THE SUPREME COURT OF FLORIDA

CASE NO. 93,470

W. A. BROWN, as Trustee of THE ONE HUNDRED ELEVEN ON HUNDRED THIRTEENTH STREET TRUST,

Petitioner,

v.

CITY OF TAMPA,

Respondent.

Petition for Discretionary Jurisdiction from an Opinion of the Florida Second District Court of Appeal, Case No. 97-01376

RESPONDENT'S ANSWER BRIEF ON JURISDICTION

JAMES D. PALERMO
CITY ATTORNEY, CITY OF TAMPA
Jorge I. Martin
Assistant City Attorney
Florida Bar No. 378471
Fifth Floor - City Hall
315 E. Kennedy Boulevard
Tampa, Florida 33602
(813) 274-8996

Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE

A Petition to the Supreme Court for Discretionary Jurisdiction under Fla.R.App.P 9.030(a)(2). Petitioner alleges direct conflict between the Third and Second Circuit Courts of Appeal.

STATEMENT OF FACTS

The facts relevant to the instant petition are those appearing on the face of the district court opinions. Copies of both are attached to this Answer Brief as an Appendix. Respondent submits the following summary:

A. City of Tampa v. W. A. Brown, Etc., __ So.2d __, 23 FLW D1061 (Fla. 2d. DCA 1998), reversed a Summary Judgment against the City of Tampa which invalidated nine of its Code Enforcement Board Orders creating liens on real property. The Second District Court of Appeals ("2d DCA") held that Code Enforcement Board Orders creating liens do not have to be served by certified mail, return receipt requested or pursuant to any of the other methods delineated in §162.12, F.S.

The 2d DCA opinion states that, in regard to each of the liens at issue, City of Tampa held a hearing after notice and provided a copy of the order to the violator by regular mail. That manner of service is sufficient for statutory and due

process purposes. The Court concluded that the liens arise under §162.09, F.S. which does not make the order a "required notice".

B. Personal Representative of the Estate of Jacobson v. Attorneys Title Insurance Fund, Inc., 685 So.2d 19 (Fla. 3d DCA 1996). In this case, the Third District Court of Appeals ("3d DCA"), invalidated a Monroe County Code Enforcement Board lien on the basis that statutory requirements were not met. The 3d DCA did not elaborate on the facts merely stating that the record below showed that the "required notice" was sent by regular mail.[1] The 3d DCA does not define what a required notice is or hold that a Code Enforcement Board order must be served under the provisions of §162.12(1), F.S.

SUMMARY OF THE ARGUMENT

Petitioner invokes Supreme Court jurisdiction on the basis of an apparent conflict between the Second and Third District Courts of Appeal in decisions interpreting the provisions of Chapter 162, Florida Statutes. To support the Supreme Court's exercise of discretionary jurisdiction, a conflict must be express and direct. The Court will not imply a conflict or elucidate the facts by reviewing

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[1] A second ground for reversal was that the copy of the order imposing fine recorded in the public records by Monroe County was not a certified copy. This ground is not argued by the Petitioner as a source of conflict jurisdiction.

the lower court record. Instead, the conflict must appear within the four corners of the majority decision.

The decisions before this Court do not present an express and direct conflict. In the 2d DCA decision, the facts are specifically set-out and delineate the issue, i.e. whether service of a City of Tampa Code Enforcement Board Order after a hearing has been held and a violation found can be made by regular mail. The 3d DCA opinion, however, merely states that the record shows that a "required notice" was sent by regular mail and not pursuant to the provisions of §162.12(1), F.S. The 3d DCA does not specify what was the "required notice" reflected in the record below. To find a conflict between the two decisions, one must assume that the "required notice" mentioned by the 3d DCA was one contained in the Code Enforcement Board Order. That assumption, however, places the decisions outside the definition of direct, express conflict.

ARGUMENT

Article V, Section 3(b)(3) of the Florida Constitution, as amended in 1980, allows the Florida Supreme Court to exercise discretionary jurisdiction to review direct conflicts between decision of the Courts of Appeal. It is a narrow grant of jurisdiction. This court has consistently held that, subsequent to the 1980

amendment to Article V, Section 3(b)(3), Fla. Const., "conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision." Dept. of Health v. National Adoption Counseling Service, Inc., 476 So.2d 888, 889 (Fla. 1986) quoting Reaves v. State, 485 So.2d 829, 830 (Fla. 1986). The court will neither review implied conflicts nor review the record below to elucidate one.

The cases for which the Petitioner seeks review are not in express, direct conflict. In City of Tampa v. W.A. Brown, Etc., __So.2d__, 23 FLW D1061 (Fla. 2d DCA 1998), the Court specifically addressed the issue of whether an order of a code enforcement board is a "required notice" for purposes of §162.12, F.S. The 2d DCA concluded that it is not based on the provisions of §162.09, F.S. which governs the creation of code enforcement liens.

In Personal Representative of the Estate of Jacobson v. Attorneys title Insurance Fund, 685 So.2d 19, (Fla. 3rd DCA 1996), the Court held that a code enforcement lien was not valid because applicable notice requirements were not strictly complied with. The 3d DCA did not state what the "required notice" was. The decision merely says that the record shows that the notice was sent by regular mail and not as required by §162.12, F.S. Looking only at the four corners of the 3d DCA opinion, the required notice mentioned by the Court can only be the

subject of conjecture. Possibly, it could have been a notice of violation or a notice of hearing, both of which must be served under §162.12(1), F.S. pursuant to Chapter 162. There are no facts in the Jacobson opinion showing that the required notice referred to is an order or a provision of an order. Accordingly, it is impossible for these two decisions to be in express, direct conflict and the petition should be discharged. Dept. of Revenue v. Johnston, 442 So.2d 950, 952 (Fla. 1983).

It should be noted that the 3d DCA in Jacobson states that §162.12(1), F.S. authorizes the Code Enforcement lien. In fact, code enforcement liens are authorized and arise under §162.09, F.S. The Court's statement indicates a misapprehension of the statutory framework created by Chapter 162. When the appearance of conflict may be resolved by proper statutory construction, conflict jurisdiction is inapplicable. State v. Brown, 476 So.2d 660, 661 (Fla. 1985)

CONCLUSION

The cases before the Court are not in express, direct conflict. The Petition should be discharged or dismissed.

Respectfully submitted on this 14th day of August, 1998.

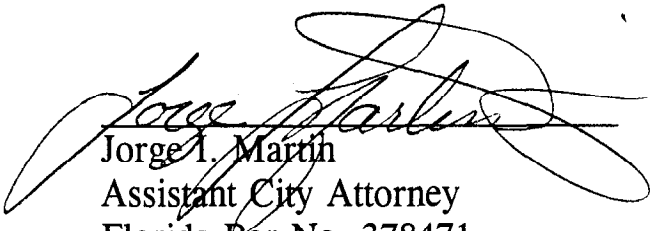
JAMES D. PALERMO
CITY ATTORNEY, CITY OF TAMPA

Jorge I. Martin
Assistant City Attorney
Florida Bar No. 378471
Fifth Floor - City Hall
315 E. Kennedy Boulevard
Tampa, Florida 33602
(813) 274-8996

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail on Jeff D. Jackson, Esq., JOHNSON, BLAKELY, POPE, BOKOR, RUPPEL & BURNS, P.A., P.O. Box 1100, Tampa, FL. 33601-1100, on this 14th day of August, 1998. I FURTHER CERTIFY that the size and style of type used used in this Brief is 14 points proportional Times Roman.

JAMES D. PALERMO
CITY ATTORNEY, CITY OF TAMPA



Jorge I. Martin
Assistant City Attorney
Florida Bar No. 378471
Fifth Floor - City Hall
315 E. Kennedy Boulevard
Tampa, Florida 33602
(813) 274-8996

APPENDIX

CITY OF TAMPA, Appellant,
v.
W.A. BROWN, as Trustee of The One Hundred Eleven On Hundred Thirteenth Street Trust, Appellee.

No. 97-01376.

District Court of Appeal of Florida, Second District.

April 24, 1998.

Rehearing Denied June 16, 1998.

Action was brought challenging code enforcement liens on real property. The Circuit Court, Hillsborough County, Sam D. Pendino, J., declared liens void. City appealed. The District Court of Appeal, Patterson, J., held that city was not required to use certified mail in serving final orders imposing liens.

Reversed.

CONSTITUTIONAL LAW ⚖278.1
92k278.1
City was required under due process clause to provide owner of real property with notice of code enforcement liens, opportunity to be heard, and copy of final orders from which appeal could be taken, but city was not required to use certified mail in serving final orders. U.S.C.A. Const.Amend. 14; West's F.S.A. §§ 162.07, 162.09, 162.12.

HEALTH AND ENVIRONMENT ⚖32
199k32
City was required under due process clause to provide owner of real property with notice of code enforcement liens, opportunity to be heard, and copy of final orders from which appeal could be taken, but city was not required to use certified mail in serving final orders. U.S.C.A. Const.Amend. 14; West's F.S.A. §§ 162.07, 162.09, 162.12.

James D. Palmermo, City Attorney, and Jorge I. Martin, Assistant City Attorney, Tampa, for Appellant.

Jeff D. Jackson of Johnson, Blakely, Pope, Bokor, Ruppel & Burns, P.A., Tampa, for Appellee.

PATTERSON, Judge.

*1 The City of Tampa (the City) appeals from a final judgment, which declares nine of its code enforcement liens on a parcel of real property to be void ab initio because the City failed to send its orders to the property owner by certified mail. We reverse.

The sole issue in this case is whether a code enforcement board order entered pursuant to sections 162.07 and 162.09, Florida Statutes (1995), must be provided to the property owner by certified mail. The City concedes that the orders at issue were sent by regular mail. In reaching its conclusion that certified mail delivery was required, the trial court determined that code enforcement board orders contained "notices" which require compliance with section 162.12, Florida Statutes (1995). The question, however, is not what the order may contain, but rather what is a "required notice." If a notice is "required," section 162.12 governs its delivery:

> 162.12 Notices.--
> (1) All notices required by this part shall be provided to the alleged violator by certified mail, return receipt requested; by hand delivery by the sheriff or other law enforcement officer, code inspector, or other person designated by the local governing body; or by leaving the notice at the violator's usual place of residence with any person residing therein who is above 15 years of age and informing such person of the contents of the notice.

When a code violation is discovered, the violator must receive a notice of a hearing under section 162.12. See § 162.06, Fla. Stat. (1995). If the court finds a code violation at the hearing, it enters an order pursuant to section 162.07. This order may include a deadline for compliance and notice that a fine may be imposed for failure to comply. See § 162.09, Fla. Stat. (1995). The statute does not require that a copy of this order be provided to the violator.

If the violator fails to comply with the section 162.07 order, a second order may be entered under section 162.09 imposing a continuing fine. This order, upon recording in the public records, becomes a lien on the property. See § 162.09(3),

Fla. Stat. (1995). It is this type of order which is the subject of this case.

Section 162.09, however, does not provide for a hearing and does not require that the order entered be provided to the violator. In fact, in regard to each of the liens imposed in this case, the trial court conducted a hearing, after notice, and a copy of the order was provided to the violator, albeit by regular mail. Because there is no statutory requirement that a copy of the order be provided to the violator, it cannot be a "required notice" under section 162.12.

It is necessary to fill the procedural gaps in this statute by the common- sense application of basic principles of due process. The violator received notice, had the opportunity to be heard, and was provided a copy of the final order from which an appeal could be taken. Nothing more is required. The statute does not require the service of the final order in a certain manner and, more particularly, by certified mail. Therefore, we reverse.

*2 We acknowledge apparent conflict with Personal Rep. of Estate of Jacobson v. Attorneys' Title Ins. Fund, 685 So.2d 19 (Fla. 3d DCA 1996).

Reversed.

PARKER, C.J., and FULMER, J., concur.

END OF DOCUMENT

PERSONAL REPRESENTATIVE OF the ESTATE OF Frederick JACOBSON, Appellant,
v.
ATTORNEYS' TITLE INSURANCE FUND, INC., Appellee.

No. 95-570.

District Court of Appeal of Florida, Third District.

Nov. 20, 1996.

As Corrected on Denial of Rehearing Jan. 15, 1997.

Title insurance company which, at purchaser's request, had paid off alleged administrative lien on property brought suit to recover, as subrogee, from probate estate of former owner who allowed alleged lien to be placed on property. The Circuit Court, Monroe County, Sandra Taylor, J., entered judgment in favor of insurance company, and personal representative appealed. The District Court of Appeal held that: (1) no administrative lien arose in favor of county code enforcement board where, contrary to statutory requirements for creation of lien, notice of lien was mailed only by regular and not by certified mailed, and (2) insurance company acted as mere volunteer in paying invalid administrative lien, and could not recover, as subrogee, from probate estate of former owner.

Reversed with directions.

[1] LIENS ⇐8
239k8
When statutory lien is given on compliance with stated requirements, absent language stating otherwise, no lien is acquired unless party asserting lien strictly complies with those requirements.

[2] HEALTH AND ENVIRONMENT ⇐32
199k32
No administrative lien arose in favor of county code enforcement board where, contrary to statutory requirements for creation of lien, notice of lien was mailed only by regular and not by certified mail to home of alleged violator, and board recorded only an uncertified copy of order imposing fine. West's F.S.A. § 162.12(1).

[3] INSURANCE ⇐3514(3)
217k3514(3)
Formerly 217k606(2.1)
Title insurance company acted as mere volunteer in paying invalid administrative lien, and could not recover, as subrogee, from probate estate of former owner who allowed alleged lien to be placed on property. West's F.S.A. § 162.12(1).

*19 Allan Jay Atlas, Fort Myers, for appellant.

Keith, Mack, Lewis, Cohen & Lumpkin, and R. Hugh Lumpkin and Cynthia Perez, Miami, for appellee.

*20 Before BARKDULL, GREEN and FLETCHER, JJ.

PER CURIAM.

The personal representative of the estate of Frederick Jacobson [FN1] appeals from a final summary judgment finding Jacobson liable for an administrative lien placed against his real property in 1989 by the Monroe County Code Enforcement Board. The property was sold three times after the lien was recorded but only the final purchaser, Maggie Kaspersetz, discovered the encumbrance, albeit after she purchased the property and received title insurance from appellee, Attorneys' Title Insurance Fund ("ATIF"). ATIF paid the lien and sued, as subrogee, Jacobson. The case was first filed in Dade County and thereafter transferred to Monroe County. The trial court entered final summary judgment in the amount of $22,500, plus $4,394 as prejudgment interest in favor of ATIF. Attorney's fees and costs in the amount of $4,209 were additionally awarded to ATIF at a subsequent hearing.

FN1. Jacobson died during the pendency of this appeal and the personal representative of his estate was duly substituted as the appellant.

We reverse the final summary judgment and award of attorney's fees and hold that the administrative lien was never valid because the Monroe County Code Enforcement Board was not in compliance with statutory requirements.

[1][2] Where a statutory lien is given on compliance with stated requirements, absent language stating otherwise, a lien is not acquired unless the applicable notice requirements are strictly complied with. Stresscon v. Madiedo, 581 So.2d 158, 159-60 (Fla.1991). Section 162.12(1), Florida Statutes (1989), which authorizes the lien in this case, requires that the alleged violator be sent notice by certified mail, by hand delivery, or by leaving the notice at the violator's place of residence. The record in this case shows that the required notice was sent only by regular mail. In addition, section 162.09(3), Florida Statutes (1989) states that, if the lien is to be recorded in the public records, a certified copy of the order imposing the fine must be recorded. The records show that the order recorded by the county was not a certified copy.

[3] In view of the county's facially apparent failure to notice or record the lien in compliance with the statute, we hold that it did not even substantially comply with the statutory requirements for obtaining a lien. See, e.g., Mirror and Shower Door Prods., Inc. v. Seabridge, Inc., 621 So.2d 486, 487 (Fla. 4th DCA 1993) ("[O]nly immaterial errors and omissions in the form of the notice have been excused by the courts."). Consequently, there was never a valid lien in the first instance. Therefore, the title company was a mere volunteer in satisfying the purported lien.

Accordingly, we reverse the summary judgment entered in favor of ATIF and remand with instructions that judgment be entered in favor of appellant.

Reversed with directions.

END OF DOCUMENT