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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC14-1282

L.T. CASE NO. 13-CA-003457

SIDNEY KARABEL, CHRISTOPHER TRAPANI, and VICKI THOMAS,

Appellants,

v.

CLEAN ENERGY COASTAL CORRIDOR,

Appellee.

On Appeal from the Circuit Court of the Second Judicial Circuit, in and for Leon County, Florida

INITIAL BRIEF of APPELLANTS

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STATEMENT OF THE CASE AND FACTS

Appellee, Clean Energy Coastal Corridor, is a unit of special purpose local government created by interlocal agreement between three small municipalities in Miami-Dade County, Florida. (App. 18-25.) The purpose of Appellee is to fund the construction and installation of certain qualifying energy-efficiency, clean energy, and wind-resistance improvements to real property through the provisions of section 163.08, Florida Statutes, better known as Property Assessed Clean Energy ("PACE"). (App. 19.)

In Florida, PACE is a mechanism by which a local government can promote the state policy of encouraging certain energy improvements by providing money, up front, for the construction and installation of qualifying improvements, in exchange for the property owner's consent to an assessment against the real property by which the property owner can pay, over time, an amount equivalent to the cost of the improvement and associated funding and administrative costs. § 163.08, Fla. Stat. (2013).

In 2013, Appellee passed a resolution to issue bonds for the purposes of financing a PACE program within the cities party to the interlocal agreement. (App. 81-87.) The resolution was on its face intended to be effective in Miami-Dade and Broward Counties (and, arguably, state-wide), however, it would be effective only when other general purpose local governments agreed to participate.

(App. 82.) The resolution also adopted forms of various documents that would be used to support repayment of the bonds through PACE assessments. (App. 88-107.)

One such document was a Financing Agreement between Appellee and the various property owners who would seek to finance a qualifying improvement to their property. (App. 94-107.) The Financing Agreement approved by Appellee's board includes the remedy of judicial foreclosure in the event of a failure to pay an assessment installment.[1] (App. 95-96, 98.) There are several such provisions in the Financing Agreement. In Section 4, the document reads

> The Property Owner agrees and acknowledges that if any Assessment installment is not paid when due, the Authority shall have the right to seek all appropriate legal remedies to enforce payment and collect the Assessment or amounts due hereunder, *including but not limited to foreclosure*, and seek recovery of all costs, fees and expenses (including reasonable attorneys' fees and costs and title search expenses) in connection with the enforcement and foreclosure actions. The Property Owner acknowledges that, if bonds are sold or if the Authority enters into another financing relationship to finance the Final Improvements or an Abandonment Payment, the Authority may obligate itself, through a covenant with the owners of the bonds or the lender under such other financing relationship, *to exercise its foreclosure rights* with respect to delinquent Assessment installments under specified circumstances.

[1] Appellants argued, and the Circuit Court agreed, that because section 163.08, Florida Statutes, requires PACE assessments to be collected via the uniform method described in section 197.3632, and that statute in turn requires collection through no method other than the tax certificate process described in chapter 197, the use of judicial foreclosure to enforce payment of a PACE assessment would be unlawful. (App. 284.)

(App. 95-96 (emphasis added).) Section 17 continues

> The Authority has the right to assign or delegate to any person or entity . . . this Agreement and any or all of its rights (including . . . the right to pursue judicial foreclosure of the Assessment lien . . .) and obligations under this Agreement, without the consent of the Property Owner. . . . The obligation to pay the Assessment set forth in this Agreement and in the Addendum is an obligation of the Property and no agreement or action of the Property Owner will serve to impair in any way the Authority's rights, including, but not limited to, the right to pursue judicial foreclosure of the Assessment lien . . . ."

(App. 98.)

Appellee sought to validate its bonds pursuant to chapter 75, naming in its complaint the State and property owners, taxpayers, and citizens of both Miami-Dade and Broward counties. (App. 1-17.) Subsequent to publication of the Order to Show Cause, Appellee determined not to include property owners in Broward County and filed a Notice of Dismissal, which was served on the State Attorney for Broward County, on March 6, 2014, four days before the scheduled hearing. The Notice of Dismissal applied only to Broward County and was not published or otherwise served on the property owners, taxpayers, or citizens of Broward County.[2]

On the date scheduled for the hearing on the Order to Show Cause, Appellants Trapani and Karabel, residents of Broward County, appeared through counsel at the hearing and objected on several grounds. (App. 128-36.) Appellants'

[2] Appellee was not served with and could not obtain a copy of this Notice.

first notice of the Notice of Dismissal came when Appellee objected to their participation in the hearing. (App. 186.) The court determined that it would continue the hearing to a later date and directed the parties to submit memoranda supporting their positions both on the Notice of Appearance and the validity of the proposed bonds. (App. 212-13.) Before the continuation of the hearing, Appellant Thomas filed a notice of appearance through the same counsel retained by Appellants Karabel and Trapani. (App. 158.)

At the continuation of the hearing, the Circuit Court determined that the foreclosure language in the Financing Agreement could mean that Appellee simply intended to use lawful remedies, and determined that it would validate the bonds with the proviso that judicial foreclosure not be used. (App. 282-85.) The trial court, during the hearing, worked to find a way to validate the bonds while preventing Appellee from using an unlawful remedy, and ultimately ruled that the bonds were valid, directing Appellee to submit a proposed final judgment that limited the scope of the ruling to the three cities that were currently members of Appellee and that no remedies not prescribed by law could be used to enforce the assessments. (App. 293, 298.)

The trial court also ruled that the dismissal of the Broward County defendants was valid and concluded that Appellants Trapani and Karabel would

not be permitted to participate, granting Appellee's motion to strike their appearance and filings. (App. 298, 379.) This timely appeal follows.

SUMMARY OF ARGUMENT

The trial court denied Appellants due process of law by working actively with Appellee to make changes to the documents supporting the bond issuance and to the Complaint so that the bonds, in a form not envisioned or approved by the governing body of Appellee, would comply with the law and thus could be validated. Appellants' burden at the bond validation hearing was to demonstrate cause why the bonds should not be validated, and, once such cause had been shown, the court's authority was limited to denying the complaint for validation and dismissing the cause. In addition, amendment of the complaint or documents attached to the complaint after publication of the Order to Show Cause denied Appellants proper notice of the facts of the proceeding in violation of established precedent. By entering the policy-making arena, and by allowing amendment of the complaint and associated documents pled as fundamental to the Complaint by Appellee, the trial court violated Appellants' rights to due process. This cause should be reversed and remanded.

The trial court further compounded its errors by disallowing the participation of Appellants Karabel and Trapani, property owners in Broward County who were subject to an unauthorized Notice of Dismissal and who were proper parties to the

cause, in the proceeding. The trial court improperly allowed their dismissal, despite the pleadings that expressly indicated the validation would be binding against them, and struck their pleadings. This error is fundamental and warrants reversal.

ARGUMENT

I. The Actions of the Plaintiff and the Court in Amending the Complaint and the Documents on Which the Proposed Bonds are Based During the Pendency of the Proceedings Denied Appellants Fundamental Due Process Rights and Was Unauthorized By Law.

The constitutional right to due process involves, at its most basic level, notice and an opportunity to be heard. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). A bond validation proceeding pledging revenues from non-ad valorem assessments[3] clearly has the potential to deprive taxpayers and property owners of property, and accordingly triggers the protections of the Due Process clauses of the Florida and federal constitutions. *Keys Citizens for Responsible Gov't, Inc. v. Fla. Keys Aqueduct Auth.*, 795 So. 2d 940, 948-49 (Fla. 2001). While published notice in a bond validation proceeding need not be perfect, it must still be reasonably calculated to apprise the defendants of the nature of the proceeding. *See Mullane*, 339 U.S. at 314.

[3] Though the non-ad valorem assessments proposed here are "voluntary," they still involve deprivation of property rights—especially where, as here, they are imposed in violation of state law. The fact that a defendant need not choose to participate is irrelevant, as the property interest for all property owners at the time of validation is identical, none having yet determined whether or not to pursue a PACE improvement on their property.

Chapter 75, Florida Statutes, governs bond validation proceedings. That chapter creates a careful balance of the need for local governments to have the validity of their bond issuances definitively and expeditiously determined with the due process rights of property owners affected by the proposed bond issuance. *See Rianhard v. Port of Palm Beach Dist.*, 186 So. 2d 503, 505 (Fla. 1966). For example, chapter 75 allows for notice by publication, as opposed to personal service, section 75.06, Florida Statutes, severely curtails the availability of discovery, *Rianhard*, 186 So. 2d at 305, and the scheduling of a hearing before giving notice of suit to interested parties, section 75.05, Florida Statutes. In exchange for these curtailments to the due process rights of property owners affected by bond issuance, the Legislature established a few procedural safeguards: a party may appear in the case as an intervenor by simply pleading to the complaint or appearing at the hearing, section 75.07, Florida Statutes, and the nature of the hearing as one on an order to show cause, rather than a trial, section 75.05, Florida Statutes.

This latter difference is crucial to both the preservation of process due to the defendants in a bond validation case, given the expedited and limited nature of the proceeding, and the conduct of the hearing itself, which should be in the nature of a show cause hearing, not a trial. A show cause hearing is not the final adjudication of a matter, unless no cause is shown why the bonds should not be validated. *See,*

e.g., Brown v. Reynolds, 872 So. 2d 290, 296-97 (Fla. 2d DCA 2004) (discussing, in context of a replevin case, nature of show cause hearing and Fla. R. Civ. P. 1.440).

In the instant case, Appellants' due process rights were violated by the seemingly well-meaning actions of the trial court. At the Order to Show Cause hearing, the trial court accepted some of Appellants' arguments, namely that Appellee did not have the authority to seek judicial foreclosure of an assessment lien, which was a feature[4] of the documents attached to the Complaint for Validation and supporting the assessments used to repay the proposed bonds. (App. 95-96, 98.) However, the court did not follow the appropriate procedure for a show cause hearing, which would have been to conclude that good cause had been shown not to validate the bonds and decline to validate them.[5] Instead, it created a workshop environment where it creatively worked with counsel for Appellee to craft new documents—ones that had never been approved by any policy-making

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[4] A feature unauthorized by state law; and one quite likely relied upon the credit markets and bondholders.

[5] Normal civil litigation procedure might dictate, at this point, that the case proceed to trial. However, in a bond validation proceeding, the majority of defendants do not appear at the show cause hearing, and would thus not be apprised of any changes that might be necessary in the case of, for example, an amended complaint. *See* Fla. R. Civ. P. 1.190 (discussing need for notice to defendants of amended complaint). Since a finding that cause had been shown why the bonds should not be validated would result in the need for an amendment, the proper result in such a case would be to dismiss the Complaint and allow for re-filing with the appropriate notice specified by statute.

body—that would conform to the requirements of law. (App. 288-90.) It then validated the bonds with the requirement that the newly minted documents be used. (App. 293.) This procedure is foreign to bond validation.

Further, any change to the documents available for inspection by the property owners, taxpayers, and citizens who are defendants in a bond validation proceeding cannot be changed after the publication of the Order to Show Cause without violating the principles of due process. Notice is a key feature of compliance with the due process clause. *Mullane*, 339 U.S. at 313. Notice in a typical civil proceeding involves personal service of the Complaint and any amendments thereto on the defendant. In a bond validation proceeding, however, initial notice is accomplished through publication of the show-cause order, and there is no provision for accomplishing notice regarding any changes to the complaint. Allowing a complaint to be changed after publication would result in the situation where notice is given as to a different character of taking than the one eventually brought before the Court, which means that a property owner who inspected the proceedings after publication of the notice and found them unobjectionable would never know of a subsequent change that rendered the proceedings problematic or less favorable to the property owner. This Court has disapproved just such a situation. In *Ingram v. City of Palmetto*, 112 So. 861 (Fla. 1927), the trial court in a validation proceeding allowed the City of Palmetto to

substantively amend its petition for validation to comply with the requirements of statute that were alleged to have been violated. This Court determined, simply, that an intervenor must be given notice and an opportunity to be heard regarding any changes to the pleadings, and even if a change at the hearing would make a proposed bond issuance valid, such a change does not comply with the procedures set forth by the Legislature and likely violates due process. *Id.* at 862. While the bond validation statutes have been updated since 1927, the fact remains that there is no provision for amending the bond documents or the complaint and there is no authority for a court to enter the policy-making arena and correct documents for a local government so that they comply with the law. Where a complaint for validation as it existed at the time of publication is insufficient to support the validation of the proposed bonds, the court's responsibility is to deny validation once cause is shown.

This Court should reverse the judgment and remand to the trial court for entry of an order dismissing the cause.

II. The Trial Court Denied Appellants Karabel and Trapani Due Process of Law and Violated Section 75.07, Florida Statutes, By Denying Them the Right to Participate in the Case as Intervenors.

Florida Statutes provide that every taxpayer, citizen, and property owner, and those who are otherwise interested in the proceedings, shall be permitted to participate in a bond validation proceeding if they appear at the hearing or plead to

the complaint. This is one of the fundamental due process protections built into the already curtailed procedures described in chapter 75 and discussed above. By denying Defendants Karabel and Trapani the opportunity to participate in the hearing, despite their submission of a pleading to the complaint and appearance through counsel at the hearing, the Court ignored section 75.07, Florida Statutes, and violated the Defendants' right to due process of law.

Procedural due process under either the 14th Amendment to the United States Constitution or Article 1, section 9 of the Florida Constitution, requires, at a minimum both notice and an opportunity to be heard before the government (in this case, the Circuit Court and Appellee) can deprive a person of life, liberty, or property.[6] *Mullane*, 339 U.S. at 313; *State ex rel. Gore v. Chillingworth*, 171 So. 649, 654 (Fla. 1936). The nature and extent of the process required by the Due Process clauses is dependent on the nature of the interest to be taken and the circumstances surrounding the practicality of affording formal procedures. *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976); *Hadley v. Dept. of Administration*, 411 So. 2d 184, 187 (Fla. 1982).

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[6] Appellants have a property interest in this proceeding. Regardless of whether Appellants have the present intent to participate in the assessment program, neither they nor any subsequent owner of their real property may participate in the program except on the terms validated by the Circuit Court. Thus, a valuable property right has been determined in the judgment of validation—the right to participate in a PACE program that is free of legal flaws.

Section 75.07, Florida Statutes, provides that any property owner, taxpayer, citizen, or person interested in a bond validation proceeding may become a party to the proceeding simply by "moving against or pleading to the complaint at or before the time set for hearing." In the instant case, the question is not whether Defendants Karabel and Trapani moved against the complaint at or before the time set for hearing; the record reflects they did. The question is whether their status as parties was defeated by Appellee's purported dismissal of the property owners, taxpayers, and citizens of Broward County originally named in the complaint and against whom relief was sought in the complaint at all points during the proceeding.

As discussed above, substantive amendment of a complaint for bond validation after constructive notice is accomplished violates the procedural due process rights of property owners, taxpayers, and citizens involved in the proceeding. It is unsettled whether a bond validation plaintiff may defeat an intervenor by simply dismissing them from the case; however, that issue is not squarely presented here. A plaintiff may not voluntarily dismiss a party while simultaneously seeking relief against them. Despite the purported dismissal of the Broward County defendants, Appellee's complaint—never amended—sought relief against defendants in Broward County and, indeed, statewide. If Appellee were permitted to dismiss the Broward County defendants, they would be

dismissing necessary parties, since relief would not be proper against defendants in Broward County without providing them notice and an opportunity to be heard.

The Broward defendants had a right to participate in the hearing and be heard, regardless of whether their views were adopted by any other party or whether Appellee had inappropriately attempted to dismiss them. Dismissal of a necessary party is fundamental error and is not subject to harmless error analysis. *Lovett v. Lovett*, 112 So. 768, 783 (Fla. 1927). Such dismissal, however, is exactly what happened in the lower court here: The Broward County defendants, who had timely moved to participate in the action and against whom the judgment would be rendered, were denied intervention by the Circuit Court. This Court should reverse the lower court's decision to exclude the Broward County defendants and remand to the lower court to allow for full participation of the State Attorney in Broward County and the Broward County defendants in another hearing open to all defendants.

CONCLUSION

Appellee's approach—as outlined in the Financing Agreement and approved in the final judgment—fundamentally alters the procedural safeguards established by the Legislature ensuring that contracts are not unlawfully impaired. This Court has been assailed with trivial, meritless arguments regarding severability and standing that serve to distract from the merits of the issue, treating instead the bond

validation process as if the court system was established simply to rubber-stamp local bond issuances rather than thoroughly examine each case and all matters properly associated therewith on the merits.

First, the Appellee and the Court have committed fundamental error in dismissing some, but not all defendants. This is not harmless error. This is particularly so when the pleadings taken as a whole when filed reflect an intent to rely on them in all of Miami-Dade County, all of Broward County, and statewide. Second, this case presents a simple question of whether a local government can distort the crisp line between non-ad valorem assessments and private liens that the Legislature has drawn. This Court should reinforce this distinction, conclude the bonds are invalid, and reverse and remand this case to the trial court to deny validation.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via e-mail to Mitchell J. Burnstein at mburnstein@wsh-law.com, Jeffrey D. DeCarlo at jdecarlo@wsh-law.com, Georgia Cappleman at capplemang@leoncountyfl.gov, Joel Rosenblatt at joelrosenblatt@miamisao.com, Kathryn Heaven at kheaven@sao17.state.fl.us, and Eve Boutsis at eboutsis@fbm-law.com this 4th day of August, 2014.

FOR J. Stephen Menton

CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief is computer-generated in 14-point Times New Roman font in compliance with Florida Rule of Appellate Procedure 9.210(a).

FOR J. Stephen Menton