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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION,

Petitioner,

vs.

CLIPPER BAY INVESTMENTS, LLC,

Respondent.

CASE NO. SC2013-775
LT CASE NO. 1D11-5496
08-1218-CA01-ORP

SUPPLEMENTAL REPLY BRIEF ON THE MERITS OF PETITIONER, STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION

On Review from the District Court of Appeal
First District, State of Florida

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SUPPLEMENTAL REPLY BRIEF

1. The Department and Clipper Bay agree on all three points on which this Court ordered supplemental briefing.

As Clipper Bay notes in its amended supplemental answer brief (Am. Supp. AB at 2-3), this Court asked for three things in its April 29 order: (1) verification that the lease between the Department and Santa Rosa County was recorded in the Santa Rosa County records; (2) verification that the property description in the lease includes only the county road; and (3) an aerial map clearly demarking certain features and property boundaries.

Stripped of argument this Court did not ask for, Clipper Bay's amended supplemental brief makes clear that there is no daylight between the parties' stands on these three points:

(1) Clipper Bay and the Department both verify that the lease was recorded in the Santa Rosa County records in 1987. (Am. Supp. AB 3.)

(2) Clipper Bay and the Department both verify that the lease does not include only the county road. (Am. Supp. AB at 3.) The lease establishes a centerline and leases the property within 30 feet on either side of the centerline as well as 1.61 acres, more or less, in the parking area.

(3) Clipper Bay acknowledges the aerial maps the Department furnished with its supplemental initial brief are "accurate." (Am. Supp. AB 5.)

2. Frank Jackson's testimony was limited to whether Clipper Bay's claimed root of title was a valid root of title. He did not testify that the lease was not in Clipper Bay's chain of title.

Clipper Bay argues that its title examiner, Frank Jackson, testified that the lease was not in Clipper Bay's chain of title and that this fact "is not disputed." (Am. Supp. AB 4.) Actually, Jackson offered no opinion on whether a reasonable title search would have found the lease, as the transcript excerpt attached to Clipper Bay's brief attests:

> Q (by Mr. Dunaway) [counsel for Clipper Bay] Mr. Jackson, I'm now showing you what's been marked and admitted into evidence as exhibit 15. . . .
>
> A There is a lease agreement from the State of Florida, Department of Transportation, to the Board of County Commissioners of Escambia County, Florida.[1]
>
> Q Why was it that you did not find that document in Clipper Bay's chain of title?
>
> A Because it's that part of blocks 356, 357, 358, 359, 360, 61, 62, 63, 364, 365, 366 through 367. Also, the undivided area lying west of Avalon Beach. There's no specific reference to the block. I didn't do this search so I'm not sure how to answer the question. I might have picked it up.

[1] The lease at issue in this appeal is between the Department and the Santa Rosa County Board of Commissioners. (Supp. IB Ex. A.) It is not clear whether Mr. Jackson is referring here to some other lease.

(Tr. I 177) (emphasis added). Jackson was asked why **he** did not find a lease in Clipper Bay's chain of title, not whether the lease was in the chain of title, and Jackson answered that he did not do the search but that he might have found it if he had. On cross examination, Jackson testified that his opinion testimony was limited to whether he would have insured title as it was insured and that the deed that Clipper Bay claimed as its root of title qualified as a root of title under MRTA:

> Q [by counsel for FDOT] And you don't know anything – you were not employed, were you, to do anything about the facts of this case but rather only title examination?
>
> A Other than I would have insured the title exactly as it was insured, no.
>
> Q I don't mean to make that assumption. You have already testified that you would accept 204-704[2] as a root?
>
> A Correct. Other than –
>
> Q Besides that fact, there's nothing else that you have that regards this case specifically?
>
> A Correct.

(Tr. I 182-183.)

[2] The reference is to a book and page number, as reflected in the parcel outlined in yellow on Exhibit B (Sheet 1) to the Department's supplemental initial brief.

3. The record does not support Clipper Bay's claim that the lease establishes the I-10 right-of-way.

Clipper Bay next notes that the 1987 lease "dictates that the county road be constructed just north of the I-10 right-of-way" and characterizes the lease as one "in which FDOT describes its right-of-way as south of the county road . . . ." (Am. Supp. AB 4-5.)

Clipper Bay is apparently suggesting that the I-10 right-of-way cannot include the disputed property because certain language in the lease suggests that the I-10 right-of-way is distinct from the county road right-of-way. If this is Clipper Bay's argument, it fails for three reasons:

First, for Section 712.03(5) to apply, it is not necessary that **the disputed property** is used as right-of-way; all that is required is that the Department's property is used as right-of-way, and such use preserves the whole from the operation of MRTA. (Pet'r's Initial Merits Br. at 30-33.)

Second, if this Court accepts the First District's conclusion that evidence of use of the disputed property as right-of-way is required, it is not necessary to show the disputed property is used as right-of-way **for I-10**; all that is required is a showing that the disputed property is used as "right-of-way" as the Legislature defines that term. Id. at 33-34. The Department's lease of part of the property to Santa Rosa County for the purpose of building and maintaining a transportation facility means the disputed property is used as right-of-way. Id.

Finally, Clipper Bay's argument depends on the lease acting as a sort of admission against the Department, which in turn depends on Clipper Bay's unattributed assertion that "FDOT prepared the 1987 lease." (Am. Supp. AB at 4.) The record evidence establishes that the Department prepared the legal description in the lease, but not necessarily the lease itself:

> Q [by Mr. Lambert, counsel for the Department] The paragraph number 12 that you just read describes the proposed road being near the existing I-10 right-of-way because that is the highest land elevation so that the least amount of wetlands would be disturbed. That's what you just read, isn't it?
>
> A [by Eddie Rudd] Yes, sir. Could I say something else in regards to that?
>
> Q Yes, sir.
>
> A While it's true that Philip Minor's name stamp is on there, what that really means is Phillip Minor prepared the legal description.
>
> Q And that's where I'm going.
>
> A The other part, this first portion is prepared by some of those lawyer people and they prepared that.
>
> [Mr. Dunaway] Who don't know where the right-of-way is?
>
> A I don't know about that. I'm not going to go there.

(Tr. I 299-300.)

4. The Department's conveyance of property north of the canal to the homeowners is not of record because Clipper Bay never claimed an interest in that property.

In response to the Department's statement that the red line on Exhibit B, Sheet 1, shows that the Department's property line extends through some residential tracts bordering the north bank of the canal and that the Department deeded any interest in those tracts to the homeowners, Clipper Bay notes there is no record support for this statement. (Am. Supp. AB 5-6.) There is no record support for this statement because Clipper Bay never asserted an interest in the tracts north of the canal so the Department's dealings with the homeowners north of the canal was not relevant to the case.

A. Counsel for Clipper Bay admitted making extra-record representations at oral argument and should not be heard to criticize the Department's extra-record defense against those representations.

The Department noted this conveyance to assuage this Court's obvious concern over the implications of the Department's position vis-à-vis these other homes – implications that counsel for Clipper Bay brought to the fore without record support:

> Justice Pariente: Let me ask about, sort of the practical side of this, you said your client would have never purchased the property because of the, this dispute, does it prevent, are you, is this property that you have, is it being used?

> Mr. Bell: No, it can't be used.
>
> Justice Pariente: Well, what's, why can't it be used?
>
> Mr. Bell: Because it's in litigation. They're claiming they own it, we're claiming we own it.
>
> Justice Pariente: No, but that part, but don't you own, is there, what else is there –
>
> Mr. Bell: No, this is everything we own, because everything north of the right-of-way, including if you look on the plat map, there are private property owners with residences that are in the same situation here, that pursuant to this plat recorded and accepted by the county and taxed for 40 years are suffering the same risk.
>
> Justice Pariente: So there's no use.
>
> Mr. Bell: No, it can't be used. . . .
>
> Justice Quince: Did you just say that there are other people who bought this same land and have homes on it and that their titles are now in jeopardy?
>
> Mr. Bell: If you accept their argument, all of the property north of the fence line is theirs and its subject to them claiming homes, canal front homes, and if you look on the plat, the whole Escambia Shores plat that was recorded, would be subject to their claim.

http://wfsu.org/gavel2gavel/viewcase.php?eid=2138 at 30:42 (last visited June 17, 2014).

Later, the Court returned to this issue:

> Justice Lewis: Let me make sure that I'm clear on this, is that the theory that's being advanced by the Department of Transportation would negatively impact every other home that's already in that area that's above your property that was subject to the purchase.
>
> Mr. Bell: There are two homes –
>
> Justice Lewis: Oh, there are only two homes in that area?

Id. at 36:27. Just before his time expired, counsel for Clipper Bay confirmed that nothing in the record supported the assertion that the homes are subject to the Department's claim:

> Justice Pariente: The issue on . . . about the other houses, because obviously the implications, you know this Court is always concerned about policy issues, is that in the record, about the other homes and what it would do to the other homes?
>
> Mr. Bell: No, but –
>
> Justice Pariente: So how do we, I mean –
>
> Mr. Bell: The plat, the plat is in the record.

Id. at 37:50. On rebuttal, counsel for the Department stated that the Department has no claim to the plat north of Block C. Id. at 38:20.

Because Clipper Bay made representations outside the record at oral argument on the implications of the Department's position vis-à-vis the property

north of the canal, Clipper Bay should not be heard to criticize the Department for going outside the record to defend itself.

5. The fence line is not the right-of-way line.

Clipper Bay notes that the plat map of the Escambia Shores subdivision shows I-10 is south of Block C of the plat. (Am. Supp. AB at 6.) The location of I-10 has never been in controversy. If Clipper Bay is suggesting the fence line is the right-of-way line, id. at 6-7, the record evidence does not support this suggestion. (Pet'r's Initial Merits Br. 33-40.)

6. The Department's position that the lease will continue in effect if the disputed property is quieted in the Department is relevant.

Clipper Bay contends that the Department's position that the 1987 lease will continue in force if the disputed property is quieted in the Department is "irrelevant." (Am. Supp. AB at 7.) The Department's position on what will happen with the lease should the property be quieted in the Department may well be irrelevant to Clipper Bay, but relevance, like beauty, is in the eye of the beholder – surely the Santa Rosa County Commission and the patrons of the road, boat ramp, and parking area would find the Department's position relevant.

CONCLUSION

For the reasons developed in the jurisdictional briefs, merits briefs, oral argument, and supplemental briefs, this Court should find:

1. On the conflict question, that Section 712.03(5), Florida Statutes, applies to rights-of-way held in fee as well as rights-of-way created by easement, affirming that part of the decision below on the conflict question and disapproving Florida Department of Transportation v. Dardashti Properties, 605 So. 2d 120 (Fla. 4th DCA 1992).
2. On whether Clipper Bay has marketable record title, that the First District Court of Appeal erred by concluding that the Department's entire fee ownership had not been preserved by operation of either the Section 712.03(1) or Section 712.03(5) exceptions to marketability and remand the cause with directions to affirm that portion of the Final Judgment quieting title to the limited access area on the right-of-way map in the Department, reverse only the portion of the Final Judgment quieting title to the borrow area depicted on the right-of-way map in Clipper Bay, and remand the cause to the trial court with directions to enter final judgment quieting title to the entirety of the Department's fee estate acquired through the 119/303 deed in the Department.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Supplemental Reply Brief has been furnished by email on this 24th day of June, 2014, to counsel for Respondent, KENNETH B. BELL, ESQUIRE, and WILLIAM J. DUNAWAY, ESQUIRE, Clark, Partington, Hart, Larry, Bond & Stackhouse, P.O. Box 13010, Pensacola, FL 32502, kenbell@cphlaw.com and wdunaway@cphlaw.com, and to ANGELA JONES, ESQUIRE, 6495 Caroline St., #C, Milton, Florida 32570, angiej@santarosa.fl.gov.

/s/ Marc Peoples

CERTIFICATE OF TYPE COMPLIANCE

I HEREBY CERTIFY that a copy hereof has been furnished to the foregoing prepared using Times New Roman 14 point font.

/s/ Marc Peoples