker, from getting permits, would "free up" capacity which would then be given to Somerset (R-147). As Judge Cheatwood found out when Parker called Mr. Stewart of the Environmental Protection Commission as a witness, that was not true. (R-351-53). Also, at the hearing on the temporary injunction, Judge Cheatwood was not told that the "assignments" to which Somerset claimed a "clear legal right" were without recourse (R-180). Somerset, from the face of the assignment, knew when it obtained the assignment of the sewer hookup rights that there were going to be problems with delay and that it was not guaranteed sewer capacity (R-180). Also, Somerset, while claiming irreparable injury at the December 11, 1985 hearing on the temporary injunction, neglected to tell Judge

Cheatwood that it had not even used two-thirds of the sewer connection hookups it did have (R-517-18).

Somerset argues, citing Rice v. White, 147 So.2d 204 (Fla. 1st DCA 1962), that a dismissal of an action does not necessarily entitle an adversely affected party to damages unless it is "an adjudication on the merits." Somerset asserts that the temporary injunction was dissolved because it had become ineffectual, moot and of no consequence. (Brief 33). The temporary injunction did not "become" moot after being issued, as Mr. Stewart testified, it never should have been issued because the DER would not have "revoked" Parker's permits and would not have issued Somerset the general permits (R-350-53). Indeed, Somerset after the issuance of the temporary injunction never even asked the Environmental Protection Commission for the general permits. (R-352-53).

Clearly, Judge Cheatwood's final judgment (R-12) was an adjudication that the temporary injunction was wrongful and is "a final determination that said injunction was wrongfully issued." Roger Dean Chevrolet v. Painters, 155 So.2d 422 (Fla. 2d DCA 1963). Somerset also chooses to ignore the ample precedent in Florida that damages for wrongful issuance of an injunction are proper where it is determined, for example, on appeal of the temporary injunction, that there had been no showing of irreparable harm or lack of an adequate remedy of law. See Braun v. Intercontinental Bank, 452 So.2d 998 (Fla. 3d DCA 1984), rev. denied, 462 So.2d 1106 (Fla. 1985), appeal after remand, 466 So.2d 1130 (Fla. 3d DCA 1985).

C. PARKER SUFFERED DAMAGES IN EXCESS OF $10,000.

Without explanation, Somerset in its Summary of Argument (Brief 21A) but nowhere in its Argument, makes the bald assertion that the record does not support a finding that the temporary injunction procured by Somerset had "caused any damage to Parker." Somerset apparently ignores the stipulation drafted by its counsel which states clearly "Somerset Development Corporation stipulates that Parker Tampa Two's damages that it would be able to prove at the trial of this cause would exceed $10,000.00." (R-11).

The apparent basis for this contention is the assertion that the County would not have issued any permits to Parker (Brief 21A). This is apparently a reference to Mr. Stewart's (the head of EPC - not the County Building Department), that EPC would not issue any more permits to hook up the sewer plant (R-350-353). Parker, however, already had its permit for a sewer collection system to hook up to the sewer plant, but needed building permits to construct its apartments (R-49-52).

Somerset also ignores the affidavit submitted by Parker (R-49-51) and the testimony (R-382-83) which details that as a result of the temporary injunction prohibiting the issuance of the building permits, Parker suffered substantial damages. The actual basis of this argument is even more mysterious given the fact that it was not raised in Somerset's trial brief (R-315-20), nor in its motion for rehearing (R-323).

III. PARKER, A REAL PARTY IN INTEREST, CAN RECOVER DAMAGES FOR WRONGFUL INJUNCTION.

Somerset argues that since Parker was not an express named beneficiary under the bond, it cannot recover any damages (Brief 21A). Somerset's argument ignores the terms of its own injunction bond. The injunction bond does not limit beneficiaries to merely Hillsborough County, but to "the defendants in the above-styled case." (R-250, App-1). Parker attempted to intervene as a party defendant, but the Court ordered "for purposes of convenience" that Parker Tampa Two, Inc. intervene as a party plaintiff. (R-76).

In addition, the condition of the injunction bond is also clear Somerset was obligated to pay "all costs and damages" incurred or suffered "by any party who may be found to be wrongfully restrained thereby. . ." (R-250, App-1). Clearly, Somerset, from the face of the bond, was obligating itself to pay "all costs and damages" suffered by "any party." There was no limitation that the bond only ran to the benefit of those "parties" at the time the bond was issued. Indeed, it was certainly anticipated at the December 11, 1985 hearing on the temporary injunction that other parties would be adversely affected in light of the discussion concerning indispensable parties not being joined and that other developers would not be connected, which would "free up" additional capacity for Somerset. (R-144-47).

Somerset then goes on to argue that the few Florida cases dealing with this issue "indicate" that only a party specifically

named in the injunction can recover on the bond (Respondent's Brief 36). Not one of the cases cited by Somerset even addresses that issue. See Cowart v. Gilson, 271 So.2d 821 (Fla. 1st DCA 1973) (reversed denial of wrongful injunction damages and remanded the case for an award of damages to the parties enjoined); Calder Race Course, Inc. v. Gaitan, 430 So.2d 975 (Fla. 3d DCA 1983) (in pertinent part merely affirmed without prejudice to appellant instituting a separate action, a denial of damages because appellant had requested a jury trial); Rice v. White, 147 So.2d 204 (Fla. 1st DCA 1962) (merely affirmed denial of damages where there had been no showing other than a dismissal of the underlying complaint that a temporary restraining order had been wrongfully issued).

Clearly, it would be inequitable to permit Somerset to frustrate a two-party agreement (e.g., a building permit to be issued by Hillsborough County to Parker) by merely enjoining one of the parties to that agreement and thereby avoid liability for wrongful injunction to the party not named who had no notice of the hearing.

The one out of state case cited by Somerset on this issue, Seaton v. Western Auto, 609 S.W.2d 207 (Mo. 1980), is clearly distinguishable. The court was very careful to note that the party plaintiff in the case before it was not a party to the underlying action brought by Western Auto against another "associate dealer of Western Auto" nor "did he make any effort to intervene after obtaining knowledge" of the temporary restraining order. Id. at 209. Obviously, in this case, Parker, three days

after it found out about the temporary injunction, attempted unsuccessfully to have Somerset voluntarily stipulate that it was not subject to the injunction and then moved to intervene twice over Somerset's continued opposition. Furthermore, after it was allowed to intervene, Somerset, knowing full well the impact of the temporary injunction on Parker, refused to agree and have it modified and instead demanded that the temporary injunction was to remain into effect from February 4 hearing to February 28, 1986 hearing. (R-143-44). The order dissolving the injunction was signed March 4, 1986 (R-69).

Somerset next asserts incorrectly that the Second District Court of Appeals relied "exclusively" on the language of the bond (Brief 37). This is not accurate. The court below also relied on the principle that a real party in interest, after it intervenes in an action, can maintain an action for damages for a wrongful injunction is well established. This principle is stated in 43A C.J.S Injunction § 322, which the Second District Court of Appeal cited. It states:

> Real parties in interest not formally enjoined, after being made parties defendant at their own request and after obtaining dissolution of the injunction, then they move for an assessment of damages (at 717-718).

This, of course, is exactly what Parker did in this case.

Finally, Somerset in asking this Court to reweigh the evidence, microscopically viewing the Record, points to a statement made by one of Parker's counsel, who from the Record appeared at no

other hearings. Fairly read, the citation to the Record (R-657) (TR-37 4/30/86 Hearing on Motion to Dismiss) indicates that at the time the bond was posted (December 23, 1985), Parker was not a party, which is correct. In any event, this argument was **NEVER** made to Judge Cheatwood. It is not mentioned in Somerset's Trial Brief (R-315-320), Somerset's motion for rehearing (R-323) nor Somerset's Brief before the Second District Court of Appeal.

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 to the penal sum of the bond, should be reversed. This cause should be remanded on the limited issue of determining Parker's damages. In all other respects, the final judgment should be affirmed.

Respectfully submitted,

John H. Rains, III, Esquire
ANNIS, MITCHELL, COCKEY,
EDWARDS & ROEHN, P.A.
Post Office Box 3433
Tampa, Florida 33601
Attorneys for Petitioner/
Cross-Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand this 8th day of August, 1988 to Samuel R. Mandelbaum, Esquire, 100 South Ashley Drive, Suite 1170, Tampa, Florida 33602.

Attorney

045-08-1722-030