

IN THE SUPREME COURT OF FLORIDA
CASE # SC09-1401

ZENAIDA GOMEZ,
Petitioner,

v.

VILLAGE OF PINECREST,
Respondent.

Petitioner, Zenaida Gomez' Reply Brief on the Merits

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CLAIMANT ZENAIDA GOMEZ' REPLY BRIEF

The Village's Answer takes the following specific positions. **One**, that Gomez is raising a new issue on appeal in that before the District Court of Appeals, she argued that an element of owner knowledge should be read into the APH stage under the Florida Contraband and Forfeiture Act ("the Act") and now, before the Supreme Court, argues that that provision unconstitutionally violates due process. **Two**, that the plain reading of the Act only requires a probable cause showing. **Three**, that the failure of the Florida legislature to put a specific owner knowledge requirement into the act, particularly when it was amended for other reasons in 1995 and failed to do so, expresses that the legislature did not intend, when it had an opportunity to do so, that a seizing agency establish claimant knowledge at an APH. **Fourth**, that there is no due process violation because an owner/claimant receives notice and an opportunity to be heard at an APH. **Fifth**, that there is no private interest affected by official action since the APH is a safeguard against an unlawful taking of property. **Sixth**, that there are sufficient procedural safeguards in the statute to justify the risk of an erroneous deprivation of property. **Seventh**, that there is an overriding government interest in the government's ability to seize property and requiring some showing of owner knowledge at an APH places an unreasonable burden on the seizing agency. **Eighth**, that there are no due process rights implicated by the APH or the forfeiture

statutes. **Ninth**, that Gomez’ public policy arguments are unsupported by the record. **Last**, that on the merits, the Village offered some indicia of owner knowledge.

ARGUMENT

1. GOMEZ IS NOT RAISING A NEW ISSUE ON APPEAL

At the District Court of Appeals level, Gomez argued that an element of owner knowledge should be read into the APH stage under the Act because to do so would deprive Gomez and other potential claimants in the future of their property without due process of law. In numerous instances in her opening brief and during oral argument, Gomez complained that the defect in the statute was one that resulted in a constitutional violation – a taking of one’s property without due process of law. Gomez argued then, and argues now, that in order for the “opportunity” *to be meaningful*, it had to have the capability of impacting on the probable cause determination.

2. WHILE THE PLAIN READING OF THE ACT ONLY REQUIRES A PROBABLE CAUSE SHOWING, THE FIRST AND THE FIFTH DISTRICT COURTS OF APPEAL HAVE NEVERTHESS HELD THAT IN THE PROBABLE CAUSE DETERMINATION, AN ELEMENT OF AT LEAST SOME OWNER KNOWLEDGE SHOULD BE REQUIRED

Both the First and Fifth District Courts of Appeal recognized that the plain text of the Act did not require owner knowledge. However, both appellate courts

recognized the need that some owner/claimant knowledge was required at an APH. And the reasoning of these appellate courts is well grounded because probable cause is based on the totality of the circumstances and those circumstances should not exclude the voice of an owner/claimant.

3. THE FLORIDA LEGISLATURE'S FAILURE TO PUT AN EXPRESS REQUIREMENT OF OWNER KNOWLEDGE INTO THE APH PROVISION IN THE ACT WHEN IT AMENDED PART OF THE ACT IN 1995 DOES NOT CURE THE CONSTITUTIONAL DEFICIENCY OF THE APH PROVISION OF THE STATUTE

The Florida legislature amended the Act in 1995. That change, shifted the ultimate burden from the owner/claimant to the seizing agency. But the failure of the legislature to amend the APH provision does not mean that it meets constitutional due process standards.

4. THE APH VIOLATES DUE PROCESS

The Village argues that because an owner/claimant receives notice of an APH and is given an opportunity to be heard at the APH, that the constitutional requirements of due process are met. Not so. For all intents and purposes, an owner/claimant is really not heard because what he/she says is ignored at the APH and is not one of the factors included in the probable cause determination.

5. PRIVATE INTERESTS ARE AFFECTED BY OFFICIAL ACTION AND THE APH IS NOT A SAFEGUARD AGAINST THE UNLAWFUL TAKING OF PROPERTY

The Village argues that because the Act has a “safe harbor provision”, that any private interest adversely affected by seizure following an APH have a remedy.

As argued in our opening brief, the Act does not provide an “all inclusive” remedy making a successful owner/claimant whole following the successful defense of a forfeiture action.

There is no absolute or automatic entitlement to attorney’s fees. The standard for an award of attorney’s fee is very high. Additionally, since the Act vests title in the seizing agency immediately upon a finding of probable cause, an owner/claimant may lose his/her property simply because the seizing agent does not continue to support and maintain it appropriately. Although a monetary remedy might follow in Gomez, for example, her once stellar credit is now ruined forever because while title immediately vested in the Village, it elected not to pay taxes, insurance or mortgage on Gomez’ real property.

6. THE STATUTE DOES NOT PROVIDE SUFFICIENT PROCEDURAL SAFEGUARDS TO JUSTIFY THE RISK OF AN ERRONEOUS DEPRIVATION OF PROPERTY.

This argument is a rehash of the Village’s fifth argument

7. WHILE THERE IS CLEARLY A GOVERNMENT INTEREST IN SEIZING PROPERTY SUBJECT TO FORFEITURE, SUCH INTEREST CANNOT OVERRIDE THE CONSTITUTIONAL DUE PROCESS RIGHTS OF PROPERTY OWENRS

The Village argues that the government's interest in seizing forfeitable property overrides any requirement of proving owner knowledge at an APH and that this becomes an unreasonable burden on the seizing agency.

Truth be told, there should be a significant burden on any government agency attempting to take away an individual's property. Clearly, the only way an APH can occur, is if an owner/claimant demands one. The APH hearing is scheduled and the owner/claimant gets notice. The owner/claimant then has three choices. One, not appear at the APH, or appear and remain silent, and last, appear at the APH and testify. If in the first two scenarios the court finds probable cause then there is no constitutional violation because the owner got notice and had (but waived) the opportunity to be heard. The constitutional violation occurs when the owner/claimant testifies convincingly that he/she had no knowledge or reason to know that his/her property was being used for unlawful purpose, but that testimony falls on deaf ears, is not considered in the probable cause determination, and therefore is not meaningful.

8. THERE ARE NO DUE PROCESS RIGHTS IMPLICATED BY THE APH OR THE FORFEITURE STATUTES

The Village's argument on this point was rejected by two appellate courts in this state. It is axiomatic and fundamental to our state and federal constitutions, that an owner will not be deprived of property without due process of law. The

APH deprives an owner of property because upon the finding or probable cause, title immediately vests in the seizing agency. That is a taking. Due process, simply stated, is a requirement, not a luxury. It requires notice – which is not the subject matter of this appeal – and an opportunity to be heard. An opportunity to be heard, by implication, means to be considered and listened to, not ignored. For these reasons, the APH should require some indicia of owner knowledge and if an owner/claimant testifies consistent with no such knowledge, then there cannot be a probable cause finding.

9. GOMEZ' PUBLIC POLICY ARGUMENTS ARE UNSUPPORTED BY THE RECORD

The Village argues that Gomez' public policy arguments are not supported by the record. But, public policy need not be supported by any record. Notably, however, the Village says that “in reality, the (sic) a seizing agency can enter into an occupancy agreement with a resident, as noted *supra*, and mortgage payments can be continued to be paid to a lender after a seizure has occurred.” The key word here is “can”. So, what the Village is really saying is that a seizing agency can act arbitrarily and capriciously and decide which owner/claimant will lose his/her home and which one will not. Such unfettered government powers is precisely why forfeitures are disfavored under the law and why this Court should require some proof of owner/claimant knowledge at an APH.

10. THE VILLAGE DID NOT ESTABLISH INDICIA OF OWNER KNOWLEDGE AT THE APH

The Village argues that owner/knowledge was presented at the APH because she never met Mr. Herrera, and did not do any background checks on him. As the record reflects, Gomez dealt with Mrs. Herrera, Mr. Herrera's wife and there is no duty on a landlord to conduct a background check on a prospective tenant. Next, the Village suggests that Gomez should have inspected the property when she went to pick up the rental payments. Both Florida law and the lease in this case impose a duty on a landlord to give his/her tenant peaceful and quiet enjoyment of the premises and the tenancy precludes any right of trespass. It is not reasonable to require a landlord to conduct an interior search of the property he/she is leasing to a tenant during an open tenancy.

CONCLUSION

Forfeiture places a substantial burden on innocent parties. The constitution requires that the taking of a property from an owner or proper claimant, be preceded by a due process proceeding. Due process, to be constitutionally effective must be meaningful. There is no meaningful due process to the adversarial preliminary hearing provision of the Florida Contraband and Forfeiture Act when there is no requirement that the seizing agency demonstrate – even by a mere showing – that the owner or claimant knew or reasonably should have known

that the property subject to seizure and forfeiture was involved in a crime. The holdings of the First and Fifth District Courts of Appeals were well founded and should be followed by the Supreme Court.

Respectfully submitted,

s/ Richard Diaz

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Certificate of Service

I HEREBY CERTIFY that a true copy of the foregoing was mailed this ____ day of March, 2010, mailed to: Cynthia Everett, Esq., Village of Pinecrest City Attorney, 7700 North Kendall Drive, Suite 703, Miami, FL 33156.

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Certificate of Compliance with Font Requirements

WE HEREBY CERTIFY that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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