

IN THE SUPREME COURT OF THE STATE OF FLORIDA

Fla. Supreme Court
Case Number: SC03-1270

JAMES A. ZINGALE,

Fourth DCA CASE NO.: 4D02-3754

Petitioner,

vs.

ROBERT O. POWELL, et al,

Respondents.

**AMICUS BRIEF OF GARY R. NIKOLITS,
PALM BEACH COUNTY PROPERTY APPRAISER
FILED IN SUPPORT OF THE PETITIONERS, ZINGALE, ET AL.**

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¹ The Petitioner has consented to this brief. The Respondent has not consented to the filing of this brief. A motion for leave to file an Amicus Brief was filed December 18, 2003. As of the date of filing this brief, this motion has not been ruled upon.

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SUMMARY OF THE ARGUMENT

The amicus curiae filing this brief is Gary R. Nikolits, who is the duly elected Property Appraiser of Palm Beach County. He has an immediate interest in this case because if the Fourth District Court of Appeal's opinion subject to this appeal (Powell v. Markham, 847 So.2d 1105 (Fla. 4th DCA 2003)) is affirmed or otherwise upheld, it will have a significant impact on the administration of ad valorem taxation in one of Florida's largest counties.

In Florida, residents may be entitled to a constitutionally provided for homestead exemption on the residence in which they permanently reside. There are two benefits of being granted this ad valorem "homestead exemption". The first benefit is that \$25,000 of the assessment is exempt from taxation.

In 1992, a citizens initiative added section (c) to Article 7, Section 4 of our Constitution. This was known as the "Save Our Homes" act and limited the assessments of residential properties from increasing more than 3% a year (or the CPI whichever is less).

To be entitled to these two benefits afforded by the homestead exemption, a taxpayer must apply for the exemption by March 1st of that year. It is well established that failure to apply by March 1 of that tax year waives the entitlement to the homestead exemption and the benefits attendant to the homestead exemption (i.e. \$25,000 exemption and 3% cap).

In Powell, Justices Gunther and Farmer create new law regarding homestead

exemptions. They have removed the requirement of applying for a homestead exemption to be entitled to one of the benefits.

Justice Shaw's dissent is exactly on point.

Further, the Powell opinion directly contradicts the Justices holdings in Nikolits v. Ballinger, 736 So.2d 1253 (Fla. 4th DCA 1999) and Nikolits v. Delaney, 719 So.2d 348 (Fla. 4th DCA).

The apparent effect of Powell is to overturn Ballinger and Delaney. However, in Powell, the Fourth District Court of Appeal did not recede from their earlier positions. The fact that Powell does not address, discuss or even cite Ballinger and Delaney (which are cases that address the same issue but reach a different conclusion) gives great concern whether Justices Gunther and Farmer were made aware of this precedent.

ARGUMENT

Article 7, Section 4(c) of Florida's Constitution provides:

“All persons entitled to a homestead exemption under Section 6 of this Article shall have their homestead assessed at just value as of January 1 of the year following the effective date of this amendment. This assessment shall change only as provided herein.

- (1) Assessments subject to this provision shall be changed annually on January 1st of each year; but those changes in assessments shall not exceed the lower of the following:
 - a. Three percent (3%) of the assessment for the prior year.
 - b. The percent change in the Consumer Price Index ...”

Section 196.011, Florida Statutes, teaches us the procedure for obtaining an ad valorem tax "exemption". In essence, "Every person or organization who, on January 1, has.. title to real or personal property... which is entitled by law to exemption from taxation... shall, on or before March 1 of each year, file an application for exemption with the county property appraiser... Failure to make application, when required, on or before March 1 of any year shall constitute a waiver of the exemption privilege for that year" (except for limited exceptions not relevant to this case). [Emphasis Added]

Under Florida law, if a taxpayer does not timely apply for a property tax exemption, exempt status may not be granted, even if property would otherwise qualify for exemption. In re Home and Housing of Dade County, Inc., S.D.Fla.1998,

220 B.R. 492.

The instant issue before this Court has already been heard and decided by the Fourth District Court of Appeal in an earlier ruling with a well reasoned opinion written by Justice Gross with Justice Taylor and Justice Pollen concurring. Nikolits v. Ballinger, 736 So.2d 1253 (Fla. 4th DCA 1999).

In Ballinger, the taxpayer contended that increase of the 1997 assessed value of the property exceeded 3% of the 1996 value under in violation of section 193.155(1), Florida Statutes. The taxpayer argued that the Property Appraiser had improperly denied her a homestead exemption for the year 1996. However, the taxpayer did not challenge the 1996 homestead exemption denial at the time of the disapproval.

In Ballinger, the Fourth framed this issue as "whether the challenge to the 1996 homestead removal can survive as a challenge to the 1997 tax assessment, or whether it was part of the 1996 "tax assessment" within the meaning of section 194.171(2), such that the challenge was time barred since it was not [timely] filed".

The Fourth rejected the taxpayers assertion and held "...that the property appraiser's disapproval of [the] homestead exemption was part of the 1996 "tax assessment," so that the circuit court does not have jurisdiction over the challenge to the assessment in this case".

In other words, the Fourth District Court of Appeal refused to allow a taxpayer to seek the application of the "Save Our Homes" Cap because they did not timely file

for a homestead exemption.

The identical issue was also addressed by the Fourth District Court in Nikolits v. Delaney, 719 So.2d 348 (Fla. 4th DCA 1998) which was decided by Justices Stone, Gross and Taylor. The Delaney Court held:

“We find the Respondents claim that the homestead tax assessment on their property exceeds the statutory cap on increases of homestead assessments, in violation of section 193.155, Florida Statutes, is an action to contest a tax assessment governed by section 194.171, Florida Statutes. Since respondents’ action was filed beyond the sixty-day time limit prescribed in subsection 194,171(2), the trial court is without subject matter jurisdiction over this claim.”

In the case under appeal, Powell v. Markham, 847 So.2d 1105 (Fla. 4th DCA 2003), a different panel, Justice Gunther and Justice Farmer reached a different result, finding "...The Powells do not seek a homestead exemption for the year 2000; they seek application of the Save Our Homes cap to the increase in the assessed value of their home in that year."

Justices Gunther and Farmer totally ignore the fact that the "Save Our Homes Cap" is a benefit granted to those who have a homestead exemption and failure to apply for the exemption constitutes waiver of the right of the exemptions for that year.

Of great concern is that Ballinger and Delaney, which are precedential cases, go totally ignored. They are not even mentioned in the Powell case. The precedence set by Ballinger and Delaney, was not addressed nor receded from.

It is respectfully submitted that the rationale expressed by the panel in Ballinger and Delaney is well reasoned, while the rationale developed in the majority opinion in Markham is not well reasoned, nor has the consequences and impact of this decision has been addressed by the Court.

In Powell, Justice Stone delivered his well reasoned dissent, stating:

"I would affirm. In my judgment, the Powells do not qualify for "save our homes" treatment for the 2001 tax year because they did not timely apply for a homestead exemption. While the benefits of article VII, section 4(c) of the Florida Constitution apply to all persons "entitled to" a homestead exemption under section 6, section 196.011(1)(a), Florida Statutes, provides that the homestead exemption is available only to those who apply for it by March 1. The statute also states that failure to timely file results in a waiver.

Although referencing a different provision of article VII, the supreme court, in Horne v. Markham, 288 So.2d 196 (Fla.1973), rejected the assertion that article VII, section 6 creates an absolute right to the exemption, recognizing that section 6 clearly provides that taxpayers who otherwise qualify shall be granted an exemption only "upon establishment of right thereto in the manner prescribed by law". In this case, of course, "the manner prescribed by law" is set forth in Chapter 196, Florida StatutesId. at 199.

I would not impose a more restrictive reading of article VII here. By failing to timely apply for the exemption, the Powells waived their right to any constitutional tax benefits they would otherwise be entitled to because they failed to establish their right thereto, "in the manner prescribed by law."

It is respectfully submitted that this Court adopt the rationale advanced by Justice Stone and reverse Justice Gunther and Farmer's opinion.

CONCLUSION

The Palm Beach County Property Appraiser respectfully requests this Court to reverse Powell v. Markham, 847 So.2d 1105 (Fla. 4th DCA 2003) and expressly affirm the rationale of Nicolits v. Delaney, 719 So.2d 348 (Fla. 4th DCA 1998) and Nicolits v. Ballinger, 736 So.2d 1253 (Fla. 4th DCA 1999).

CERTIFICATE OF FONT AND SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished by regular U.S. mail to the parties set forth on the attached service list on this the 26th day of December, 2003. The undersigned counsel for the Respondent certifies that the size and style of type used in this brief is 14 point times new roman.

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