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IN THE SUPREME COURT
STATE OF FLORIDA
CASE NO. 76,167

FILED
SID J. WHITE
SEP 25 1990
CLERK, SUPREME COURT
By _____
Deputy Clerk

PALMA DEL MAR CONDOMINIUM ASSOCIATION #5 OF ST. PETERSBURG, INC., a Florida not-for-profit corporation,

Petitioner

vs.

COMMERCIAL LAUNDRIES OF WEST FLORIDA, INC., a Florida corporation,

Respondent
_____/

REPLY BRIEF OF PETITIONER

Petition for Discretionary Review from
the Second District Court of Appeal
Case No. 89-02144

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POINT I

The only case decided in the appellate courts of Florida concerning the issue of whether Section 718.3025, Florida Statutes applies to laundry leases was Wash-Bowl Vending Co., Inc. v. No. 3 Condominium Association Village Green, Inc., 485 So.2d 1307 (Fla. 3d DCA 1986), review denied 492 So.2d 1336 (Fla. 1986). The Third District Court of Appeal, at page 1309-10, held:

> "Wash-Bowl contends that the requirements of the statute do not logically relate to laundry space leases. We do not agree. Although no Florida cases have interpreted Section 718.3025, Florida Statutes, we believe laundry space leases fall under its purview."

The Court further held that the lease was invalid and unenforceable due to its failure to comply with the minimum requirements of the statute.

The facts of the instant case are identical. The parties entered into a contract which did not contain the minimum provisions required by Section 718.3025, Florida Statutes (1983). Because of the non-compliance with the minimum requirements of the statute, the contract was invalid and unenforceable as of the date it was signed (August 1, 1983).

Respondent describes the language used by the Court in Wash-Bowl as "curious" (R.5), directing attention to page 1310 of that case:

> "... we are asked to decide whether Wash-Bowl complied with the statutes as much as was practicable given the differences between a laundry space lease and a contract for the operation, maintenance or management of property

serving the unit owners."

There is nothing "curious" about the language used by the Court. The Third District determined that the language "property serving the unit owners" covers washers and dryers which are available for use by all owners. Wash-Bowl, at page 1310. It is clear from the Court's language that the vending company was maintaining or managing property serving the unit owners and, therefore, the lease fell under the requirements of Section 718.3025.

Respondent's allegation that the Wash-Bowl court failed to distinguish between "unit owners", "unit tenants", "visitors" and the association is a pointless one. The purpose of Section 718.3025, Florida Statutes, is to place a requirement that certain provisions be contained in all contracts executed between condominium associations and parties contracting to provide for operation, maintenance or management of a condominium association or property serving the unit owners. Section 718.3025(1), Florida Statutes (1985).

In 1986, the Florida Legislature amended Section 718.3025, Florida Statutes, by adding the following language:

> "This section does not apply to contracts for services or property made available for the convenience of unit owners by lessees or licensees of the association, such as coin-operated laundry, food, soft drink, or telephone vendors; cable television operators; retail store operators; businesses; restaurants; or similar vendors."

Respondent attempts to argue that when the Legislature made this amendment to Section 718.3025, it intended the amendment to apply retroactively. This argument is an attempt to bootstrap Respondent's position that the statute should not have applied to laundry leases in the first place. Clearly, the Third District in Wash-Bowl has held otherwise, and Respondent can only prevail if the statute is permitted retroactive application. Certainly, if the facts had been the other way around, that is, the original statute had expressly exempted laundry leases, but the Legislature later amended it to eliminate the language giving rise to that exemption, Respondent would undoubtedly be leading the charge to preserve its former contract rights, arguing that the amendment only applies to contracts signed after the date of the amendment.

The issue of retroactive application is discussed in great detail in Point II hereafter, so further discussion of that issue in relation to the issues of Point I are avoided so as to avoid confusion.

The issues of waiver and estoppel are not and cannot, as a matter of law, be issues in this action.

The issue of waiver is treated in the Condominium Act itself. Section 718.303(2), Florida Statutes (1987) provides that:

> "A provision of this chapter may not be waived if the waiver would adversely affect the rights of a unit owner or the purpose of the provision, except that unit owners or members of a board of administration may waive notice of specific meetings in writing if provided by the laws."

Waiver is the intentional relinquishment of a known right. Continental Real Estate Equities, Inc. v. Rich Man Poor Man, Inc., 458 So.2d 798 (Fla. 2d DCA 1984). Even if the statutory prohibition against waiver did not exist, Respondent has not alleged an intentional relinquishment of a known right.

It cannot be disputed that Section 718.3025, Florida Statutes (1983) created vested rights belonging to condominium associations. The statute provided that a minimum amount of information must be provided in certain contracts for such contracts to be valid and enforceable. This requirement protected associations by assuring that all aspects of the service or maintenance contract would be disclosed.

This substantive vested right was eliminated by the 1986 amendment. The elimination of that right was accompanied by a change to Section 718.302(1)(e), Florida Statutes, which eliminated certain rights that laundry leasing companies formerly enjoyed. However, neither of those amendments should be permitted to impair the substantive rights of the association which arose in 1983 when the contract was signed. The Legislature cannot constitutionally enact a statute that impairs obligations or contracts or vested rights. Standard Distributing Company v. Florida Department of Business Regulation, Division of Alcoholic Beverages, 473 So.2d 216 (Fla. 1st DCA 1985). Statutes that interfere with vested rights will not be given retroactive effect. Young v. Altenhaus, 472 So.2d 1152 (Fla. 1985).

Petitioner urges this Court to look to the existing and

binding case law which support Petitioner's contention that Section 718.3025, Florida Statutes, as it existed prior to the 1986 amendment applied to leases for laundry equipment located on condominium property, and that the lease which is the subject of this action failed to comply with that statute, and therefore is unenforceable.

POINT II

Respondent has evaded the real issue at hand by discussing the applicability of waiver and estoppel to the case before us. Petitioner hereby re-directs the court's attention to the issue presented before the court and asserts that section 718.3025, Florida Statutes (1983) applied to the laundry leases contracts between condominium associations and commercial laundry operators.

The laws which exist at the time and place of making of a contract enter into and become a part of the contract made, as if they were expressly referred to and incorporated in its terms, including those laws which affect its construction, validity, enforcement or discharge. Southern Crane Rentals, Inc. v. City of Gainesville, 429 So.2d 771 (Fla. 1st DCA 1983); Florida Beverage Corporation v. Division of Alcoholic Beverages and Tobacco, Department of Business Regulation, 503 So.2d 396 (Fla. 1st DCA 1987). See also: Brickell Bay Club, Inc. v. Ussery, 417 So.2d 692 (Fla. 3d DCA 1982). Furthermore, contracts are made in legal contemplation of the existing applicable law. Southern Crane Rentals, Inc. v. City of Gainesville, 429 So.2d 771 (Fla. 1st DCA 1983); Carter v. Government Employers Insurance Company, 377 So.2d 242 (Fla. 1st DCA 1979).

Section 718.3025, Florida Statutes (1983) was amended in 1986 to exclude, among other services, contracts for coin operated laundry machines. It does not follow, according to any legal interpretation, that the amended statute is to be applied

retroactively to all contracts formed prior to the 1986 amendment.

In Florida, it is clear that in the absence of an explicit legislative expression, a substantive law is to be construed as having prospective effect only. Young v. Altenhaus, 472 So.2d 1152 (Fla. 1985).

Respondent cites three circuit court cases which apparently held consistent with its argument. As Respondent correctly and candidly admits, those cases are not binding. Respondent asserts that although the cited circuit court decisions are not controlling precedent, they were nevertheless an indication that the issue was considered settled until the present action, and was relied on by all entities. Neither Petitioner nor the Hillsborough County Circuit Court relied on any of those cases.

This argument reached beyond any basic understanding of controlling precedent. All cases cited by Respondent are circuit court cases and two of the three cases cited are Dade County circuit court cases. Those cases lack even the smallest persuasive effect on the Hillsborough County Circuit Court, the Second District Court of Appeal, or the Florida Supreme Court.

Further, Respondent failed to mention the case of Peppertree Village Condominium Association, Inc. v. Sun Services of America, Inc., f/k/a Hicks Laundry Equipment Corporation, Pinellas County Circuit Court Case No. 88-15942, decided June 21, 1989. In that case, the Pinellas County Circuit Court held that Section 718.3025, Florida Statutes (1983), did apply to laundry equipment leases, and the 1986 amendment to that statute could not be applied

retroactively.

Respondent argues that the intent language in the 1986 amendment is a clear expression of the Legislature that the statute was to apply retroactively by citing a paragraph of the amendment which states:

> "...it is the intent of the Legislature that this section applies to contracts for maintenance or management services for which the association pays compensation."

The only "intent" expressed by this language is the intent that the statute apply to particular contracts; to wit: contracts for management or maintenance services, not that the provisions of the statute be applied to contracts already in existence.

This issue of what language is needed to retrospectively apply a statute has been made much easier due to two recent cases in the condominium field. In 1988, the Legislature created Section 718.4015, Florida Statutes, to modify what was previously set forth in Section 718.401(8). Section 718.4015 provided in pertinent part:

> "(1)It is declared that the public policy of this state prohibits the inclusion or enforcement of escalation clauses, in land leases or other leases or agreements for recreational facilities, land or other commonly used facilities serving residential condominiums, and such clauses are hereby declared void for public policy...
>
> (2)...However, the provisions of subsection (1) apply to contracts entered into prior to, on, and after June 4, 1975, if the lessor is not the government of the United States or this state or any political subdivision thereof or any agency of any political subdivision thereof. The application of subsection(1) to contracts entered into prior to

> June 4, 1975, may not divest the parties of any benefits or obligations arising from the escalation of fees prior to October 1, 1988, but only prohibits further escalation of fees pursuant to the escalation clauses, on or after October 1, 1988."

In 1989, the Legislature once again clarified its amendment saying:

> "(2) This public policy prohibits the inclusion or enforcement of such escalation clauses in leases related to condominiums for which the declaration of condominium was recorded on or after June 4, 1975; it prohibits the enforcement of escalation clauses in leases related to condominium for which the declaration of condominium was recorded prior to June 4, 1975, but which have been refused enforcement on the grounds that the parties agreed to be bound by subsequent amendments to the Florida Statutes or which have been found to be void because of a finding that such lease is unconscionable or which have been refused enforcement on the basis of the application of former 718.401(8) or 711.231; and it prohibits any further escalations of rental fees after October 1, 1988, pursuant to escalation clauses in leases related to condominiums for which the declaration was recorded prior to June 4, 1975."

Obviously, the language employed by the Legislature in this Section is clear that the intent is for retroactive application of the statute. Nevertheless, this Court held in both Association of Golden Glades Condominium Club, Inc. v. Security Management Corp., 557 So.2d 1350 (Fla. 1990), and Condominium Association of Plaza Towers North, Inc. v. Plaza Recreation Development Corp., 514 So.2d 381 (Fla. 3rd DCA 1990), that the provisions of the statute could not affect contract rights that were already in existence at the time the statute was enacted. If this Court considered such

explicit language insufficient to permit retroactive application of a statute to existing contracts, certainly it could not consider the language cited by Respondent in the 1986 amendment to Section 718.3025 to be sufficient.

Respondent's reliance on Lowry v. Parole and Probation Commission is misplaced in that it deals with legislative "interpretation" of a statute following "controversies" as to that interpretation. Such is not the case at bar. Here, Section 718.3025, **clearly** and **unequivocally** mandated certain information which **clearly** and **unequivocally** applied to laundry leases. In 1986, the Legislature eliminated that `mandate' for laundry leases. No existing controversy was resolved or interpreted. It was clearly an amendment that operated from 1986 forward.

Respondent's reliance on Adams v. Wright, Fla., 403 So.2d 391 (Fla. 1981) is also unfounded. Clearly Section 718.3025, was not a remedial statute and, therefore, did not fall into the remedial statute exception provided for in Adams v. Wright. By definition, a remedial statute is one which confers or changes a remedy; a remedy is the means employed in enforcing a right or in redressing an injury. St. John's Village I, Ltd. vs. Department of State, Division of Corporations, 497 So.2d 990 (Fla. 5th DCA 1986) (emphasis supplied). Remedial statutes or statutes relating to remedies or modes of procedure, which do not create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of rights already existing, do not come within the legal conception of a retrospective law, or the general rule

against retrospective operation of statutes. City of Lakeland v. Cantinella, 129 So.2d 133 (Fla. 1961).

The 1986 amendment to Section 718.3025, Florida Statutes clearly provides a right to laundry equipment companies that those companies did not enjoy prior to the amendment. It eliminated their obligation to provide certain information to associations in their contracts in order to make those contracts enforceable. It also eliminated the right of condominium associations to challenge the validity of such contracts if such information was not supplied. At the same time, the laundry companies lost the right to have their contracts free from cancellation by associations after turnover from the condominium's developer. Section 718.302(1), Florida Statutes (1986).

There is no clearer case of the elimination or addition of "vested rights". The law is clear that statutes which deal with the elimination or addition of vested rights are not remedial. The law which existed at the time the contract was entered into is the controlling law.

The fact that the case presented before us deals with contractual rights and obligations makes the question of retroactivity a non-issue. As this court stated in Fleeman v. Case, 342 So.2d 815 (Fla.a 1976),

> "... even were we to conclude that the Legislature intended retroactive application of this statute, we would be compelled to hold it invalid as impairing the obligation of contract under Article I, Section 10 of both the United States and Florida Constitutions".

POINT III

In claiming that Respondent is entitled to attorney's fees, Respondent relies on the provision contained in the lease agreement which states:

> "In the event lessee must resort to the services of an attorney for enforcement hereof or collection hereunder, then the lessor shall be responsible to pay lessee's reasonable attorney's fees incurred as a result thereof, together with all other costs or any other relief as provided by law."

The instant action sought only declaratory relief of the rights and obligations of the parties hereto and did not involve enforcement of the lease or collection thereunder.

Directly on point is the case of Chesterfield Company v. Ritzenheim, 350 So.2d 15 (Fla. 4th DCA 1977). In that case, an agreement between lessee and lessor contained a provision which stated:

> "The lessee shall be liable to the lessor for all costs, expenses, damages and attorney's fees which may be incurred or sustained by the lessor by reason of the lessee's breach of any of the provisions of this lease." Chesterfield Company v. Ritzenheim, 350 So.2d at page 16.

The lessee had sought a declaratory judgment under Chapter 86, Florida Statutes. The lower court had awarded attorney's fees to the lessor saying "the filing of this suit...was in effect an effort...to circumvent the provisions of the lease requiring the defense of the lease...and under the stated circumstances the defendants are entitled to recover as costs their reasonable

attorney's fees based on the lease." Chesterfield , at page 16. The Fourth District Court of Appeal held that if that order meant the fees are recoverable as costs under Section 86.081, Florida Statutes, it disagreed and reversed. However, if that order meant that the lessor was entitled to attorney's fees based on the lease, it also disagreed and reversed, because there was no showing of any breach of the lease. Chesterfield, at page 16. See also: Ocala Warehouse Investments, Ltd. v. Bison Company, 416 So.2d 1269 (Fla. 2d DCA 1982); Siltzer v. North First Bank, 445 So.2d 649 (Fla. 2d DCA 1984).

There are only three avenues one can take in order to recover attorney's fees: by statute, by contract or where a special fund is brought into this Court. State, Department of Health and Rehabilitative Services v. Johnson, 485 So.2d 880 (Fla. 2d DCA 1986); In re: Forfeiture of 1978 Green Datsun Pickup Truck, 475 So.2d 1007 (Fla. 2d DCA 1985).

The third method of recovering attorney's fees can immediately be stricken as no "special fund" was created or brought into the court.

This action was brought under Chapter 86, Florida Statutes, seeking a declaratory judgment on the rights and obligations of the parties to a written instrument. No statutory right to attorney's fees exists in such an action, and no such right exists under Chapter 718, Florida Statutes. Saul v. Basse, 399 So.2d 201 130 (Fla. 201 DCA 1981).

Rule 9.400, Florida Rules of Appellate Procedure, lists those

items which may be taxed as costs and states when and how a motion for attorney's fees may be served. The rule does not "provide" for attorney's fees and costs.

Respondent states that Appellate Court may award fees for frivolous actions without the usual findings under 57.105, Florida Statutes. The Second District Court of Appeal did not find that "there was a complete absence of a justiciable issue of either law or fact", and, in fact, recognized that Petitioner based its action on existing case law. The Second District's announced reason for reversal was simply that it disagreed with the only existing case law on the subject, and chose to create its own new law.

Section 57.105(2) provides for attorney's fees where there is a provision in a contract providing for enforcement of attorney's fees when a party is required to take action to enforce the contract. This is the third avenue available for the recovery of attorney's fees. As stated above, Respondent's argument that an action seeking a declaratory judgment on the rights and obligations of parties under a contract is equivalent to an action seeking the enforcement of a contract is erroneous. Chesterfield Company v. Ritzenheim, supra.

Therefore, because Respondent has no legal basis on which to claim an award of attorney's fees, Petitioner respectfully requests this Court to find that the Second District Court of Appeal erred in granting Respondent's Motion for Award of Attorney's Fees.

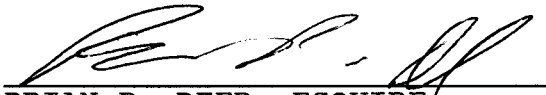
CONCLUSION

The Wash-Bowl decision by the Third District Court of Appeal was a well-reasoned and sound discussion of the law as it existed at that time. Nothing in the Respondent's argument has shown any basis for overturning that decision, and the law established thereby. Likewise, the Respondent has provided no basis for the application of a statutory amendment to a contract that was in effect, and whose rights had vested, at the time the amendment was enacted. Further, the Respondent has established no justification under any theory of law for an award of attorney's fees to it, even if it prevails in the subject action.

Therefore, the Petitioner respectfully requests this Court to reverse the order of the Second District Court of Appeal, and affirm the holding of the Trial Court in this matter.

Respectfully Submitted,

DEEB & BRAINARD, P.A.

By: 
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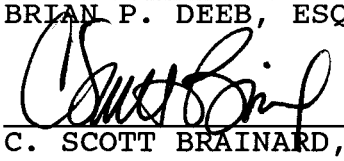
By: 
C. SCOTT BRAINARD, ESQUIRE

CERTIFICATE OF SERVICE

I hereby certify the a copy of the foregoing has been sent by Federal Express to Mauro C. Santos, Esquire, 801 Brickell Avenue, Suite 1901, Miami, FL 33131, and Ainslee R. Ferdie, Esquire, 717 Ponce de Leon Boulevard, Suite 215, Coral Gables, FL 33134, this 24 day of September, 1990.

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