
P
PARKING
24 HOURS/7 DAYS A WEEK
$1 FOR EVERY 15 MIN
DUNVEGAN LOT (LOT 4)
Additional Spaces in Alley


PRIVATE PARKING LOT
ALL VEHICLES MUST
PAY INCLUDING
AT LOT MASTER METER
PARK
HEAD
IN
ONLY
KTYGRL
TWICE
HEIST

PARKING BY DISABLED
PERMIT ONLY
TOW-AWAY ZONE
& FINE UP TO $250.00
NO
PAYMENT
NEEDED
FOR THIS
SPAC
KITTGRL
HEIST
SUNS
SMILEY
WH 25
BUILDING BEAU
WALK THR
GIRALD
AVENU


PARKING BY DISABLED
PERMIT ONLY
TOW-AWAY ZONE
& FINE UP TO $250.00
PRIVATE PARKING LOT
ALL VEHICLES MUST
PAY INCLUDING
AT PAY STATION ON
THIS PROPERTY

PAY
BY PLATE
IN ADVANCE AT PAYSTATION
ON THIS PROPERTY ONLY
ENTER LICENSE PLATE NUMBER
DISPLAY RECEIPT FACE UP ON DASH
HANDI-CAP VEHICLES MUST PAY
NO FREE PARKING ANYTIME
NO OVERSIZED VEHICLES
PARK IN ONE SPACE ONLY
PRIVATE PROPERTY - ENFORCED 24/7
Please Note
Failure to pay in advance, expired time, or failure to comply with the rules of this facility will result in your vehicle being booted or towed.
PARKING ENFORCED

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Holiday Isle Improvement Association, Inc. v. Destin Parcel 160, LLC, Fla.App. 1 Dist., August 30, 2018

223 So.3d 292
District Court of Appeal of Florida,
Fourth District.

SEARS, ROEBUCK & CO., Appellant,
v.
FORBES/COHEN FLORIDA PROPERTIES, L.P., a Michigan Limited Partnership, and City of Palm Beach Gardens, Florida, a Florida Municipal Corporation, Appellees.

No. 4D16–2314
|
[July 12, 2017]

Synopsis

Background: Tenant filed a complaint against landlord and city seeking declaratory relief after landlord refused to allow tenant to sublease property to subtenant. The Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County, No. 50–2014–CA–011945–XXXX–MB, Donald W. Hafele, J., and Edward A. Garrison, Acting Circuit Court Judge, entered judgment in favor of landlord and city. Tenant appealed.

Holdings: The District Court of Appeal, Levine, J., held that:

[1] the trial court's order, in declaratory judgment action, was deficient;

[2] resolution passed by city, which required both landlord and city to agree to any subdivision of space within mall, unconstitutionally impaired mall tenant's contract rights;

[3] resolution passed by city, which required both landlord and city to agree to any subdivision of space within mall violated tenant's substantive due process rights; and

[4] tenant was entitled to an attorney's fee award against the city.

Affirmed in part, reversed in part, and remanded with directions.

West Headnotes (23)

[1] **Declaratory Judgment**
Declaratory relief

The trial court's order, in declaratory judgment action where tenant sought relief from landlord's refusal to allow tenant to sublease property, was deficient as it merely found in favor of landlord and city, stated landlord and city "shall go hence without a day," and failed to determine the rights of the parties or make any factual findings. Fla. Stat. Ann. § 86.011.

Cases that cite this headnote

[2] **Declaratory Judgment**
Declaratory relief

Under the Declaratory Judgment Act, where a trial court denies a motion to dismiss, the trial court must fully determine the rights of the respective parties, as reflected by the pleadings. Fla. Stat. Ann. § 86.011.

1 Cases that cite this headnote

[3] **Declaratory Judgment**
Declaratory relief

Conclusory final judgments on declaratory judgment claims, which are devoid of factual findings or conclusions of law, are inadequate. Fla. Stat. Ann. § 86.011.

3 Cases that cite this headnote

[4] **Constitutional Law**
Leases in general

Landlord and Tenant
Consent of Lessor, and Waiver Thereof

Resolution passed by city, which required both landlord and city to agree to any subdivision of space within mall,

unconstitutionally impaired mall tenant's contract rights; the resolution diminished tenant's interest in contract and diminished the value of the contract, as it affected tenant's ability to enter into a sublease, and the resolution unreasonably intruded on the parties' bargain to a degree greater than was necessary as it granted landlord and city unbridled discretion to disapprove any attempts to divide the property to effectuate a sublease. U.S. Const. art. 1, § 10, cl. 1; Fla. Const. art. 1, § 10.

Cases that cite this headnote

[5] **Appeal and Error**
Statutory or legislative law

Appeal and Error
Local law;ordinances

The District Court of Appeal reviews the constitutionality of statutes and municipal enactments with the de novo standard.

Cases that cite this headnote

[6] **Constitutional Law**
Existence and extent of impairment

To impair a preexisting contract, so as to violate the state and federal constitutional provisions barring laws that impair the obligation of contracts, a law must have the effect of rewriting antecedent contracts in a manner that changes the substantive rights of the parties to existing contracts. U.S. Const. art. 1, § 10, cl. 1; Fla. Const. art. 1, § 10.

Cases that cite this headnote

[7] **Constitutional Law**
Existence and extent of impairment

Total destruction of contractual expectations is not necessary for a finding of substantial impairment, so as to violate the state and federal constitutional provisions barring laws that impair the obligation of contracts; rather, impairment is defined as to make worse; to diminish in quantity, value, excellency or strength; to lessen in power; to weaken. U.S. Const. art. 1, § 10, cl. 1; Fla. Const. art. 1, § 10.

Cases that cite this headnote

[8] **Constitutional Law**
Obligation of Contract

Any legislative action which diminishes the value of a contract is repugnant to and inhibited by the Constitution. U.S. Const. art. 1, § 10, cl. 1; Fla. Const. art. 1, § 10.

Cases that cite this headnote

[9] **Constitutional Law**
Police power;purpose of regulation

Some impairment of a contract may be tolerable where the governmental actor can demonstrate a significant and legitimate public purpose behind the regulation. U.S. Const. art. 1, § 10, cl. 1; Fla. Const. art. 1, § 10.

Cases that cite this headnote

[10] **Constitutional Law**
Contractual waiver

Tenant did not contractually waive its impairment of contract claim, as argued by landlord; while lease stated that tenant would comply with all laws and ordinances, it also reserved in tenant the right to contest the applicability of any laws, ordinances, orders, rules, or regulations. U.S. Const. art. 1, § 10, cl. 1; Fla. Const. art. 1, § 10.

Cases that cite this headnote

[11] **Constitutional Law**
Landlord and Tenant

Landlord and Tenant
Consent of Lessor, and Waiver Thereof

Resolution passed by city, which required both landlord and city to agree to any subdivision of space within mall, violated tenant's substantive due process rights; resolution failed to identify any standards or criteria that would govern when approval for

subdivision was to be granted or withheld. U.S. Const. Amend. 14.

Cases that cite this headnote

[12] **Constitutional Law**
Police power, relationship to due process

An individual's substantive due process rights protect against the mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense. U.S. Const. Amend. 14.

Cases that cite this headnote

[13] **Constitutional Law**
Substantive Due Process in General

For a government policy to be unconstitutional, in violation of an individual's substantive due process rights, it is not necessary that the record reveal that the governing body or its members have in fact acted capriciously or arbitrarily; it is the opportunity, not the fact itself, which will render an ordinance vulnerable. U.S. Const. Amend. 14.

Cases that cite this headnote

[14] **Constitutional Law**
Zoning and Land Use

Decisions based on the application of zoning regulations will not be susceptible to substantive due process challenges. U.S. Const. Amend. 14.

Cases that cite this headnote

[15] **Civil Rights**
Results of litigation;prevailing parties

Tenant was entitled to an attorney's fee award against the city under § 1983, in declaratory judgment action where tenant sought to sublease property and city entered a resolution that required both landlord and city to agree to any subdivision of space within mall; tenant's substantive due process rights were violated, city formally and expressly created and adopted the unconstitutional resolution, and tenant on appeal obtained declaratory relief it sought. U.S. Const. Amend. 14; 42 U.S.C.A. § 1983.

Cases that cite this headnote

[16] **Civil Rights**
Governmental Ordinance, Policy, Practice, or Custom

Municipalities are liable under § 1983 but only if a plaintiff shows: (1) that his constitutional rights were violated; (2) that the municipality had a custom or policy that constituted deliberate indifference to that constitutional right; and (3) that the policy or custom caused the violation. 42 U.S.C.A. § 1983.

Cases that cite this headnote

[17] **Civil Rights**
Results of litigation;prevailing parties

Civil Rights
Amount and computation

Statute governing a proceeding in vindication of civil rights requires courts to conduct a two-part inquiry; first, whether the plaintiff is a prevailing party, and second, if the plaintiff is a prevailing party, what constitutes a reasonable fee award. 42 U.S.C.A. § 1988.

Cases that cite this headnote

[18] **Civil Rights**
Results of litigation;prevailing parties

A prevailing party in a civil rights action is ordinarily entitled to recover reasonable attorney's fees unless special circumstances would render such an award unjust. 42 U.S.C.A. § 1988.

Cases that cite this headnote

[19] **Landlord and Tenant**
Consent of Lessor, and Waiver Thereof

Tenant had the contractual right to sublease to subtenant without landlord's approval; lease provided that tenant "shall have the right to assign this lease and to sublet from time to time the demised premises or any part thereof," and although the lease stated certain restrictions applied if tenant sought to sublease "all or substantially all of the demised premises," the restrictions did not apply because tenant sought to sublease only one floor of its two story mall location.

Cases that cite this headnote

[20] **Landlord and Tenant**
Reasonable construction

Landlord and Tenant
Ordinary or technical language

When interpreting a lease, words should be given their natural meaning or the meaning most commonly understood in relation to the subject matter and circumstances, and reasonable construction is preferred to one that is unreasonable.

Cases that cite this headnote

[21] **Landlord and Tenant**
Rights and liabilities of sublessees

Generally, a sublessee can have no more rights to the subleased premises than the sublessor had.

Cases that cite this headnote

[22] **Landlord and Tenant**
Rights and liabilities of sublessees

Where a lease includes the right to sublease, the sublessor may grant any rights and privileges the sublessor has except where specifically prohibited.

Cases that cite this headnote

[23] **Contracts**
Construction as a whole

In interpreting an agreement, the goal is to arrive at a reasonable interpretation of the text of the entire agreement to accomplish its stated meaning and purpose.

Cases that cite this headnote

***294** Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Donald W. Hafele, Judge, and Edward A. Garrison, Acting Circuit Court Judge; L.T. Case No. 50–2014–CA–011945–XXXX–MB.

Attorneys and Law Firms

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R. Max Lohman and Abigail F. Jorandby of Lohman Law Group, P.A., Jupiter, Florida, for appellee City of Palm Beach Gardens.

Opinion

***295** Levine, J.

Sears, Roebuck has a lease with Forbes/Cohen for a store within the Gardens Mall. It attempted to sublease part of its store to Dick's Sporting Goods. However, the landlord disapproved of the sublease and collaborated with the City of Palm Beach Gardens, unbeknownst to Sears, to enact a resolution to now require both the landlord and the City to agree to any subdivision of space within the Gardens Mall.

The issues presented in this case are whether the City's resolution unconstitutionally impairs Sears's contract rights and whether that resolution violates substantive due process because it has no criteria stating when approval to subdivide Sears's leased space may be granted or denied. As a related issue, we consider whether Sears is owed attorney's fees as a result of the City's alleged violation

of substantive due process. Finally, we consider whether Sears has a contractual right to sublease.

We conclude the City's resolution is unconstitutional both because it impairs Sears's right to contract—and the contract rights emanating from the lease between Sears and Forbes/Cohen—and deprives Sears of its substantive due process rights. Consequently, we find Sears is a prevailing party under 42 U.S.C. sections 1983 and 1988 and is owed attorney's fees. We further conclude that Sears has the contractual right to sublease without authorization from Forbes. The remaining issues are without merit and we affirm without comment.

FACTS

In 1984, Forbes/Cohen Florida Properties, L.P. ("Forbes") entered into a Land Lease to develop property within Palm Beach Gardens and construct a mall. Forbes then petitioned the City of Palm Beach Gardens (the "City") to approve construction for the mall. The City approved Forbes's petition and enacted the Palm Beach Gardens Planning Unit Development ("P.U.D.") through resolution.

The P.U.D. specifically requires that all anchor stores at the mall undergo architectural review "to achieve architectural design harmony and to maintain integrity throughout the project." Issuance of a building permit requires city council approval of any preliminary designs to ensure the proposed modifications do not "disrupt the architectural design, harmony and integrity" of the mall. Further, the P.U.D. restricts signage by limiting anchor tenants to "[o]ne wall sign for each anchor department store facade representing typical identification by sign logo, style, and illumination indigenous to that anchor department store ...."

In 1987, Forbes entered into a sublease with Sears, Roebuck & Co. ("Sears"). The thirty-year sublease gives Sears the option to extend its lease for four separate periods of ten years each so long as Sears was not in material default and was operating as a retail store. Additionally, the sublease gives Sears the "right" to sublease, stating:

> *[Sears] shall have the right to assign this Lease and to sublet from time to time the Demised Premises or any part thereof*; subject however, to the terms and provisions of the [Reciprocal Easement Agreement]. No such assignment or subletting shall relieve Tenant of its obligations under this Lease ....

(emphasis added). Lastly, the sublease requires Sears to "comply with all laws and ordinances and the orders, rules, and regulations and requirements of all Federal, State, County and municipal governments ... which may be applicable from time to time to the Demised Premises." However, the sublease also allows Sears the "*right to contest the applicability* of any laws, ordinances, ***296** orders, rules, regulations or governmental requests ...." (emphasis added).

Concurrent with the sublease, Sears entered into a Reciprocal Easement Agreement (the "R.E.A."). The R.E.A. mandates that Sears initially operate as a department store, but after twenty years, Sears could use its space for "retail and service purposes and for no other purposes." As to subleasing, the R.E.A. indicates that "Majors," that being anchor tenants like Sears, could "lease all or any portion(s) of its building and/or license departments therein" so long as the sublease otherwise complied with the R.E.A. The R.E.A also sets forth criteria for signage. The R.E.A. requires signs to comply with aesthetic and safety standards, for example prohibiting blinking lights and rooftop signs and requiring compliance with electrical codes. The R.E.A. also prohibits tenants from creating dangerous hazards within the mall. Finally, the R.E.A. provides that it exists for the "exclusive benefit of the Parties and the Fee Owner" and nothing in the R.E.A. should "be construed to create any rights in or for the benefit of any space lessee of any part of the Shopping Center Parcel."

In 2011, Sears began seeking a subtenant to sublease part of its two-story store and entered into negotiations with Dick's Sporting Goods. Sears informed Sidney Forbes, a partner of Forbes, of its plans.

Without informing Sears, Sidney met with the City, told the City of Sears's plans, and personally requested that the City enact a resolution. Forbes submitted a development application along with a $1,650 fee and then collaborated with the City in crafting the proposed resolution. The City passed Resolution 20–2012 (the "Resolution") as part of its consent agenda without taking any testimony.

The Resolution states that its purpose was to clarify the P.U.D. The Resolution requires the following:

> Prior to any proposed structural modifications, installation of kiosks, and/or any subdivision of an anchor tenant space into any sub-space which requires separate business tax receipts and/or newly separate licensing of any kind whatsoever for the business enterprise intending to occupy the newly created sub-space, anchor tenants must obtain City Council approval. Prior to seeking City Council approval the subject anchor tenant must obtain approval for the subject modification from mall ownership.

Sears, not knowing of the Resolution, informed Forbes of its plans to sublease to Dick's. Forbes claimed Dick's was inappropriate for the mall. Subsequently, Forbes sent Sears a letter stating that Sears's "contemplated actions ... are beyond [Sears's] authority under the Sublease." The letter further stated that Forbes did "not consent to the marketing by Sears of any portion of its space within the Gardens and will not consent to any proposals that is not fully in compliance with all applicable restrictions and fully satisfies all of [Sears's] obligations." Then, at a subsequent meeting, Sidney told Sears that it was not within its rights to sublease to Dick's. Sidney believed Sears could not sublease to Dick's because Dick's was not a department store, Dick's did not have signage rights, and Dick's did not "belong" at the mall.

Sears filed a complaint seeking declaratory relief. As to Forbes, Sears sought a declaratory judgment stating that it had the right to sublease to Dick's. As to the City, Sears sought a declaratory judgment stating that the Resolution was an unconstitutional impairment of contract under the Florida and United States Constitutions and that the Resolution violated ***297** Sears's substantive due process rights. Lastly, Sears sought attorney's fees under 42 U.S.C. sections 1983 and 1988. [1]

During the pendency of litigation, Sears entered into a sublease with Dick's for one floor of Sears's two-floor lease. As per the sublease, Dick's was to operate as a sporting goods store. Furthermore, the sublease was contingent on Sears getting necessary government approvals, including approvals for signage as well as obtaining a favorable declaratory judgment.

Following the trial court's denial of the City's and Forbes's motions to dismiss and Sears's motion for summary judgment, the case went to trial. At trial, testimony established that Dick's was a "first-class" retailer. Further, Forbes conceded that Sears had the right to sublease so long as it complied with the sublease and the R.E.A. Nevertheless, Forbes asserted the following reasons against the sublease: the proposed Dick's sublease was not compliant with the sublease and the R.E.A. because Dick's could not put up a sign, Sears could not exercise its option to extend its lease while subleasing to Dick's, Sears had not gotten the requisite architectural approvals for modification of the leased premises, and Dick's potential gun sales violated the R.E.A.'s prohibition on creating dangerous hazards.

Sears conceded that, under the sublease, the current signage plans were not compliant with municipal zoning standards. Sears noted that it would need to get city approvals and waivers, but that other anchor tenants at the mall had multiple signs and that it was a regular industry practice to work with municipalities in getting necessary approvals and waivers. Further, Sears conceded that it had not yet attained the necessary architectural approvals for the mall, but would do so upon favorable disposition of the declaratory judgment action. Finally, Sears had not exercised its option to renew its lease, which was set to expire in 2018.

The City's contention at trial was that the Resolution did not create new rights or obligations, but instead was administrative and merely interpreted, and reiterated, pre-existing requirements under the P.U.D. Further, the Resolution did not require approval for "subleasing," but required approval for "subdividing" anchor tenant space. Thus, the resolution did not impair Sears's contract rights nor did it violate substantive due process.

Sears argued that the prohibition on subdividing space without approval was tantamount to a prohibition on subleasing without approval. Further, the Resolution

gave both the City and Forbes unfettered authority to decide whether to permit an anchor tenant, such as Sears, to sublease. This authority, as outlined in the Resolution, did not exist in the sublease, P.U.D., or R.E.A.

Following the conclusion of trial, the trial court did not make any findings of fact or conclusions of law nor did it declare the parties' rights with respect to the sublease, R.E.A. or P.U.D. Instead, the court found as follows:

> As to Count 1, the Court finds for the Defendant, [Forbes], who shall go hence without a day.
>
> As to Counts 3, 4, 5, and 6, the Court finds for the Defendant, [the City], who shall go hence without a day.

Sears appealed.

ANALYSIS

I. DECLARATORY JUDGMENT

[1] As a preliminary issue, Sears argues that, although the trial court's order *298 was deficient as it failed to determine the rights of the parties or make any factual findings, we may nevertheless consider the merits of this appeal without remanding to the trial court. We agree.

Florida's Declaratory Judgment Act provides as follows:

> The circuit and county courts have jurisdiction within their respective jurisdictional amounts to declare rights, status, and other equitable or legal relations whether or not further relief is or could be claimed. No action or procedure is open to objection on the ground that a declaratory judgment is demanded. The court's declaration may be either affirmative or negative in form and effect and such declaration has the force and effect of a final judgment.

§ 86.011, Fla. Stat.

[2] [3] Under this Act, where a trial court denies a motion to dismiss, the trial court must "fully determine the rights of the respective parties, as reflected by the pleadings." *Local 532 of the Am. Fed'n of State, Cty., & Mun. Emps., AFL–CIO v. City of Fort Lauderdale*, 273 So.2d 441, 445 (Fla. 4th DCA 1973). Thus, conclusory final judgments on declaratory judgment claims, which are devoid of factual findings or conclusions of law, are inadequate. *See id.*; *Hyman v. Ocean Optique Distribs., Inc.*, 734 So.2d 546, 548 (Fla. 3d DCA 1999).

The final judgment in the present case simply found for Forbes and the City, stating they "shall go hence without a day." Consequently, the trial court failed to "fully determine the rights of the respective parties." *See Local 532*, 273 So.2d at 445; *see also State Farm Mut. Auto. Ins. Co. v. Hinestrosa*, 614 So.2d 633, 635 (Fla. 4th DCA 1993) (stating that the words "plaintiff take nothing and defendant go hence without day" are "words usually found in cases seeking only a money judgment rather than a declaratory judgment").

Review of a declaratory judgment generally requires adequate findings of fact and conclusions of law. *Trump Endeavor 12, LLC v. Fla. Pritikin Ctr., LLC*, 208 So.3d 311, 312 (Fla. 3d DCA 2016). Thus, normally, we would remand for the trial court to make additional findings. *See Exotic Motorcars & Jewelry, Inc. v. Essex Ins. Co.*, 111 So.3d 208, 209 (Fla. 4th DCA 2013). However, in the present case, the issues to be reviewed are purely legal in nature and the underlying facts are not in dispute. Therefore, we conclude remand is unnecessary, and find that we may consider the merits of Sears's appeal.

II. IMPAIRMENT OF CONTRACT

[4] Sears argues that the Resolution passed by the City, at the prompting of Forbes, unconstitutionally impaired its contract rights. We agree with Sears and find that the City's Resolution unconstitutionally impaired Sears's right to contract.

[5] We review the constitutionality of statutes and municipal enactments with the de novo standard. *Kuvin v. City of Coral Gables*, 62 So.3d 625, 629 (Fla. 3d DCA 2010).

Both the state and federal constitutions prohibit the impairment of contract. *See* Art. I, § 10, cl. 1, U.S. Const.; Art. I, § 10, Fla. Const. It is a hallmark of

the law in Florida that contracts are protected from unconstitutional impairment, and the Florida Supreme Court has unequivocally stated that "[t]he right to contract is one of the most sacrosanct rights guaranteed by our fundamental law. It is expressly guaranteed by article I, section 10 of the Florida Constitution." *Chiles v. United Faculty of Fla.*, 615 So.2d 671, 673 (Fla. 1993); *see also In re Advisory Opinion to the Governor*, 509 So.2d 292, 314 (Fla. 1987) ("It is ***299** ... indisputable ... that rights existing under a valid contract enjoy protection under the Florida Constitution.").

The Florida Constitution offers greater protection for the rights derived from the Contract Clause than the United States Constitution. *See Sarasota Cty. v. Andrews*, 573 So.2d 113, 115 (Fla. 2d DCA 1991) (citing *Pomponio v. Claridge of Pompano Condo., Inc.*, 378 So.2d 774, 780 (Fla. 1979)); James W. Ely, Jr., The Contract Clause: A Constitutional History 253 (2016) ("[T]he Florida Supreme Court has signaled its willingness to protect contracts more fully than the federal courts."). Thus, the Florida Supreme Court has recognized that it is "not bound to accept as controlling the United States Supreme Court's interpretation of a parallel provision of the federal constitution." *Pomponio*, 378 So.2d at 779.

[6] **[7]** "To impair a preexisting contract, a law must 'have the effect of rewriting antecedent contracts' in a manner that 'chang[es] the substantive rights of the parties to existing contracts.' " *Searcy, Denney, Scarola, Barnhart & Shipley, etc. v. State*, 209 So.3d 1181, 1191 (Fla. 2017) (citation omitted). "Total destruction of contractual expectations is not necessary for a finding of substantial impairment." *U.S. Fid. & Guar. Co. v. Dep't of Ins.*, 453 So.2d 1355, 1360 (Fla. 1984). Rather, impairment is defined as "to make worse; to diminish in quantity, value, excellency or strength; to lessen in power; to weaken." *Pomponio*, 378 So.2d at 781 n.41 (citation omitted); *Pudlit 2 Joint Venture, LLP v. Westwood Gardens Homeowners Ass'n*, 169 So.3d 145, 150 (Fla. 4th DCA 2015).

[8] "Any legislative action which diminishes the value of a contract is repugnant to and inhibited by the Constitution." *In re Advisory Opinion*, 509 So.2d at 314. For example, "[a] statute which retroactively turns otherwise profitable contracts into losing propositions is clearly such a prohibited enactment." *Id.* at 314–15. Indeed, it is a "well-accepted principle that virtually no degree of contract impairment is tolerable." *Pudlit*, 169 So.3d at 150 (quoting *Coral Lakes Cmty. Ass'n v. Busey Bank, N.A.*, 30 So.3d 579, 584 (Fla. 2d DCA 2010)); *see also Citrus Mem'l Health Found., Inc. v. Citrus Cty. Hosp. Bd.*, 108 So.3d 675, 677 (Fla. 1st DCA 2013) ("[A]ny legislation that detracts from the value of a contract is subject to the constitutional proscription ....").

[9] The conclusion, however, that " 'virtually' no impairment is tolerable necessarily implies that some impairment is tolerable," though not as much impairment as would be "acceptable under traditional federal contract clause analysis." *Pomponio*, 378 So.2d at 780. "[S]ome impairment" may be "tolerable" where the governmental actor can demonstrate a "significant and legitimate public purpose behind the regulation." *Searcy*, 209 So.3d at 1192 (quoting *Energy Reserves Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 411, 103 S.Ct. 697, 74 L.Ed.2d 569 (1983)).

In *Griffin v. Sharpe*, 65 So.2d 751 (Fla. 1953), a piece of real property had a restriction whereby only residences and apartments could be built upon it. A few years before the restriction was set to expire, the legislature enacted a statute to extend the restriction. A purchaser subsequently purchased the property and sought to build a medical office on it. The Florida Supreme Court held that the legislative enactment violated the Contract Clause. The court described this legislative restriction as "legislative fiat," stating:

> The contested restriction is without doubt a private contract between private individuals, and its attempted extension by the Legislature can in no wise [sic] be related to the reasonable exercise of ***300** the police power of the state and is a futile effort to by-pass constitutional prohibitions and re-write the agreement through governmental authority.

Id. at 752.

The Resolution passed by the City, at the behest of Forbes, states the following:

> Prior to any proposed structural modifications, installation of kiosks, and/or any subdivision of an anchor tenant space into any sub-space which requires separate business tax receipts and/or newly separate licensing of any kind whatsoever for the business enterprise intending to occupy the newly created sub-space, anchor tenants must obtain City Council approval. Prior to seeking City Council approval the subject anchor tenant must obtain approval for the subject modification from mall ownership.

It is clear that the Resolution diminished Sears's interest in the contract, namely Sears's right to sublease. Although the Resolution does not mention subleasing specifically, total destruction of Sears's interest in the contract is not required to claim an impairment of contract. *U.S. Fid. & Guar.*, 453 So.2d at 1360. The Resolution has "made worse" Sears's rights emanating from the contract. *See Pudlit*, 169 So.3d at 150. Sears, although it can still enter into a subleasing agreement, as it has with Dick's, must now get approvals from both Forbes and the City before it can subdivide the property to act on that agreement. Thus, the Resolution has depreciated and diminished the value of Sears's contract.

Having concluded the Resolution is an impairment of contract, we must consider "whether the nature and extent of the impairment is constitutionally tolerable in light of the importance of the State's objective, or whether it unreasonably intrudes into the parties' bargain to a degree greater than is necessary to achieve that objective." *Searcy*, 209 So.3d at 1192 (quoting *Pomponio*, 378 So.2d at 780).

The City's public purpose justification for the Resolution is that it helps to strengthen and maintain the mall's aesthetic qualities. This justification is neither "significant" nor "legitimate," particularly where the P.U.D. *already* sets forth aesthetic standards for the mall and *already* requires architectural approvals. The City has failed to show how the Resolution accomplishes anything to further its supposed purpose beyond what the P.U.D. already accomplishes. Additionally, the contract has been substantially impaired as it gives both the City and Forbes the unbridled discretion to disapprove of any attempts to divide property to effectuate a sublease. Thus, the impairment "unreasonably intrudes into the parties' bargain to a degree greater than is necessary to achieve that objective." *Id.* It is clear that the Resolution is an effort to "re-write the agreement through governmental authority," and that governmental authority's intervention resulted in the diminishment of Sears's interest in a preexisting contract. *Griffin*, 65 So.2d at 752.

[10] Finally, the City contends that Sears has contractually waived its impairment of contract claim. The sublease states that Sears "shall ... promptly comply with all laws and ordinances and the orders, rules, and regulations and requirements of all Federal, State, County and municipal governments ... which may be applicable from time to time to the Demised Premises ...." The City argues that the parties anticipated amendments and changes to laws and rules and that Sears agreed to follow those laws and rules, as amended. We note, however, that in the very same paragraph of the contract, Sears reserved "*the right to contest the applicability* of any laws, ordinances, ***301** orders, rules, regulations or governmental requests ...." (emphasis added).

We must read the entire agreement as a whole, and "[t]he language being construed should be read in common with other provisions of the contract." *Royal Oak Landing Homeowner's Ass'n v. Pelletier*, 620 So.2d 786, 788 (Fla. 4th DCA 1993); *Am. K–9 Detection Servs., Inc. v. Cicero*, 100 So.3d 236, 238–39 (Fla. 5th DCA 2012). The two provisions, read together, indicate that Sears must follow all laws and ordinances, but that it has the right to challenge those laws and ordinances where they are illegal, or, as here, unconstitutional. Accordingly, Sears did not contractually waive this issue and is free to challenge the Resolution.

We therefore conclude that the Resolution is unconstitutional as it impairs Sears's contract and is not "reasonable and necessary to serve an important public purpose." *Searcy*, 209 So.3d at 1192.

III. SUBSTANTIVE DUE PROCESS

[11] Sears next contends that the Resolution, in addition to being an unconstitutional impairment of contract, also deprives it of substantive due process because it requires Forbes and the City to approve subdivisions of anchor tenant space without also setting forth any standards or criteria upon which the City and Forbes are to base such a decision.

[12] [13] An individual's substantive due process rights protect against the "mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense." *WCI Cmtys., Inc. v. City of Coral Springs*, 885 So.2d 912, 914 (Fla. 4th DCA 2004). For a government policy to be unconstitutional, "it [is not] necessary that the record reveal that the governing body or its members have in fact acted capriciously or arbitrarily. It is the opportunity, not the fact itself, which will render an ordinance vulnerable." *ABC Liquors, Inc. v. City of Ocala*, 366 So.2d 146, 150 (Fla. 1st DCA 1979). Thus, the Florida Supreme Court has instructed that

> [a]n ordinance whereby the city council delegates to itself the arbitrary and unfettered authority to decide where and how a particul[a]r structure shall be built or where located without at the same time setting up reasonable standards which would be applicable alike to all property owners similarly conditioned, cannot be permitted to stand as a valid municipal enactment.

N. Bay Vill. v. Blackwell, 88 So.2d 524, 526 (Fla. 1956).

In *Drexel v. City of Miami Beach*, 64 So.2d 317 (Fla. 1953), the plaintiff was denied a permit to build a parking garage. The applicable city ordinance stated that no parking garages should be built except "upon 'approval and permit by the City Council ... after a public hearing at which due consideration shall be given to the effect upon traffic of the proposed use ....' " *Id.* at 318 (alteration in original). The court stated the ordinance was unconstitutional, reasoning:

> In the present ordinance there is found no guide whatever to aid the councilmen in deciding what permits should, and what permits should not, be granted. Reading the ordinance in a light most favorable to the city's position, each councilman was accorded the privilege of deciding in his own mind whether he had duly considered the traffic problem and when a majority of councilmanic minds concluded that such consideration had been duly given and that the proposed building would complicate traffic conditions, the composite thought would ripen into a power that would take away ***302** property. This, in our opinion, would be doing so in violation of the guaranties of the State and United States Constitutions.

Id. at 319.

Similarly, in *City of Miami Beach v. Fleetwood Hotel, Inc.*, 261 So.2d 801 (Fla. 1972), the city enacted an ordinance in order to regulate rents. However, the ordinance failed to set "objective guidelines and standards for its enforcement ... nor [could] such be reasonably inferred from the language of the Ordinance." *Id.* at 805. Further, the ordinance vested with a single individual, the City Rent Administrator, the "unbridled discretion to determine which accommodations are to be controlled and a number of other things." *Id.* at 806. The court concluded that the ordinance was unconstitutional because it failed to lay out any guidelines for its enforcement. *Id.* at 805–06; *see also Friends of the Great S., Inc. v. City of Hollywood ex rel. City Comm'n*, 964 So.2d 827, 830 (Fla. 4th DCA 2007) ("In order for ordinances which provide decisional authority to be constitutional, they must have mandatory objective criteria to be followed when making a decision."); *ABC Liquors*, 366 So.2d at 149 ("Any standards, criteria or requirements which are subject to whimsical or capricious

application or unbridled discretion will not meet the test of constitutionality.").

[14] The City contends substantive due process protections do not apply to non-legislative zoning decisions such as the Resolution. It is true that substantive due process challenges are permitted for the alleged deprivation of *constitutional* rights, and not the alleged deprivation of rights arising under state law, such as zoning decisions. *See McKinney v. Pate*, 20 F.3d 1550, 1556 (11th Cir. 1994); *Kantner v. Martin Cty.*, 929 F.Supp. 1482, 1486 (S.D. Fla. 1996). Thus, decisions based on the application of zoning regulations will not be susceptible to substantive due process challenges. *See Kantner*, 929 F.Supp. at 1486–87. However, a land use regulation *itself* may be challenged under substantive due process. *See Restigouche, Inc. v. Town of Jupiter*, 59 F.3d 1208, 1213–15 (11th Cir. 1995) (addressing the merits of whether a zoning regulation prohibiting automobile sales violated the plaintiff's substantive due process rights); *Kantner*, 929 F.Supp. at 1487. In the present case, it is the Resolution itself, not the application of the Resolution, that is being challenged. Thus, the Resolution may be subject to a substantive due process challenge.

In the present case, the Resolution states:

> Prior to any proposed structural modifications, installation of kiosks, and/or any subdivision of an anchor tenant space into any sub-space which requires separate business tax receipts and/or newly separate licensing of any kind whatsoever for the business enterprise intending to occupy the newly created sub-space, anchor tenants must obtain City Council approval. Prior to seeking City Council approval the subject anchor tenant must obtain approval for the subject modification from mall ownership.

The Resolution requires a tenant to "obtain approval" from both the City Council and "mall ownership," that being Forbes, to subdivide its anchor tenant space, but it fails to identify any standards or criteria that would govern when approval is to be granted or withheld. The Resolution, in other words, grants the City and Forbes with "unbridled discretion" in this matter. *See Fleetwood Hotel*, 261 So.2d at 806. Therefore, we conclude that the Resolution violates substantive due process and "cannot be permitted to stand as a valid municipal enactment" because it permits the City and Forbes to arbitrarily and capriciously ***303** deprive Sears of its property rights as a Tenant pursuant to the contract negotiated and executed by the parties. *See N. Bay Vill.*, 88 So.2d at 526.[2]

The City argues that it had a rational basis for enacting the Resolution, claiming the Resolution preserves the "form, function, and composition of the Gardens PUD" and promotes "the health, safety, and welfare of the public at large." Although the interests described may be a legitimate governmental interest, *see City of Miami Beach v. Ocean & Inland Co.*, 147 Fla. 480, 3 So.2d 364, 366–67 (1941), the Resolution's total lack of guidance would allow for arbitrary and capricious enforcement "having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense." *See WCI Cmtys.*, 885 So.2d at 914; *cf. Estate of McCall v. United States*, 134 So.3d 894, 901–03 (Fla. 2014) (stating a medical malpractice statute was irrational when it treated multiple claimants differently from a single claimant because there was no reason to treat the two categories differently).

[15] We next address Sears's argument that it is entitled to an attorney's fee award against the City under 42 U.S.C. sections 1983 and 1988. Under section 1983,

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an

> action at law, suit in equity, or other proper proceeding for redress ....

Section 1988 provides for attorney's fees, stating, "In any action or proceeding to enforce a provision of section[ ] ... 1983, ... the court, in its discretion, may allow the prevailing party ... a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988(b).

[16] As a preliminary issue, municipalities are liable under section 1983 but only if a plaintiff shows: "(1) that his constitutional rights were violated; (2) that the municipality had a custom or policy that constituted deliberate indifference to that constitutional right; and (3) that the policy or custom caused the violation." *McDowell v. Brown*, 392 F.3d 1283, 1289 (11th Cir. 2004). As discussed above, Sears's substantive due process rights were violated, thus satisfying the first prong. Furthermore, Sears has satisfied the second and third prongs because the City formally and expressly created and adopted the unconstitutional Resolution. *See Spell v. McDaniel*, 824 F.2d 1380, 1387 (4th Cir. 1987) ("Policy, in the narrow sense of discrete, consciously adopted courses of governmental action may be fairly attributed to a municipality ... because (1) it is directly 'made by its lawmakers,' i.e., its governing body ...." (quoting *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 694, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978))).

[17] **[18]** Section 1988 requires courts to conduct a two-part inquiry. First, "whether the plaintiff is a prevailing party," and second, "if the plaintiff is a prevailing party, what constitutes a reasonable fee award." *Boston's Children First v. City of Boston*, 395 F.3d 10, 14 (1st Cir. 2005). As to the first inquiry, "[a] plaintiff 'prevails' ***304** ... 'when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.' " *Lefemine v. Wideman*, 568 U.S. 1, 4, 133 S.Ct. 9, 184 L.Ed.2d 313 (2012) (quoting *Farrar v. Hobby*, 506 U.S. 103, 111–12, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992)). Having a declaratory judgment entered in a party's favor will generally satisfy the "prevailing party" test. *See id.* A prevailing party is "ordinarily" entitled to recover attorney's fees "unless special circumstances would render such an award unjust." *Hensley v. Eckerhart*, 461 U.S. 424, 429, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983) (citation omitted).

As a consequence of the present appeal, Sears is a prevailing party under section 1988 as it has obtained the declaratory relief it sought.

Citing *Farrar*, the City argues that, even assuming Sears prevailed in its appeal, any victory on Sears's part would be a merely nominal victory for which Sears would not be entitled attorney's fees. In *Farrar*, the plaintiff sought substantial monetary damages but received only a nominal award. The Court held that the plaintiff was not entitled to attorney's fees. Although the plaintiff was technically a "prevailing party," the plaintiff had failed to prove damages, "an essential element of his claim for monetary relief." *Id.* at 114–15, 113 S.Ct. 566. Thus, the Court stated that in such situations, "the only reasonable fee is usually no fee at all." *Id.*

The City contends that because Sears has not sought damages as part of its substantive due process claim, Sears should not be entitled to attorney's fees. We conclude, however, that *Farrar* is distinguishable. In *Farrar*, the plaintiff did not prevail in his attempt to secure substantial damages whereas in the present case Sears has received precisely what it requested: declaratory relief. The United States Supreme Court has "repeatedly held ... an injunction or declaratory judgment" will satisfy the prevailing party test. *Lefemine*, 568 U.S. at 4, 133 S.Ct. 9; *see also Sanchez v. City of Austin*, 774 F.3d 873, 882–83 (5th Cir. 2014) (explaining that *Farrar* does not control where a party sues for, and obtains, declaratory or injunctive relief even if the party receives only nominal damages). Here, because Sears has "materially alter[ed] the legal relationship between the parties," we conclude Sears is entitled to attorney's fees.

On remand, the trial court should, in calculating Sears's fees, consider both the hours expended and the reasonableness of the hourly rate and "whether the expenditure of counsel's time was reasonable in relation to the success achieved." *Hensley*, 461 U.S. at 433–37, 103 S.Ct. 1933; *see also Phelps v. Hamilton*, 120 F.3d 1126, 1131 (10th Cir. 1997) ("A court will generally determine what fee is reasonable by first calculating the lodestar—the total number of hours reasonably expended multiplied by a reasonable hourly rate—and then adjust the lodestar upward or downward to account for the particularities of the suit and its outcome.").

IV. SUBLEASING RIGHTS

[19] Sears also argues it has the contractual right to sublease and may do so without Forbes's approval. Thus, Sears asserts the trial court erred when it failed to award declaratory relief in its favor.

[20] In interpreting the Sears–Forbes sublease, we must "give effect to the plain and ordinary meaning of its terms." *Golf Scoring Sys. Unlimited, Inc. v. Remedio*, 877 So.2d 827, 829 (Fla. 4th DCA 2004). "Words should be given their natural meaning or the meaning most commonly *305 understood in relation to the subject matter and circumstances, and reasonable construction is preferred to one that is unreasonable." *Id.* (citation omitted).

The Sears–Forbes sublease states, "[Sears] shall have the *right to assign this Lease and to sublet* from time to time the Demised Premises or any part thereof; subject however, to the terms and provisions of the R.E.A." (emphasis added). Although the sublease indicates certain restrictions apply should Sears seek to sublease "all or substantially all of the Demised Premises," these restrictions do not apply because Sears seeks to sublease less than "all or substantially all" of the premises, that being only one floor of its two story mall location. Similarly, the R.E.A. states that Sears may "lease all of any portion(s) of its building and/or license departments therein ...." While the R.E.A. states Sears's space must be used for "retail and service purposes and for no other purposes," this restriction is also not prohibitive as Dick's is a retailer. Therefore, we conclude Sears may sublease to Dick's without obtaining approval from Forbes.

Forbes contends that, even if Sears does have subleasing rights, Dick's would have no right to install a sign as it is not permitted under the R.E.A because Dick's is not a party to the R.E.A.

The R.E.A does not expressly prohibit sublessees, such as Dick's, from installing signs. Rather the R.E.A. puts in place criteria by which signs are to be installed and maintained. This signage criteria does not expressly prohibit a sublessee from installing a sign nor does it prohibit Sears from granting a sublessee the right to install a sign.

[21] [22] Generally, a sublessee can have no more rights to the subleased premises than the sublessor had. *See Thal v. S.G.D. Corp.*, 625 So.2d 852, 853 (Fla. 3d DCA 1993). As a corollary to that rule, where a lease includes the right to sublease, the sublessor may grant any rights and privileges the sublessor has except where specifically prohibited. *See Max & Tookah Campbell Co. v. T. G. & Y. Stores*, 623 P.2d 1064, 1067 (Okla. Civ. App. 1981); Restatement (Second) of Prop.: Landlord & Tenant § 15.1 (Am. Law Inst. 1977) ("The interests of the landlord and of the tenant in the leased property are freely transferable, unless: ... (3) the parties to the lease validly agree otherwise."). Consequently, Sears has the right to grant Dick's signage rights that Sears has under the Forbes–Sears sublease and the R.E.A.

[23] Additionally, in interpreting an agreement, "the goal is to arrive at a reasonable interpretation of the text of the entire agreement to accomplish its stated meaning and purpose." *Am. K–9 Detection Servs., Inc. v. Cicero*, 100 So.3d 236, 238–39 (Fla. 5th DCA 2012) (citation omitted). It would be unreasonable to conclude that both the Forbes–Sears sublease and R.E.A. expressly and unequivocally permit Sears to sublease to a retailer while at the same time conclude that the R.E.A.'s signage criteria impliedly prohibits a retail sublessee, such as Dick's, from installing a sign. Where the contract unambiguously gives Sears the right to sublease, we will not rewrite the parties' agreements to add to the agreement, such as in this case, a prohibition on signage. *See Peach State Roofing, Inc. v. 2224 S. Trail Corp.*, 3 So.3d 442, 445 (Fla. 2d DCA 2009). To do so would effectively eviscerate Sears's right to sublease and render its express contractual rights merely illusory.

Forbes has also stated that the sublease is set to terminate soon and Sears would be unable to extend the sublease if it subleases to Dick's. However, no such limitation appears in the sublease. The sublease *306 states that Sears "shall have the right to extend the term of this Lease for Four (4) separate periods of ten (10) years each" so long as Sears is not in "material default at the time of the exercise of such right" and Sears is "operating the Demised Premises for retail purposes." Further, nothing in the sublease indicates Sears's subleasing rights exist only for the initial thirty-year term. Thus, we conclude Sears may extend its lease so long as it is not in material default and is operating the leased premises for retail purposes.

Forbes contends that Sears has asked us to "approve" its sublease with Dick's. Sears has neither asked this court,

nor the court below, to explicitly approve of its lease with Dick's *in toto*, nor do we do so here. Our opinion is limited to our interpretation of the Sears–Forbes sublease and the R.E.A., and our conclusion that nothing within those agreements requires Sears to seek approval before subleasing one floor of its two-story lease, within the mall, to either Dick's or any other retailer. We make no comment on whether aspects of the Sears–Dick's sublease, either as planned or as implemented in the future, violate existing contractual obligations, the P.U.D., or other any law or regulation.[3]

CONCLUSION

We conclude that the City unconstitutionally impaired Sears's right to contract and deprived Sears of its rights to substantive due process. Because the City's Resolution deprived Sears of substantive due process, Sears is also owed attorney's fees under 42 U.S.C. sections 1983 and 1988. Finally, we conclude that the trial court erred in not granting declaratory relief in Sears's favor, and we specifically find that Sears has a right to sublease, pursuant to the 1987 lease agreement.

Affirmed in part, reversed in part, and remanded with directions.

Warner and Forst, JJ., concur.

All Citations

223 So.3d 292, 42 Fla. L. Weekly D1543

Footnotes

1 Sears also contended the Resolution was in fact an ordinance and was therefore void as the passing of the Resolution did not comply with statutory requirements for enacting ordinances. We find this argument to be without merit and affirm without comment.

2 We note that our opinion is limited to the Resolution itself. We express no comment as to the architectural review requirements found within the P.U.D. nor do we comment on any other municipal ordinance or code.

3 Specifically, Forbes has argued (1) that Dick's potential sale of guns violates the R.E.A.'s prohibition on creating "dangerous hazards" and (2) Sears has not gotten the necessary approvals for signage. We do not consider the first argument as it has been made prematurely. As to the second argument, while we conclude Sears may grant its signage rights to Dick's as part of a sublease, we do not comment on whether any planned or implemented sign will in fact comply with the P.U.D. or any other local ordinance.

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KeyCite Yellow Flag - Negative Treatment
Called into Doubt by Statute as Stated in Cenvill Investors, Inc. v. Condominium Owners Organization of Century Village East, Inc., Fla.App. 4 Dist., February 14, 1990

378 So.2d 774
Supreme Court of Florida.

Arthur R. POMPONIO, et al., Petitioners,
v.
The CLARIDGE OF POMPANO CONDOMINIUM, INC., etc., et al., Respondents.

No. 52812.
|
Nov. 15, 1979.
|
Rehearing Denied Jan. 30, 1980.

Synopsis

Condominium unit owners brought action against developer of condominium and lessors of recreational lease associated with the condominium. The Circuit Court, Broward County, John G. Ferris, J., granted unit owners' motion to permit payment of rents into registry of court and developer and lessors appealed. The Supreme Court, England, C. J., held that as applied retroactively, absent a lessor's express consent to its incorporation into terms of lease, statute providing for deposit of rent into registry of court during litigation involving obligations under a condominium lease, was invalid as an unconstitutional impairment of obligation of contract, inasmuch as such statute potentially allowed retention in court of at least some portion of deposited rent during entire term of litigation.

Order reversed and vacated.

Overton, J., concurred specially and filed opinion.

Adkins, J., concurred in the result only.

Alderman, J., dissented.

West Headnotes (3)

[1] Constitutional Law
Relation to Constitutions of Other Jurisdictions

State Supreme Court, when construing a provision of State Constitution, was not bound to accept as controlling United States Supreme Court's interpretation of the parallel provision of Federal Constitution.

9 Cases that cite this headnote

[2] Constitutional Law
Existence and Extent of Impairment
Constitutional Law
Legal Services

Deposit into court of monies which one or another contract litigant may withdraw only after incurring some legal cost or a modest delay does not impair contract rights in the constitutional sense. U.S.C.A.Const. art. 1, § 10, cl. 1; West's F.S.A.Const. art. 1, § 10.

11 Cases that cite this headnote

[3] Constitutional Law
Leases in General
Deposits in Court
Custody and Investment of Funds in General

As applied retroactively, absent a lessor's express consent to its incorporation into terms of lease, statute providing for deposit of rent into registry of court during litigation involving obligations under a condominium lease, was invalid as an unconstitutional impairment of obligation of contract, inasmuch as such statute potentially allowed retention in court of at least some portion of deposit of rent during entire term of litigation. West's F.S.A. § 718.401(4); U.S.C.A.Const. art. 1, § 10, cl. 1; West's F.S.A.Const. art. 1, § 10.

38 Cases that cite this headnote

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Opinion

ENGLAND, Chief Justice.

The present cause is before us to determine the constitutionality of section 718.401(4), Florida Statutes (1977), which provides for the deposit of rents into the registry of the court during litigation involving obligations under a condominium lease.[1] We have jurisdiction pursuant to article V, section 3(b)(1) of the Florida Constitution. The question of whether this statute impermissibly impairs the obligation of contracts in violation of article I, section 10 of the Florida and federal constitutions an issue expressly reserved in an earlier case concerning the statute's operation[2] is now squarely presented.

The Claridge of Pompano Condominium, Inc., ("the Association") and several individual unit owners who are members of the Association brought suit against the developer of the condominium and the lessors of a ninety-nine year recreational lease associated with the condominium.[3] The Association, as a representative of the unit owners, is the named lessee under the recreational lease. As required by section 718.401(4), the trial court granted the Association and unit owners' motion to permit payment of rents into the registry of the court, despite the developer and lessors' contention that the provision is unconstitutional. By this appeal, the developer and lessors seek to *776 have the ruling reversed. We hold that the statute is unconstitutional.

The parties argue, respectively, that the rent deposit statute either permissibly modifies a contractual remedy or impermissibly impairs substantial contract rights and obligations. Yet a proper analysis of this issue cannot hinge exclusively on any supposed distinction between "remedies" and "obligations." The United States Supreme Court has discarded this distinction as "an outdated formalism,"[4] and we choose to do likewise. To formulate a more logical approach to the question of impairment, it is necessary at the outset to examine the interpretive development of the contract clause in the decisions of the United States Supreme Court.

While the intent of the framers with respect to the contract clause has generated considerable speculation, its origins remain too obscure to be of any assistance in its construction.[5] It is nonetheless clear that in the early decisions of the United States Supreme Court the clause was interpreted literally as a strict prohibition.[6] As with other seemingly absolute constitutional provisions, however, it soon became evident that some degree of flexibility would have to be read into the clause to ameliorate the harshness of such rigid application.[7] In order to accommodate necessary legislation without deviating from the principle that all laws impairing the obligations of contract are constitutionally prohibited, the Court developed two basic analytical devices the "obligation-remedy" distinction and the "reserved powers" doctrine[8] both of which dominated contract clause interpretation for the next century.

The "Obligation-Remedy" Test

Home Building & Loan Association v. Blaisdell, 290 U.S. 398, 54 S.Ct. 231 (1934), is the most important case in the history of contract clause interpretation.[9] In Blaisdell, the Court upheld a mortgage moratorium statute that Minnesota had enacted to provide relief for homeowners threatened with foreclosure. The statute enabled a court to extend the time for redemption beyond that provided for in the mortgage contract. Though the statute directly affected lenders' foreclosure rights, the Court ruled that it did not violate the contract *777 clause, reasoning that "the state . . . continues to possess authority to safeguard the vital interests of its people."[10]

In its decision, the Blaisdell majority traced the judicial history of the obligation-remedy distinction[11] and the reserved powers doctrine[12] in contract clause analysis. It then concluded:

> It is manifest from this review of our decisions that there has been a growing appreciation of public

needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare. . . .

> It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time. . . . "The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago." [13]

Having jettisoned the analytical framework which governed prior contract clause cases, the Court formulated a new test against which legislation would be measured:

> The question is not whether the legislative action affects contracts incidentally, or directly or indirectly, but whether the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end. [14]

Thus, beginning with Blaisdell, the Court began to permit certain "reasonable" impairments of contractual obligations. [15] This new and more flexible approach to contract clause analysis later was refined and developed by the Court in three major cases. [16]

The Evolving "Reasonableness" Test

In City of El Paso v. Simmons, 379 U.S. 497, 85 S.Ct. 577 (1965), the Court stated that it would not even "pause to consider . . . again the dividing line under federal law between 'remedy' and 'obligation' . . . ." [17] Instead, the majority noted that "decisions dating from (Blaisdell) have not placed critical reliance on the distinction between obligation and remedy," and proceeded to demonstrate that its post-Depression rulings had been made "without any regard to whether the measure was substantive or remedial." [18] Recognizing that " '(t)he Constitution is "intended to preserve practical and substantial rights, not to maintain theories," ' " [19] the Court in Simmons clearly refuted the notion that statutes could be properly measured by any criteria other than reasonableness:

> This Court's decisions have never given a law which imposes unforeseen advantages or burdens on a contracting party constitutional immunity against change. . . . Laws which restrict a party to those gains reasonably to be expected *778 from the contract are not subject to attack under the Contract Clause, notwithstanding that they technically alter an obligation of a contract. [20]

In resolving the controversy before it, the Simmons majority applied what Justice Black decried in dissent as a "balancing" test, [21] giving due consideration for the "buyer's undertaking," whether "the buyer was substantially induced to enter into these contracts" because of the promise, and the significance of the "State's vital interest," [22] and concluded that the Texas statute at issue was constitutionally permissible because "(t)he measure taken . . . was a mild one indeed, hardly burdensome to the purchaser . . ., but nonetheless an important one to the State's interest." [23]

The next major decision in the interpretive development of the contract clause was United States Trust Co. v. New Jersey, 431 U.S. 1, 97 S.Ct. 1505 (1977). [24] The Court's analysis in United States Trust both expanded upon the "balancing" test of Simmons and refined the "reasonableness" standard of Blaisdell:

> (a) finding that there has been a technical impairment is merely a preliminary step in resolving the more difficult question whether that impairment is permitted under the Constitution.
>
> . . . (T)he Contract Clause limits otherwise legitimate exercises of state legislative authority, and the existence of an important public interest is not always sufficient to overcome that limitation. . . . Moreover, the scope of the State's reserved power depends on the nature of the contractual relationship with which the challenged law conflicts.
>
> . . . The Court in Blaisdell recognized that laws intended to regulate existing contractual relationships must serve a legitimate public

> purpose. . . . Legislation adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption. [25]

The Court concluded that the correct standard to be employed in assessing the validity of legislation affecting a state's own contracts is that:

> (a)s with laws impairing the obligations of private contracts, An impairment may be constitutional if it is reasonable and *779 necessary to serve an important public purpose. [26]

In finding that the challenged statute did not satisfy this test, the Court emphasized that while "(t)he extent of impairment is certainly a relevant factor in determining its reasonableness," an enactment cannot be considered "necessary" if the legislature "without modifying the covenant at all, . . . could have adopted alternative means of achieving their . . . goals," because "a State is not free to impose a drastic impairment when an evident and more moderate course would serve its purposes equally well." [27]

In its most recent pronouncement on the subject, Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 98 S.Ct. 2716 (1978), the Court invalidated a Minnesota law which retroactively imposed upon certain private companies with voluntary pension plans additional obligations as to employees who would not have been entitled to such benefits under the original terms of the plan. Without any mention of the obligation-remedy distinction, the majority reviewed the underpinnings of the Court's post Blaisdell decisions and formulated its statement of the proper approach to contract clause challenges thusly:

> In applying these principles to the present case, the first inquiry must be whether the state law has, in fact, operated as a substantial impairment of a contractual relationship. The severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation. [28]

Several factors to be considered in this balancing test were identified in Spannaus :

(a) Was the law enacted to deal with a broad, generalized economic or social problem? [29]

(b) Does the law operate in an area which was already subject to state regulation at the time the parties' contractual obligations were originally undertaken, or does it invade an area never before subject to regulation by the state? [30]

(c) Does the law effect a temporary alteration of the contractual relationships of those within its coverage, or does it work a severe, permanent, and immediate change in those relationships irrevocably and retroactively? [31]

Analysis and Conclusion

[1] [2] [3] We recognize that this Court, when construing a provision of the Florida Constitution, is not bound to accept as controlling the United States Supreme Court's interpretation of a parallel provision of the federal Constitution. Yet such rulings have long been considered helpful and persuasive, and are obviously entitled to great weight. [32] With this in mind, we now choose *780 to adopt an approach to contract clause analysis similar to that of the United States Supreme Court. That Court's decisions [33] in this area of law convince us that such an approach is the one most likely to yield results consonant with the basic purpose of the constitutional prohibition.

In our view, any realistic analysis of the impairment issue in Florida must logically begin both with Yamaha Parts Distributors Inc. v. Ehrman, [34] which applied the well-

accepted principle that virtually no degree of contract impairment is tolerable in this state, and with the notion enunciated in Louisiana ex rel. Ranger v. New Orleans, [35] that "he who pays too late, pays less." [36] These concepts direct our inquiry to the actual effect of the rent deposit statute on the lessor's contractual right to receive its bargained-for rent. That effect, when fully analyzed, persuades us that in the absence of contractual consent [37] significant contract rights are unreasonably impaired by the statute's operation. [38]

Preliminarily, it should be noted that the deposit into court of moneys which one or another contract litigant may withdraw only after incurring some legal cost or a modest delay is constitutionally permissible. [39] Our conclusion in Yamaha that "virtually" no impairment is tolerable necessarily implies that some impairment is tolerable, although perhaps not so much as would be acceptable under traditional federal contract clause analysis.

To determine how much impairment is tolerable, we must weigh the degree to which a party's contract rights are statutorily impaired against both the source of authority under which the state purports to alter the contractual relationship and the evil which it seeks to remedy. Obviously, this becomes a balancing process to determine whether the nature and extent of the impairment is constitutionally tolerable in light of the importance of the state's objective, or whether it unreasonably intrudes into the parties' bargain to a degree greater than is necessary to achieve that objective.

Section 718.401(4), of course, does more than provide a procedure for the deposit of rents subject to disbursement upon compliance with some procedural showing or its equivalent. [40] This statute potentially allows the retention in court of at least some portion of the deposited rent during the entire term of litigation. Barring the current use of court-retained rent moneys is an ***781** economic deprivation for which a landlord obviously has not bargained, producing potential erosion of value (at least in our persistently inflationary economy) which goes beyond mere inconvenience. To this extent at least, the statute "impairs" the landlord's contract. [41]

The degree of impairment created by section 718.401(4) is confined to amounts deemed by the legislature not to be essential to the maintenance of the property in dispute. Withdrawals are authorized for amounts "necessary for payment of taxes, mortgage payments, maintenance and operating expenses, and other necessary expenses incident to maintaining and equipping the leased facilities." [42] This formulation precludes a uniform level of impairment in each case, inasmuch as the impairment in any particular situation will depend directly on the disparity between the contract amount of rent and the landlord's property maintenance obligations that is, the lessor's built-in profit. [43] In this formulation, of course, all other needs or desires of the lessor for its promised rents are wholly ignored. [44]

On the other side of the ledger is the state's interest in requiring a unit owner's deposit of leasehold rents into court during the course of litigation. This provision rests on the state's exercise of its police power to promote the health, safety, and welfare of its citizens. While the specific objectives for section 718.401(4) are neither expressly articulated nor plainly evident from a reading of the statute, [45] the litigants have suggested that the legislature's concern was the protection of unit owners from the lessor's foreclosure for non-payment of rent during the pendency of the litigation. To this assertion we have two answers. There is to our knowledge neither a documented threat of massive condominium foreclosures in Florida nor any documentation of the underlying premise that unit owners would withhold rents from landlords pending litigation with them.

We believe that the balance between the state's probable objectives and its method of implementation, on the one hand, and the degree of contract impairment inflicted in furtherance of its policy, on the other, favors preservation of the contract over this exercise of the police power. Bearing on ***782** our view is the fact that the manner in which the police power has been wielded here is not the least restrictive means possible. See City of El Paso v. Simmons, 379 U.S. 497, 516-17, 85 S.Ct. 577 (1965). Contrast, for example, Florida's Residential Landlord and Tenant Act, which similarly requires the payment of rent into the court's registry during the pendency of a lawsuit between parties to the lease, [46] but which authorizes the court to disburse to a landlord all or any portion of the funds on deposit upon a showing of "actual danger of loss of the premises or Other personal hardship resulting from the loss of rental income from the premises." [47]

In that statute the legislature has acknowledged that the consequences of rent detention may extend to a deprivation of sums needed for purposes other than the preservation of the controverted property. The severity of impairment wreaked by section 718.401(4) would have been mitigated by a "personal hardship" provision like that in the landlord-tenant act, but none is present.[48]

Therefore, in the face of an express constitutional prohibition against any law "impairing the obligation of contracts,"[49] the state's justification for an exercise of the police power to impair the lessor's contractual bargain does not, in our opinion, provide sufficient countervailing considerations. As applied retroactively, absent a lessor's express consent to its incorporation into the terms of the contract, the statute is invalid. Accordingly, the trial court's order authorizing payment of rents into the registry of the court is hereby vacated.

It is so ordered.

BOYD, OVERTON and SUNDBERG, JJ., concur.

OVERTON, J., concurs specially with an opinion.

ADKINS, J., concurs in result only.

ALDERMAN, J., dissents.

OVERTON, Justice, concurring specially.
I concur. This Court's recent construction of section 28.33, Florida Statutes (1977), in Beckwith v. Webb's Fabulous Pharmacies, Inc., 374 So.2d 951 (Fla.1979), expressly held that moneys deposited in the registry of the court are "held by a public officer in a public account (and) accrue to the benefit of all of the people." We further stated that "interest earned on the clerk of the circuit court's registry account is not private property." This holding precludes any disposition of these earned interest funds to the proper prevailing party. Because of our construction of section 28.33, I must agree that section 718.401(4), which mandates the deposit of rents into the registry of the courts during litigation concerning a condominium lease, does in fact constitute an impairment of rights guaranteed under the contract clause and due process provisions of the Florida and United States Constitutions. With the prime rate of interest at an all-time high, a party's loss of earned interest is a significant financial deprivation.

The fact that section 718.401(4) has the effect of mandating the forfeiture of interest earned on rents due under the lease when there is litigation concerning the lease makes this depository provision of the statute invalid. It should be noted that the clerk of the circuit court receives a fee for his services apart from the interest earned on deposited funds. s 28.33, Fla.Stat. (1977).

*783 In my view, if the trial court had the authority to direct the disposition of interest earned and the lessors or lessees could be made whole if their position was upheld at the conclusion of the proceedings, then such a depository arrangement would be constitutional.

All Citations

378 So.2d 774

Footnotes

1 Section 718.401(4) provides:

> In any action by the lessor to enforce a lien for rent payable or in any action by the association or a unit owner with respect to the obligations of the lessee or the lessor under the lease, the unit owner may raise any issue or interpose any defenses, legal or equitable, that he may have with respect to the lessor's obligations under the lease. If the unit owner initiates any action or interposes any defense other than payment of rent under the lease, the unit owner or the association shall pay into the registry of the court any allegedly accrued rent and the rent which accrues during the pendency of the proceeding, when due. If the unit owner fails to pay the rent into the registry of the court, it shall constitute an absolute waiver of the unit owner's defenses other than payment, and the lessor shall be entitled to default. When the unit owner has deposited the required funds into the registry of the court, the lessor may apply to the court for disbursement for all or part of the funds shown to be necessary for the payment of taxes, mortgage payments, maintenance and operating expenses, and other necessary expenses incident to maintaining and equipping the leased facilities. The Court, after preliminary hearing, may award all or part of the funds on deposit to the lessor for such purpose.

2 Century Village, Inc. v. Wellington, E, F, K, L, H, J, M, & G, Condominium Ass'n, 361 So.2d 128, 132 (Fla.1978).

3 Although the Pompano lease was executed prior to the enactment of section 718.401(4) or its predecessor, section 711.63(4), Florida Statutes (1975), the Court specifically held in Century Village that this provision was intended by the legislature to be applied retroactively. Unlike the lease considered in Century Village, the present condominium lease does not incorporate statutory amendments enacted subsequent to the contract's execution.

4 United States Trust Co. v. New Jersey, 431 U.S. 1, 19 n.17, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977).

5 "In the construction of the contract clause, the debates in the Constitutional Convention are of little aid." Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 427, 54 S.Ct. 231, 235-36, 78 L.Ed. 413 (1934). See also Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 257, 98 S.Ct. 2716, 57 L.Ed.2d 727 (1978) (Brennan, J., dissenting). The most unkind of observers has concluded that the provision was "apparently motivated by the economic self-interest of the framers," Comment, Revival of the Contract Clause, 39 Ohio St.L.J. 195, 196 (1978), but a variety of other, more noble, purposes have also been suggested. See Comment, The Contract Clause and the Constitutionality of Retroactive Application of Exemption Statutes: A Reconsideration, 9 Pac.L.J. 889, 892-93 (1978), and sources cited therein.

6 See, e. g., Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 4 L.Ed. 629 (1819). Until the late nineteenth century, the contract clause was the subject of the Court's attention more frequently than any other provision except the commerce clause, B. Wright, The Contract Clause of the Constitution 91-92 (1938), and as the Court itself recently observed, "it was perhaps the strongest single constitutional check on state legislation during our early years as a Nation . . . ." Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 241, 98 S.Ct. 2716, 2721, 57 L.Ed.2d 727 (1978).

7 See generally Comment, The Contract Clause Reemerges: A New Attitude Toward Judicial Scrutiny of Economic Legislation, 1978 S.Ill.U.L.J. 258, 260.

8 For a brief discussion and comparison of these two approaches, See, e. g., Comment, Revival of the Contract Clause, 39 Ohio St.L.J. 195, 196-98 (1978); Comment, Supra note 4, at 260-62.

9 The United States Supreme Court has itself stated that "(t)he Blaisdell opinion . . . amounted to a comprehensive restatement of the principles underlying the application of the Contract Clause," City of El Paso v. Simmons, 379 U.S. 497, 508, 85 S.Ct. 577, 583-84, 13 L.Ed.2d 446 (1965), and "is regarded as the leading case in the modern era of Contract Clause interpretation." United States Trust Co. v. New Jersey, 431 U.S. 1, 15, 97 S.Ct. 1505, 1514, 52 L.Ed.2d 92 (1977).

10 290 U.S. at 434, 54 S.Ct. at 238-39.

11 Id. at 429-34, 54 S.Ct. 231.

12 Id. at 434-38, 54 S.Ct. 231.

13 Id. at 442-43, 54 S.Ct. at 241-42 (quoting from Missouri v. Holland, 252 U.S. 416, 433, 40 S.Ct. 382, 64 L.Ed. 641 (1920)).

14 290 U.S. at 438, 54 S.Ct. at 240. In our opinion, however, there is considerable merit to the argument that, without regard to the particular approach which it claimed to be applying, the Court both before and after Blaisdell actually proceeded to work practical solutions based on the facts and circumstances of each case. See Comment, The Role of the Contract Clause in Municipalities' Relations with Creditors, 1976 Duke L.J. 1321, 1327. If this theory is correct, then the "new test" unveiled in Blaisdell was really no more than an attempt to restate what the Court had actually been doing all along, with an implicit admission that the traditional obligation-remedy distinction had been used merely for the purpose of post-analytical labelling and categorization.

15 Comment, Supra note 5, at 198.

16 See notes 17-31 and accompanying text Infra.

17 379 U.S. at 506, 85 S.Ct. at 582.

18 Id. at 506-07 n.9, 85 S.Ct. at 582-83 n.9.

19 Id. at 515, 85 S.Ct. at 587 (quoting from Faitnote Iron & Steel Co. v. City of Asbury Park, 316 U.S. 502, 514 (1942)).

20 379 U.S. at 515, 85 S.Ct. at 587.

21 Id. at 517, 528-33, 85 S.Ct. 577 (Black, J., dissenting).

22 Id. at 514-15, 85 S.Ct. at 587.

23 Id. at 516-17, 85 S.Ct. at 588.

24 In United States Trust, the Court had this to say about the obligation-remedy distinction:

> (I)t was . . . recognized very clearly that the distinction between remedies and obligations was not absolute. . . . More recent decisions have not relied on the remedy/obligation distinction, primarily because it is now recognized that obligations as well as remedies may be modified without necessarily violating the Contract Clause.
>
> Although now largely an outdated formalism, the remedy/obligation distinction may be viewed as approximating the result of a more particularized inquiry into the legitimate expectations of the contracting parties.

431 U.S. at 19 n.17, 97 S.Ct. at 1517 n.17 (citations omitted and emphasis added).

25 Id. at 21-22, 97 S.Ct. at 1517-18. The majority put to rest any notion that a "reasonableness" standard was utilized in Blaisdell solely because of the emergency conditions which prompted the Minnesota legislation at issue in that case:

> Blaisdell suggested further limitations that have since been subsumed in the overall determination of reasonableness. . . . Undoubtedly the existence of an emergency and the limited duration of a relief measure are factors to be assessed in determining the reasonableness of an impairment, but they cannot be regarded as essential in every case.

Id. at 22-23 n.19, 97 S.Ct. at 1518 n.19. Although the Court in a more recent decision appeared to make much of the "broad and desperate emergency economic conditions" of which judicial notice was taken in Blaisdell, it was careful to point out that the reference "is not to suggest that only an emergency of great magnitude can constitutionally justify a state law impairing the obligations of contracts." Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 249 & n.24, 98 S.Ct. 2716, 2725, & n.24 (1978).

26 431 U.S. at 25, 97 S.Ct. at 1519 (emphasis added).

27 Id. at 27-31, 97 S.Ct. at 1520-22.

28 438 U.S. at 244-45, 98 S.Ct. at 2723. (footnotes omitted and emphasis added). Reasoning that the effect of the statute on the employer's contractual obligation was severe and that the law "simply does not possess the attributes of those state laws that in the past have survived challenge under the Contract Clause of the Constitution," See notes 29-31 and accompanying text infra, the Court concluded that "if the Contract Clause means anything at all, it means that Minnesota could not constitutionally do what it tried to do to the company in this case." Id. at 250-51, 98 S.Ct. at 2726.

29 Id. at 250 (citing Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 445, 54 S.Ct. 231 (1934)).

30 Id. (citing Veix v. Sixth Ward Bldg. & Loan Ass'n, 310 U.S. 32, 38, 60 S.Ct. 792, 84 L.Ed. 1061 (1940)).

31 Id. (citing United States Trust Co. v. New Jersey, 431 U.S. 1, 22, 97 S.Ct. 1505 (1977)).

32 See, e. g., Dudley v. Harrison, McCready & Co., 127 Fla. 687, 699, 173 So. 820, 825 (1937); State v. Hetland, 366 So.2d 831, 836 (Fla. 2d DCA 1979); Leveson v. State, 138 So.2d 361, 364 (Fla. 3d DCA 1962); Houston v. State, 113 So.2d 582, 584-85 (Fla. 1st DCA 1959).

33 See notes 9-31 and accompanying text Supra.

34 316 So.2d 557 (Fla.1975).

35 102 U.S. 203, 26 L.Ed. 132 (1880).

36 Id. at 207. As applied to this rent deposit statute, the rubric should be rephrased to read that "he who receives payment too late, receives less."

37 See note 3 Supra.

38 We recognize the difficulty of narrowing the focus of attention on the issue of impairment so as to synthesize in subjective consideration the wisdom or necessity of this legislation. The judicial mind is required to do so, however, despite the difficulty. We must remind ourselves that the very real economic problems of condominium unit owners, as magnified by the alleged imbalance in bargaining power between unit owners and landlords, and the pervasive influence of the condominium industry on Florida's economy and citizens, are not alone determinative of the impairment question. These considerations are relevant, of course, in this context as well as others. See Avila South Condominium Ass'n v. Kappa Corp., 347 So.2d 599 (Fla.1977).

39 The deposit procedure of Florida Rule of Civil Procedure 1.600, for example, does not "impair" contract rights in the constitutional sense. Unlike the statutory rent deposit provision at issue in this case, our rule does not direct that disputed moneys are required to be deposited in court, but permits such a procedure to be invoked "by leave of the court." Thus, the decision as to whether or not a temporary deprivation is justified and whether withdrawal should be allowed in whole or in part, will be vested in the sound discretion of the trial judge, who can assess from the circumstances in each case the relative merit or frivolity of the claim asserted and the legitimate needs of the parties.

40 Contrast, for example, sections 76.18 and 76.19, Florida Statutes (1977), which authorize a bond to free property from an attachment.

41 In State ex rel. Women's Benefit Ass'n v. Port of Palm Beach Dist., 121 Fla. 746, 759, 164 So. 851, 856 (1935), we said:

> To "impair" has been defined as meaning to make worse; to diminish in quantity, value, excellency or strength; to lessen in power; to weaken. Whatever legislation lessens the efficacy of the means of enforcement of the obligation is an impairment. Also if it tends to Postpone or Retard the enforcement of the contract, it is an impairment. (Emphasis in the original).

42 It is unclear whether funds may be withdrawn from the deposited rents in order to improve the leased premises. One incidental effect of the uncertainty could well be that lessees' prospects for promised additional (or improved) facilities, such as tennis courts, swimming pools, or meeting halls, may be thwarted by a suit instituted by some unit owners which requires significant rent deposits.

43 As a practical matter, the amount of "spread" will also vary from month to month depending upon such factors as seasonal maintenance needs and due dates for tax or mortgage payments. Thus, in some months the landlord may be able to withdraw virtually all, and in others none, of the rent deposits.

44 See note 48 Infra. The present lessors, in fact, would seem to be effectively barred from any disbursement under the statute in its present form. Section 718.401(4) provides that the "unit owner or association shall pay (rents) into the registry of the court." The provision permits disbursement of these rents, however, only "(w)hen the unit owner has deposited the required funds." As the Court stated in Century Village, the terms "unit owner" and "association" are not interchangeable. 361 So.2d at 133-34. Were the present statute read as it seemingly was intended, rents deposited by the Association would be totally inaccessible to the lessor. The precise terms of the present statute need not be interrelated, however, since it impermissibly impairs the obligation of contracts even if the restricted withdrawal privilege were available.

45 By contrast, the legislative intent in Blaisdell was spelled out in the statute, 290 U.S. at 416, 54 S.Ct. 231, and in the Women's Benefit Ass'n case, there were reports of the emergency conditions to document the legislative history and intended effect of the constitutional amendment at issue. 121 Fla. at 765-66, 164 So. at 858 (Buford, J., dissenting).

46 s 83.60(2), Fla.Stat. (1977).

47 s 83.61, Fla.Stat. (1977) (emphasis supplied).

48 As the United States Supreme Court has observed:

> The severity of an impairment of contractual obligations can be measured by the factors that reflect the high value the Framers placed on the protection of private contracts. Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them.

Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 245, 98 S.Ct. 2716, 2723 (1978).

49 U.S.Const. art. I, s 10, cl. 1; art. I, s 10, Fla.Const.

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693 So.2d 77
District Court of Appeal of Florida,
Fifth District.

BREVARD COUNTY, Florida, etc., Appellant,
v.
FLORIDA POWER & LIGHT
COMPANY, etc., Appellee.

No. 96–1666.
|
May 2, 1997.

Synopsis
Electric utility brought action against county, challenging propriety of county ordinance requiring county permit before construction of electric transmission line, seeking declaratory relief, and alleging breach of franchise agreement and unconstitutional impairment of utility's contractual rights. Parties moved for summary judgment. The Circuit Court, Brevard County, Edward M. Jackson, J., granted final summary judgment for utility. County appealed. The District Court of Appeal, Antoon, J., held that ordinance unreasonably intruded into utility's contractual rights to degree greater than necessary to achieve ordinance's stated purpose and, thus, ordinance violated impairment of contracts clauses of State and Federal Constitutions.

Affirmed.

West Headnotes (5)

[1] **Constitutional Law**
Contracts with Counties in General
Electricity
Permit or Consent by Public Authorities

County ordinance requiring permit before construction of electric transmission line unreasonably intruded into electric utility's contractual rights to degree greater than necessary to achieve ordinance's stated purpose of protecting residents from potential diminishment of property values, aesthetic blight, and adverse health effect caused by construction of transmission lines adjacent to residential property and, thus, ordinance violated impairment of contracts clauses of State and Federal Constitutions; ordinance substantially and materially changed utility's rights under franchise agreement, as sole criterion for location of transmission line under parties' franchise agreement was that line be located and erected so as to interfere as little as possible with traffic and reasonable egress and ingress to property, but ordinance set forth additional criteria, allowing permit disapproval for reasons other than those relating to traffic. U.S.C.A. Const. Art. 1, § 10, cl. 1; West's F.S.A. Const. Art. 1, § 10; Brevard County, Fla., Ordinance Nos. 31–3, 77–37, 95–13.

1 Cases that cite this headnote

[2] **Constitutional Law**
Police Power;Purpose of Regulation

Laws of municipality which are reasonable and necessary to secure public's health, safety, and general welfare are constitutional even if laws impair obligations of private contract. U.S.C.A. Const. Art. 1, § 10, cl. 1; West's F.S.A. Const. Art. 1, § 10.

Cases that cite this headnote

[3] **Constitutional Law**
Application to State and Local Laws and Regulations

Municipal laws which unreasonably and unnecessarily impair obligations of private contract can be struck down as being unconstitutional. U.S.C.A. Const. Art. 1, § 10, cl. 1; West's F.S.A. Const. Art. 1, § 10.

Cases that cite this headnote

[4] **Constitutional Law**
Police Power;Purpose of Regulation

For purposes state and federal constitutional impairment of contracts clauses, when government regulation impairs rights of parties to contract, trial court's analysis, in weighing degree of impairment against evil

which regulation seeks to remedy, requires balancing of person's interest not to have his contracts impaired with state's interest in exercising its legitimate police power. U.S.C.A. Const. Art. 1, § 10, cl. 1; West's F.S.A. Const. Art. 1, § 10.

Cases that cite this headnote

[5] **Constitutional Law**

Police Power;Purpose of Regulation

For purposes state and federal constitutional impairment of contracts clauses, there must be significant and legitimate public purpose behind enactment of government regulation that impairs rights of parties to contract, and regulation must not unreasonably intrude into parties' bargain to a degree greater than is necessary to achieve stated public purpose. U.S.C.A. Const. Art. 1, § 10, cl. 1; West's F.S.A. Const. Art. 1, § 10.

1 Cases that cite this headnote

Attorneys and Law Firms

*78 Scott L. Knox, County Attorney, Viera, for Appellant.

Ron A. Adams, P.A., and John W. Little, III, P.A., of Steel Hector & Davis LLP, and Jean G. Howard, Florida Power and Light Company, Miami, for Appellee.

Opinion

ANTOON, Judge.

Brevard County appeals the final summary judgment entered by the trial court in favor of Florida Power & Light (FPL), determining that Brevard County Ordinance No. 95–13 violated FPL's constitutional right to be protected against the impairment of contracts. We affirm.

FPL planned to construct, operate, and maintain a seven-mile stretch of 138–kilovolt overhead transmission line in Brevard County. The line was to become a part of a multicounty transmission line grid. The route selected for construction of the transmission line included unincorporated areas of Brevard County as well as a 60 by 1,944 foot parcel of property located south of the Timbers West subdivision within the City of Rockledge.

In order to complete the construction of the transmission line, FPL was required to obtain various county permits. FPL anticipated approval of the permits based upon a 1977 franchise agreement it had with Brevard County. The franchise agreement was a bilateral agreement in which Brevard County had granted FPL contractual rights to construct, maintain, and operate electric facilities within the unincorporated areas of the county. [1] The agreement was embodied in Brevard County Ordinance No. 77–37 which provided, in relevant part:

> AN ORDINANCE GRANTING TO FLORIDA POWER AND LIGHT COMPANY, ITS SUCCESSORS AND ASSIGNS, AN ELECTRIC FRANCHISE IN THE UNINCORPORATED AREAS OF BREVARD COUNTY, FLORIDA, IMPOSING PROVISIONS AND CONDITIONS RELATING THERETO, PROVIDING FOR PAYMENTS BY THE FRANCHISEE TO THE COUNTY; AND PROVIDING AN EFFECTIVE DATE.
>
> * * * * * *
>
> Section 1. That there is hereby granted to Florida Power and Light Company ... the nonexclusive right, privilege or franchise to construct, maintain, and operate in, under, upon, over and across the present and future streets, alleys, bridges, easements and other public places throughout all the unincorporated areas of *79 Brevard County, Florida ... with respect to electrical construction and maintenance, for the period of thirty (30) years from the date of acceptance hereof ... for the purpose of supplying electricity....
>
> Section 2. That the facilities shall be so located or relocated and so erected as to interfere as little as possible with traffic over said streets, alleys, bridges and public places, and with reasonable egress from and ingress to abutting property. The location or relocation of all facilities shall be made under the supervision and with the approval of such representatives as the governing body of [Brevard County] may designate for the purpose, but not so as unreasonably to interfere with the proper operation of [FPL's] facilities and service....

However, the application process did not proceed smoothly.

In November of 1993, several residents of the Timbers West subdivision, including a Brevard County commissioner, attended a Rockledge city council meeting and objected to the proposed route for the transmission line. The objections were primarily based on (1) the fear of adverse health risks due to electromagnetic fields associated with the transmission line, and (2) the loss in property values due to these electromagnetic fields. A month later, the issue of FPL's permits was raised at a meeting of the Brevard County Commission. Specifically, a motion was made requesting that the County withhold any permits requested by FPL in relation to the construction of the transmission line. The County Commission passed the motion. FPL responded by instituting a suit for eminent domain against the City of Rockledge as fee owner, and Brevard County, as owner of the nonexclusive easement located on the property. Brevard County later requested that it be dropped from the suit because the proposed construction did not interfere with its drainage easement.

In February of 1995, the Timbers West residents again attended a Brevard County Commission meeting and spoke in opposition to the construction of the transmission line. After hearing from the residents, the Commission directed the county attorney to draft an ordinance regulating the construction of transmission lines in Brevard County which could then be used by the City of Rockledge in defending against FPL's eminent domain suit. The Commission also instructed its attorney to expedite the drafting of the ordinance so that it could be used by the City of Rockledge at a March court hearing in the eminent domain suit.

As directed, the county attorney drafted Brevard County Ordinance 95–13, which authorizes Brevard County to decide if, where, and how transmission lines are to be constructed, operated, and maintained. In this regard, the ordinance provides in relevant part:

AN ORDINANCE OF BREVARD COUNTY, FLORIDA, CREATING CHAPTER 31, CODE OF ORDINANCES OF BREVARD COUNTY, FLORIDA, ENTITLED "ELECTRICAL TRANSMISSION LINES," PERTAINING TO THE PERMITTING OF ELECTRICAL TRANSMISSION LINES AND CORRIDORS NOT OTHERWISE REGULATED UNDER STATE LAW; ESTABLISHING A TITLE, DEFINITIONS, PURPOSE, PERMITTING PROCEDURE, APPLICATION REQUIREMENTS, CRITERIA FOR PERMIT ISSUANCE, JURISDICTION OF OTHER REGULATORY BODIES OR AGENCIES, ENFORCEMENT AND REVOCATION; PROVIDING FOR SEVERABILITY; AND PROVIDING AN EFFECTIVE DATE.

WHEREAS, the state statutes requiring certification of electrical transmission lines pertain only to those designed to operate at 230 kilovolts or greater; and

WHEREAS, the state certification process excepts certain transmission lines designed to operate at 230 kilovolts or more from certification; and

WHEREAS, the exemption provision in state certification laws expressly preserves local permitting authority for exempt transmission lines and the County has, in its franchise agreement with Florida Power & Light Company, reserved the right to approve the location of electrical transmission and other facilities; and

*80 WHEREAS, the Florida courts have recognized the potential for diminishment of property values due to 'fear' of transmission lines located adjacent to residential property; and

WHEREAS, the County recognizes that the location of electrical transmission lines has the potential for aesthetic blight and for adversely affecting property values and the health, safety and welfare of the public as well as the use and maintenance of public facilities, easements and rights of way;

WHEREAS, the definition of development, as set forth in Chapter 163, Florida Statutes, does not include installation of transmission lines or other power lines and, therefore, this ordinance does not affect or constitute a land development regulation.

NOW, THEREFORE, be it ordained by the Board of County Commissioners of Brevard County, Florida, that

******

C. Sec. 31–3. Purpose.

This chapter is enacted under the charter power of the County for the purpose of providing necessary regulation, conditions and provisions which shall apply to:

(1) The granting and issuance of permits for the location of electrical transmission lines within the incorporated and unincorporated limits of the County; and

(2) The implementation of franchise agreements between the County and electric utilities where the County's approval is required for location or relocation of utility facilities; and

(3) The providing of reasonable and suitable protection and control over the use of County-owned easements and rights of way for installation of electrical transmission lines; all in the interest of the public health, safety and welfare of the citizens and inhabitants of the County.

The ordinance further provides that any electric utility company "desiring to install and operate any electrical transmission line in the ... County shall apply to the Board for a corridor permit pursuant to this chapter." The ordinance also sets forth specifics concerning the terms of the application process and the criteria for permit issuance. Specifically, the ordinance states that a permit may be issued upon a demonstration that the proposed electrical transmission line complies with applicable use regulations and land development regulations; will not conflict with county support services; will not materially impair the county's existing use or reasonably foreseeable use of a right-of-way or a planned expansion or maintenance of an existing county facility or public works project; and will not materially and adversely affect property values of existing adjacent residences. On March 14, 1995, the Commission passed the ordinance.

Once the ordinance was enacted, FPL filed suit in the circuit court seeking declaratory relief. In its complaint, FPL alleged that the ordinance breached the terms of its franchise agreement with Brevard County, and was unconstitutional because it unreasonably impaired FPL's contractual rights under the franchise agreement. Both FPL and Brevard County filed motions for summary judgment. After conducting a hearing, the trial court entered a written order granting final summary judgment in favor of FPL, concluding that Brevard County Ordinance No. 95–13 violated the impairment of contracts clause of the state and federal constitutions:

> Ordinance 95–13 adopted by Brevard County on March 14, 1995, substantially and materially changed the contract (franchise) rights between the parties by requiring Plaintiff to obtain a permit from the Defendant; and in Section 31–5 of the Ordinance, the Defendant established new criteria for permit issuance by adding that County disapproval of a permit could be based upon its finding that the Transmission Lines would materially and adversely affect real properly values of existing or adjacent residences, or such lines would materially or substantially impair the County's existing use of drainage easements, or such lines would materially impair a planned county expansion of public works, or such lines would violate applicable development regulations concerning noise, emergency vehicle radio interference, or such lines would interfere with *81 other county support services. Such arrogation by Brevard County of these additional criteria as to the Plaintiff's siting of transmission lines, particularly as it relates to affecting real property values, over and above the single criteria in the franchise which related only to impact on traffic, is unreasonable, without justification and directly impairs the contractual rights between Brevard County as one of the contracting parties and the plaintiff. This use of its police power by the County is not justified in balancing its method of implementation, particularly as the history of Ordinance of 95–13

> is so prompted and promoted in its focus on the two-thousand feet of transmission line in Rockledge, Florida.

[1] Brevard County appeals this ruling, arguing that the ordinance is not subject to attack under the impairment of contract principle because the County cannot, as a matter of law, contract away its police power originating in Article I, Section 10 of both the United States and Florida constitutions. Stated another way, the County maintains that, since it is prohibited from contracting away its police power to protect the health, morals, and safety of the public, its franchise agreement with FPL embodied in Ordinance 77–37 is not protected from impairment under the contract clause of the state or federal constitutions. We disagree.

[2] [3] The County is correct that the laws of a municipality which are reasonable and necessary to secure the public's health, safety, and general welfare are constitutional even if the laws impair the obligations of a private contract. *Yellow Cab Co. of Dade County v. Dade County,* 412 So.2d 395 (Fla. 3d DCA 1982), *rev. denied,* 424 So.2d 764 (Fla.1983). However, contrary to the County's claim, the government's authority in this regard is not unrestrained. Rather, laws which unreasonably and unnecessarily impair the obligations of a private contract can be struck down as being unconstitutional. *Pomponio v. Claridge of Pompano Condominium, Inc.,* 378 So.2d 774 (Fla.1979).

[4] [5] In *Pomponio,* our supreme court discussed the method of determining just when government impairment of private contracts is permissible. In this regard, the court explained that, when government regulation impairs the rights of parties to a contract, the duty is on the trial court to weigh the degree of impairment against "the evil which [the regulation] seeks to remedy." *Id.* at 780. This analysis "requires a balancing of a person's interest not to have his contracts impaired with the state's interest in exercising its legitimate police power." *U.S. Fidelity & Guaranty Co. v. Department of Insurance,* 453 So.2d 1355, 1360 (Fla.1984). There must be a significant and legitimate public purpose behind the enactment of the regulation, and the regulation must not unreasonably intrude into the parties' bargain to a degree greater than is necessary to achieve the stated public purpose. *Pomponio,* 378 So.2d at 780.

In its clear and thorough summary final judgment order, the trial court aptly recognized that Ordinance 95–13 substantially and materially changed FPL's rights under the franchise agreement. In this regard, the trial court acknowledged that the only criterion for the location of a transmission line under the parties' franchise agreement was that the line be located and erected so "as to interfere as little as possible with traffic over said streets, alleys, bridges, and public places, and with reasonable egress from and ingress to abutting property." However, Ordinance 95–13 materially altered this criterion by requiring that FPL first obtain a county permit before constructing a transmission line. Furthermore, the ordinance set forth additional criteria for the issuance of a permit, allowing Brevard County to disapprove the issuance of a permit for a variety of reasons other than those relating to traffic. For example, Brevard County is authorized to disapprove a permit based upon a finding that the proposed transmission line would adversely impact the value of adjacent residential property, impair the County's drainage easements, or impair planned expansion of public works. Ordinance 95–13 also permits Brevard County to deny an application for a permit upon a finding that the transmission line would violate development regulations concerning noise or emergency radio interference, or that the line would interfere *82 with other county support services. Interestingly, the narrowly stated purpose for the ordinance was the protection of Brevard County residents from the potential diminishment of property values, aesthetic blight, and adverse health effect caused by the construction of transmission lines adjacent to residential property. Relying on *Pomponio,* the trial court properly concluded that Ordinance 95–13 unreasonably intrudes into FPL's contractual rights to a degree greater than was necessary to achieve this stated purpose. Accordingly, we affirm the trial court's order.

AFFIRMED.

COBB and GRIFFIN, JJ., concur.

All Citations

693 So.2d 77, Util. L. Rep. P 26,603, 22 Fla. L. Weekly D1099

Footnotes

1 Although it is not germane to this opinion, we note that neither party argued that the 60 by 1,944 foot parcel lying within the City of Rockledge was within the incorporated area of the County and thus not subject to the provisions of the 1977 ordinance.

65 So.2d 751
Supreme Court of Florida, En Banc.

GRIFFIN et ux.
v.
SHARPE et al.

June 2, 1953.

Synopsis

Suit to restrain and permanently enjoin defendants from proceeding with construction of a doctor's office on specified land owned by defendants. The Circuit Court for Hillsborough County entered a decree which granted injunction and defendants appealed. The Supreme Court, Holt, A. J., held that where private parties in individual deeds of conveyances imposed restriction as to use of land conveyed to run for a definite period of time, a legislative act which had as sole purpose removal of such expiration date and continuance of such restrictions in force was invalid as impairing obligation of contract and as constituting a taking of property without due process of law and without just compensation.

Reversed.

West Headnotes (2)

[1] **Constitutional Law**
⇐ Police Power;Purpose of Regulation
Constitutional Law
⇐ Police Power;Public Safety and Welfare
Constitutional Law
⇐ Police Power, Relationship to Due Process
Municipal Corporations
⇐ Delegation of Power by Municipality
Municipal Corporations
⇐ Concurrent and Conflicting Exercise of Power by State and Municipality
Municipal Corporations
⇐ Ordinances and Regulations in General
Municipal Corporations
⇐ Discrimination

Ordinances enacted under general police power must not infringe on constitutional guarantees by invading personal or property rights unnecessarily or unreasonably, denying due process of law or equal protection of laws, or impairing obligations of contracts, must not be inconsistent with general laws of state, including common law, equity and public policy, unless exceptions are permitted, must not discriminate unreasonably, arbitrarily or oppressively, and must not constitute a delegation of legislative or executive or administrative power.

Cases that cite this headnote

[2] **Constitutional Law**
⇐ Real Property in General
Constitutional Law
⇐ Real Property in General
Covenants
⇐ Nature and Operation in General
Eminent Domain
⇐ Zoning, Planning, or Land Use;Building Codes

Where private parties in individual deeds of conveyances imposed restrictions as to use of land conveyed to run for a definite period of time, legislative act which had as sole purpose removal of such expiration date and continuance of such restrictions in force was unconstitutional as impairing obligation of contract and as constituting a taking of property without due process of law and without just compensation. Sp.Acts 1947, c. 24595; F.S.A.Const.Declaration of Rights, §§ 12, 17; U.S.C.A.Const. art. 1, § 10.

1 Cases that cite this headnote

Attorneys and Law Firms

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Charles F. Blake, Tampa, for appellees.

Opinion

HOLT, Associate Justice.

The Legislature of Florida, at its regular session in 1947, enacted Chapter 24595, Laws of Florida, Acts of 1947, entitled.
'AN Act to Remove the Time Limitation on Property Restrictions in the Territory and Area in Hillsborough County, Florida, Described as: All the Territory or Area in Davis Islands in the City of Tampa as the same is Platted in Plat Book 10, Pages 52, 53, 54, 55, 56 and 57, and Plat Book 17, Pages 5, 6, 7, 8, 9 and 13, All of Said Maps or Plats Being Recorded in the Public Records of Hillsborough County, Florida, and to Provide for the Enforcement of This Act in the Name of the Resident of Any Lands in Said Area and Territory by Injunction or Other Appropriate Remedy.'

The purpose of this Act was to extend by legislative fiat a restriction upon use of appellants' land located in Davis Islands, a subdivision of Tampa, Hillsborough County, Florida.

The restriction, which provided for erection of residences and apartment houses only on the property involved, expired by its own terms on January 1, 1950. It was this private contract between individuals that the Legislature sought to give life to, *752 anticipatory to and after its contractual death on the date mentioned.

Appellants purchased (1952) this property with notice of the expired restriction and the enactment of the statute described. Thereafter, he (appellant Griffin) obtained from the City of Tampa a building permit to erect a medical office and clinic on the real estate affected; and a few days later appellees, adjoining owners of homes in the same locality, brought their bill to restrain and enjoin permanently appellants from proceeding with the construction of the doctor's office.

The learned Chancellor below, after hearing the testimony of all the witnesses, granted the injunction, hence this appeal.

Several interesting and intriguing questions have been advanced and argued, but we refrain from indulging our desire to wander in such legal elysian fields which at times are so inviting, yet contain so many unseen pitfalls that we restrict this opinion to only one point, which when decided eliminates the necessity of disposing of the others.

As stated, we face this query:

'Where private parties in individual deeds of conveyances impose restrictions as to the use of the land conveyed to run for a definite period of time, is a legislative act valid where its sole purpose is to remove expiration date and continue the restrictions in force, and thereby impair the obligation of the contract so created?'

It is contended that the statute involved was purely an exercise of the police power of the state, and as such should be upheld. This court has long recognized such principle, but with the qualification that there must be present a reasonable use of such power and reasonable limitations thereto, else we let the gates down, as advocated here, and the whole field of private contract would be invaded and infected to the extent that security of contract in this respect would be lost and irreparable harm and damage to the legal, constitutional, and economic facets of what we know as the business and financial world of the State and Nation, would inevitably and necessarily follow. See State of Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 49 S.Ct. 50, 73 L.Ed. 210; Treigle v. Acme Homestead Ass'n, 297 U.S. 189, 56 S.Ct. 408, 80 L.Ed. 575; Riverbank Imp. Co. v. Chadwick, 228 Mass. 242, 117 N.E. 244, L.R.A.1918B, 55.

[1] What we declared in Miami Shores Village v. Wm. N. Brockway Post No. 124, 156 Fla. 673, 24 So.2d 33, 35 is peculiarly pertinent and applicable here:
'Ordinances such as the one here under consideration are enacted under the general police power, and 'they must not (1) infringe the constitutional guarantees of the nation or state by (a) invading personal or property rights unnecessarily or unreasonably, (b) denying due process of law, or (c) equal protection of the laws, or (d) impairing the obligations of contracts; (2) must not be inconsistent with the general law of the state, including the common law, equity and public policy, unless exceptions are permitted; (3) must not discriminate unreasonably, arbitrarily or oppressively, and (4) must not constitute a delegation of legislative or executive or administrative power.' McQuillin, Municipal Corporations, 2nd Ed., page 119.' See also, Hunter v. Green, 142 Fla. 104, 194 So. 379, filed this term.

The contested restriction is without doubt a private contract between private individuals, and its attempted extension by the Legislature can in no wise be related to the reasonable exercise of the police power of the state and is a futile effort to by-pass constitutional prohibitions and re-write the agreement through governmental authority.

[2] The purported Act of revivor impairs the obigation of contract, section 17, Declaration of Rights, Florida Constitution, F.S.A., constitutes a taking of property without due process of law and without just compensation, section 12, Declaration of Rights, Florida Constitution, F.S.A., and article 1, section 10, Constitution of the United States of America.

Reversed.

ROBERTS, C. J., and TERRELL, HOBSON, MATHEWS and DREW, JJ., concur.

All Citations

65 So.2d 751

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Opinion Clarified by Chiles (Lawton) V United Faculty of Florida, Fla., March 23, 1993

615 So.2d 671
Supreme Court of Florida.

Lawton CHILES, et al., Appellants,
v.
UNITED FACULTY OF FLORIDA, et al., Appellees.

No. 81252.
|
March 11, 1993.
|
On Motion for Clarification March 23, 1993.

Synopsis
Unions representing public employees sued after legislature eliminated collectively bargained pay raise. The Circuit Court, Leon County, F.E. Steinmeyer, III, J., found for unions. State appealed. After certification by the District Court of Appeal, the Supreme Court, Kogan, J., held that legislature's unilateral modification and abrogation of agreement, which had been funded, violated employees' right to collectively bargain and constituted impermissible impairment of contract.

Affirmed.

Grimes, J., concurred and filed opinion in which Barkett, C.J., joined.

Harding, J., concurred and filed opinion in which Barkett, C.J., joined.

Overton, J., dissented and filed opinion.

McDonald, J., dissented and filed opinion in which Overton, J., joined.

West Headnotes (5)

[1] **Constitutional Law**
Compensation
Labor and Employment
Modification

Legislature's unilateral modification and abrogation of collectively bargained agreement for pay raise for public employees, which had been funded, violated right to collectively bargain and constituted impermissible impairment of contract. West's F.S.A. Const. Art. 1, §§ 6, 10.

8 Cases that cite this headnote

[2] **Public Contracts**
Application of General Rules of Construction in General
States
Construction and operation of contracts

Once executive has negotiated and legislature has accepted and funded agreement, state and all its organs are bound by that agreement under principles of contract law. West's F.S.A. Const. Art. 1, § 10.

6 Cases that cite this headnote

[3] **Public Contracts**
Appropriation or provision for payment as prerequisite of contract
States
Express contracts in general

Legislature's act of funding an agreement through valid appropriation is point in time at which contract comes into existence.

2 Cases that cite this headnote

[4] **Labor and Employment**
Modification
States
Operation and effect

Legislature has authority to reduce previously approved appropriations to pay public workers' salaries made pursuant to collective bargaining agreement, but only where it can demonstrate compelling state interest; legislature must be given some leeway to deal with bona fide emergencies. West's F.S.A. Const. Art. 1, §§ 6, 10.

7 Cases that cite this headnote

[5] **Labor and Employment**
Modification
States
Operation and effect

Before legislature can reduce previously approved appropriations for increase in public workers' salaries pursuant to collective bargaining agreement, legislature must demonstrate that funds are available from no other possible reasonable source; political expediency is not compelling reason. West's F.S.A. Const. Art. 1, §§ 6, 10.

7 Cases that cite this headnote

Attorneys and Law Firms

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Benjamin R. Patterson, III and Jerry G. Traynham of Patterson and Traynham, Tallahassee, for Florida Public Employees Council 79, AFSCME, et al.

Gene" Hal" Johnson, Tallahassee, for Florida Police Benevolent Ass'n.

Ronald G. Meyer of Meyer and Brooks, P.A., Tallahassee, for Federation of Physicians and Dentists, Nat. Union of Hosp. and Healthcare Employees.

KOGAN, Justice.

We have on appeal an order of the circuit court certified by the First District Court of Appeal as a matter of great public importance requiring immediate resolution by this Court. We have jurisdiction. Art. V, § 3(b)(5), Fla. Const.

The various Appellees are unions representing classes of public employees unable to resolve a collective bargaining process for pay and benefits during the fiscal year 1991–92. Pursuant to its statutory authority, the Legislature resolved the impasse by authorizing a three-percent pay raise to be effective January 1, 1992. Ch. 91–272, Laws of Fla. The unions ratified the raise.

Subsequently state officials projected a shortfall in public revenues. To meet the shortfall, the Legislature convened in special session in December 1991 and, among other measures, postponed the planned pay raises until February 15, 1992. Ch. 91–428, Laws of Fla. Later during the 1992 regular session, the Legislature responded to continuing revenue shortfalls by eliminating the pay raises altogether. Ch. 92–5, Laws of Fla.

The unions filed suit, and the trial court ruled in their favor. The court determined that the legislative actions here violated the right to collectively bargain and constituted an impermissible impairment of contract. Art. I, §§ 6, 10, Fla. Const. The state appealed, and the district court certified the case for our immediate review.

[1] We begin by noting that the present case is factually quite different from our recent opinion in *State v. Florida Police Benevolent Association,* 613 So.2d 415 (Fla.1992). There we dealt with a situation in which no final agreement had been reached between the parties, unlike here where an agreement was reached and funded, then unilaterally modified by the legislature, and finally unilaterally abrogated by the legislature. Accordingly, we do not believe that the result reached in *Police Benevolent* dictates the result here.

The state now argues that whatever agreement was reached between it and the unions somehow failed to reach the level of a fully enforceable contract. Indeed, the logical conclusion of the state's position is that public-employee bargaining agreements cannot ever constitute fully binding contracts, even after they are accepted and funded. We cannot accept this position.

[2] [3] Likewise we cannot accept the state's argument that the legislature is not a "party" to the contract and thus cannot be bound by the agreement after expressing legislative assent through the act of appropriating funds. The state itself clearly is a party to the contract, and the legislature is a constituent branch of the state. Once the executive has negotiated and the legislature has accepted *and* funded an agreement, the state and all its organs are *673 bound by that agreement under the principles of contract law. The act of funding through a valid

appropriation is the point in time at which the contract comes into existence. *Police Benevolent,* 613 So.2d at 419, 419 n. 5.

These conclusions are compelled by the Florida Constitution. The right to contract is one of the most sacrosanct rights guaranteed by our fundamental law. It is expressly guaranteed by article I, section 10 of the Florida Constitution, and is equally enforceable in labor contracts by operation of article I, section 6 of the Florida Constitution. The legislature has only a very severely limited authority to change the law to eliminate a contractual obligation it has itself created. Art. I, § 10, Fla. Const. As we stated in *Police Benevolent,* 613 So.2d at 421,

> [w]here the legislature provides enough money to implement the benefit as negotiated, but attempts to unilaterally change the benefit, the changes will not be upheld, and the negotiated benefit will be enforced.

[4] We recognize that in the sensitive area of a continuing appropriation obligation for salaries and perhaps in other contexts as well, the legislature must be given some leeway to deal with bona fide emergencies. Accordingly, we agree with the trial court that the legislature has authority to reduce previously approved appropriations to pay public workers' salaries made pursuant to a collective bargaining agreement, but only where it can demonstrate a compelling state interest. Art. I, §§ 6, 10, Fla. Const.; *Hillsborough County Governmental Employees Ass'n, Inc. v. Hillsborough County Aviation Authority,* 522 So.2d 358 (Fla.1988).

[5] Before that authority can be exercised, however, the legislature must demonstrate no other reasonable alternative means of preserving its contract with public workers, either in whole or in part. The mere fact that it is politically more expedient to eliminate all or part of the contracted funds is not in itself a compelling reason. Rather, the legislature must demonstrate that the funds are available from no other possible reasonable source. *Accord United States Trust Co. v. New Jersey,* 431 U.S. 1, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977); *Association of Surrogates and Supreme Court Reporters v. New York,* 940 F.2d 766 (2d Cir.1991); *Sonoma County Organization of Public Employees v. County of Sonoma,* 23 Cal.3d 296, 152 Cal.Rptr. 903, 591 P.2d 1 (1979). That has not happened here.

We do not agree that the savings clauses in the contracts are sufficient to nullify them. The savings clauses clearly were meant as a means of preserving the contracts in the event of partial invalidity; they are not an escape hatch for the legislature. Indeed, were we to accept the state's position on this point, we necessarily would be required to conclude that there was no contract here at all for lack of mutuality because one party could nullify the agreement at any time, and for any reason. Obviously the parties intended there to be a contract, and we will construe the provisions so as to achieve that result.

Finally, we are not today revisiting or modifying our opinion in *Chiles v. Children A, B, C, D, E, & F,* 589 So.2d 260 (Fla.1991), where we reaffirmed Florida's strong separation of powers doctrine. The present case does not itself present a violation of separation of powers, nor are we attempting a judicial appropriation of public money. Here, the legislature acted pursuant to its powers, appropriated funds for collective bargaining agreements, and thereby created a binding contract. Having exercised its appropriation powers, the legislature cannot now change its mind and renege on the contract so created without sufficient reason. Separation of powers does not allow the unilateral and unjustified legislative abrogation of a valid contract.

Accordingly, we affirm the order of the trial court below based on article I, sections 6 and 10 of the Florida Constitution, and the Appellants are hereby directed to adjust the pay and pay records of all employees covered by the collective bargaining agreements that are the subject of this opinion, and to otherwise take necessary ***674** steps to implement the pay raise covered by this opinion retroactive to January 1, 1992, as required by chapter 91–272, section 5, Laws of Florida. [1]

It is so ordered.

BARKETT, C.J., and SHAW, J., concur.

GRIMES and HARDING, JJ., concur with an opinion, in which BARKETT, C.J., concurs.

OVERTON, J., dissents with an opinion.

McDONALD, J., dissents with an opinion, in which OVERTON, J., concurs.

GRIMES, Justice, concurring.

There is no doubt that the shortfall in projected state revenue which was then approaching $700 million required drastic legislative action in order to balance the budget. However, because the state had contracted for the public workers' pay raise, I believe that the legislature was required first to make other reasonable reductions in appropriations or seek other reasonable sources of revenue. Given the fact that the total annual state budget exceeded $28 billion, I cannot say that the legislature had a sufficiently compelling state interest to repudiate the contract by eliminating the $35.4 million necessary to fund the pay raise.

BARKETT, C.J., concurs.

HARDING, Justice, concurring.

I concur with the majority in affirming the order of the trial court below. I find that the legislature acted in violation of article I, sections 6 and 10 of the Florida Constitution when it rescinded the three-percent pay raise which it had previously authorized.

I agree with the majority that *State v. Florida Police Benevolent Association,* 613 So.2d 415 (Fla.1992), is not applicable to this case. In *Police Benevolent,* the governor entered into collective bargaining agreements with several unions. However, the legislature altered those agreements in its general appropriations act. This Court found that "[w]here the legislature does not appropriate enough money to fund a negotiated benefit, as it is free to do, then the conditions it imposes on the use of the funds will stand even if contradictory to the negotiated agreement." *Id.* at 421.

In contrast, the instant case did not involve a negotiated agreement because the governor and the unions reached an impasse. Pursuant to section 447.403(4)(d), Florida Statutes (1991), the legislature resolved the impasse by authorizing a three-percent pay raise, which the unions subsequently ratified. The legislature's funding of this pay raise created a valid contract between the state and the unions. The legislature's subsequent attempt to rescind the pay raise, absent a showing of a compelling state interest, violated both the right to contract and the right to bargain collectively.

BARKETT, C.J., concurs.

OVERTON, Justice, dissenting.

I dissent and fully agree with the analysis and reasoning of Justice McDonald's dissent. I write only to express my deep concern regarding the majority's elimination of the critical power of the legislature to make difficult choices in the face of a revenue shortfall in this state.

Contrary to the majority's conclusion, in my view, when a budget shortfall is so great that a revenue crisis occurs and the Governor is required to call a special session to balance the state's budget, clearly a compelling state interest exists. Once that occurs, every item in the appropriations bill should be "back on the table," and the legislature, through its exclusive authority to grant appropriations, should be the sole entity to determine what items must be cut to constitutionally balance the budget.

In his concurrence, Justice Grimes appears to state that a compelling state interest in cutting the raise has not been justified *675 because an almost $700 million shortfall is not significant given the overall size of the $28 billion budget. At first glance, such a position appears to be reasonable. However, once the budget is analyzed, it becomes obvious that a substantial part of our budget is composed of federal funds and trust funds for transportation and education that are specifically allocated in part by federal law. Consequently, a $700 million shortfall *is* significant and substantial when one considers how little of that $28 billion is actually "on the table" for the legislature to cut. Consider, for instance, that the $700 million shortfall was more than three times the total judicial budget for the fiscal year in question.

Moreover, it appears that by this lawsuit state employees have won the battle but could well lose the war. Before this decision, the legislature had a choice in tough fiscal times of eliminating the pay raises or eliminating jobs. Henceforth, however, once state employee pay raises have been agreed upon and appropriated and a revenue shortfall subsequently occurs, the legislature's sole choice will be the elimination of state jobs. Ironically, the majority's opinion will allow the legislature to eliminate

those jobs but will not allow it to eliminate pay raises that have not even gone into effect for those jobs.

When initially faced with this revenue shortfall, the Governor and Cabinet, thinking they had the authority to do so, made the necessary cuts and determined not to eliminate the pay raises but instead, in making the difficult reduction choices, to eliminate programs for children and education. These cuts resulted in the action we resolved in *Chiles v. Children A, B, C, D, E, & F,* 589 So.2d 260 (Fla.1991), in which we said that the reduction choices were solely within the exclusive authority of the legislature. As noted in my concurrence to that opinion:

> The extent of the Governor's and Cabinet's legislative policy-making authority granted by section 216.221(2) is illustrated by the total elimination of funds appropriated by the legislature for emergency housing for homeless families with children, as well as the elimination of a special appropriation for additional aid to dependent children.

589 So.2d at 269 (Overton, J., concurring). Subsequently, once the difficult budget reduction choices were taken from the Governor and Cabinet and placed within the discretion of the legislature, the legislature exercised its authority and determined that the programs for children and education were more important than the state employee raises. Consequently, it kept those funds in the budget and eliminated the pay raises. The majority, in effect, is now saying that the legislature could properly cut programs for children and education but could not cut the pay raises, even though funds for all of those expenses were approved and enacted in the same appropriations bill.

Neither section 6 nor section 10 of article I of the Florida Constitution was intended to alter or restrict the fundamental constitutional power of the legislature to make difficult economic choices in the face of an economic crisis and resulting revenue shortfall. This Court has no authority whatsoever, nor should it have, to substitute its judgment for that of the legislature in this regard.

McDONALD, Justice, dissenting.
I dissent.

Although private employees have long had the right to bargain collectively, public employees have not. *E.g., City of Springfield v. Clouse,* 356 Mo. 1239, 206 S.W.2d 539 (1947). Indeed, the right of Florida's public employees to engage in collective bargaining has been recognized for only two decades. In *Dade County Classroom Teachers' Association, Inc. v. Ryan,* 225 So.2d 903, 905 (Fla.1969), this Court held "that with the exception of the right to strike, public employees have the same rights of collective bargaining as are granted private employees." This holding does not mean, however, that there are no differences between public and private employee bargaining. *State v. Florida Police Benevolent Ass'n, Inc.,* 613 So.2d 415 (Fla.1992); ***676** *United Teachers v. Dade County School Board,* 500 So.2d 508 (Fla.1986). Article I, section 6 was "not intended to alter fundamental constitutional principles, such as the separation of powers doctrine" and does not "give to public employees the same rights as private employees to require the expenditure of funds to implement the negotiated agreement." *Florida PBA,* 613 So.2d at 419. Also, legislative enactments regulating collective bargaining by public employees should be accorded great deference. *Dade County Classroom Teachers'.*

The subject of wages is one area where there are major differences between the public and private sectors. In dealing with public, rather than private, employees "[w]ages are a legislative matter, and only bargainable to a limited degree." Daniel P. Sullivan, *Public Employee Labor Law* § 11.11, at 75 (1969). As noted by the Second District Court of Appeal, "a wage agreement with a public employer is obviously subject to the necessary public funding which, in turn, necessarily involves the powers, duties and discretion vested in those public officials responsible for the budgetary and fiscal processes inherent in government." *Pinellas County Police Benevolent Ass'n v. Hillsborough County Aviation Authority,* 347 So.2d 801, 803 (Fla. 2d DCA 1977). Based on the doctrine of separation of powers, this Court has long recognized that "the power to appropriate state funds is legislative and is to be exercised only through duly enacted statutes." *Chiles v. Children A, B, C, D, E, & F,* 589 So.2d 260, 265 (Fla.1991).

Appropriating state funds is "the exclusive constitutional prerogative of the Legislature." *United Faculty of Florida v. Board of Regents,* 365 So.2d 1073, 1074 (Fla. 1st DCA 1979). Moreover, "the power to *reduce* appropriations, like any other lawmaking, is a legislative function." *Chiles v. Children,* 589 So.2d at 265 (emphasis in original). Collective bargaining agreements are subject to the legislature's power to appropriate, and the agreements themselves recognize this limitation.[2] *Florida PBA; United Faculty.* Thus, "the legislature's exclusive control over public funds," *Florida PBA,* 613 So.2d at 420, "is not an abridgment of the right to bargain, but an inherent limitation" on that right. *Id.* at 419 n. 6, 421 n. 10.

We recently stated: "Where the legislature provides enough money to implement the benefit as negotiated, but attempts to unilaterally change the benefit, the changes will not be upheld, and the negotiated benefit will be enforced." *Id.* at 421 (footnote omitted). The unions argue that, because the collective bargaining agreements had been ratified by their members, those agreements were contracts that could not be modified unilaterally by the legislature. Therefore, the unions contend that the raises could not be altered by the legislature. Because several billion dollars had been appropriated, the unions argue that the pay raises should not have been rescinded. Instead, they argue the legislature should have raised more revenue by raising taxes or should have decreased spending by cutting any appropriations other than those made to fund the bargaining agreements. This argument, however, ignores the conclusion in *Florida PBA* that "should the legislature be able to show a compelling state interest justifying the abridgment of the right to collectively bargain, its unilateral changes would be enforced." *Id.* at 421, n. 11.[3]

Florida's Constitution requires that the state operate under a balanced budget.[4] "It is the duty of the Governor, as chief budget officer, to ensure that revenues collected will be sufficient to meet the appropriations *677 and that no deficit occurs in any state fund." § 216.221(1), Fla.Stat. (Supp.1992).[5] When the governor certifies that a shortfall in revenues has caused a fiscal emergency, a compelling state interest, i.e., the necessity of a balanced state budget, exists.

The necessity for a balanced budget is at the heart of the legislature's power to appropriate. The legislature represents the people and speaks with the voice of all the people. Thus,

> only the legislature, as the voice of the people, may determine and weigh the multitude of needs and fiscal priorities of the State of Florida. The legislature must carry out its constitutional duty to establish fiscal priorities in light of the financial resources it has provided.

Chiles v. Children, 589 So.2d at 267. When the three-percent pay raise was appropriated projected revenues were adequate to fund all sums appropriated. Actual revenues received proved this to be substantially wrong and dramatic changes in the entire appropriations were required. The three-percent pay raise, along with many other appropriations, was cut in an effort to balance the budget.

Laws must be made by the legislature, not through bargaining by anyone outside the legislature. Agreeing with the unions' argument that sufficient moneys had been appropriated to cover the pay raises even after the $600 million had been cut from the budget because contracts are involved guts the legislature's power over appropriations. Acceding to the unions' demand in this case would mean that any contract entered into by the state—for purchases, for rent, for collective bargaining —would take precedence in the state budget over any program the legislature might wish to implement.

No citizen or group of citizens has a right to a contract for any legislation. The legislature must speak through laws that are binding on all the people, not through contracts that bind only the parties to them. Legislative power cannot be delegated, *Chiles v. Children,* nor can the legislature's power and discretion "be bargained away." *Florida PBA,* 613 So.2d at 418. Thus, the legislature has discretion "either to reduce the appropriations or to raise 'sufficient revenue' to satisfy the appropriations it deems necessary to run the government." *Chiles v. Children,* 589 So.2d at 267. Without the power to cut the specific appropriations it finds necessary, the legislature loses its role as the voice of the people.

An unanticipated revenue shortfall befell the state. The legislature had not only the right, but the constitutional duty to review all of its appropriations. Because of the substantial change in the financial conditions of this state, contractual employee obligations were subject to modification along with other budgeted items. I believe the legislature, in such circumstances, has the unrestricted power to meet the compelling state interest of a balanced budget by reducing whatever appropriations it deems advisable. [6]

OVERTON, J., concurs.

ON MOTION FOR CLARIFICATION

PER CURIAM.

The State asks that we clarify our opinion with reference to the period of time during which the pay raises will be effective and the availability of interest on amounts wrongfully withheld from employees. As we noted in the majority opinion, the legislature is a constituent element of the state, which is itself bound by the contracts negotiated with employees once *678 those contracts are accepted *and* funded. Accordingly, the legislature is bound by its contract as would be any private employer.

However, the legislature's legal obligation terminated on June 30, 1992, as counsel for the unions conceded in oral argument. We therefore are of the opinion that the legislature was under no legal obligation to provide the same level of funding beyond that date. It is clear to us that the legislature has authority to reduce base salaries as it deems appropriate, subject however to the terms of any contracts it has entered with its employees. [1] Because the legislature chose not to fund the raise the second year it effectively assented only to a three-percent raise ending June 30, 1992; there was nothing to require the state to extend the three-percent increase beyond that date. [2]

Finally, we recognize that elsewhere we have held that an award of interest may be appropriate in suits by public employees based on violation of a contract with a public employer. *Broward County v. Finlayson,* 555 So.2d 1211 (Fla.1990). However, the *Finlayson* case involved failure to compensate for overtime hours worked by a small group of emergency medical technicians, not a question of base pay owed to unionized employees. We also stressed in *Finlayson* that an award of interest in this context depends heavily on equitable considerations. *Id.* at 1213. In light of the unique circumstances here, we find that equity favors the State. The legislature is free to award interest if it so chooses, but equity will not require it to do so.

It is so ordered.

BARKETT, C.J., and GRIMES and HARDING, JJ., concur.

McDONALD, J., concurs specially with an opinion, in which OVERTON, J., concurs.

SHAW, J., concurs in part and dissents in part with an opinion, in which KOGAN, J., concurs.

NO MOTION FOR REHEARING WILL BE ALLOWED.

McDONALD, Justice, specially concurring on motion for clarification.
While I adhere to my original dissent, I agree that if the respondents were entitled to a three percent pay raise, it was limited to the period of January 1, 1992 through June 30, 1992. There was no legal requirement to continue the pay raise thereafter.

The state is not obligated to pay interest. *Flack v. Graham,* 461 So.2d 82 (Fla.1984). On this issue I also adhere to my dissent in *Broward County v. Finlayson,* 555 So.2d 1211 (Fla.1990).

OVERTON, J., concurs.

SHAW, Justice, concurring in part, dissenting in part.
I disagree with the majority's determination that state workers are not entitled to prejudgment interest on their back pay. This Court's own precedent favors payment.

Initially, we have held that no special immunity insulates the State from liability on its contractual obligations:

> Where the legislature has, by general law, authorized entities of the state to enter into contract or to undertake those activities which, as a matter of practicality, require entering into contract, the legislature has clearly intended that such contracts be valid and binding on both parties. As a matter of law, the state must be obligated to the private citizen or the legislative authorization for such action is void and meaningless. We therefore hold that where the state has entered into a contract fairly authorized by the powers granted by general law, the defense of sovereign immunity will ***679** not protect the state from action arising from the state's breach of that contract.

Pan–Am Tobacco Corp. v. Department of Corrections, 471 So.2d 4, 5 (Fla.1984). Once the State enters the arena of formal contracts, it waives any right to special treatment when it reneges on its promises. As a rule, the State has the same responsibility as any private party to honor its word in a contractual setting.

As to the specific matter of prejudgment interest, this Court summarized the applicable law in *Broward County v. Finlayson,* 555 So.2d 1211 (Fla.1990):

> In *Kissimmee Utility Authority v. Better Plastics, Inc.,* 526 So.2d 46 (Fla.1988), we reaffirmed our decision in *Argonaut Insurance Co. v. May Plumbing Co.,* 474 So.2d 212 (Fla.1985), and stated the general rule concerning the payment of prejudgment interest: "Once damages are liquidated, the prejudgment interest is considered an element of those damages as a matter of law, and the plaintiff is to be made whole from the date of the loss." This general rule is not absolute. In *Flack v. Graham,* 461 So.2d 82 (Fla.1984), we refused to permit recovery of any prejudgment interest, stating: "[I]nterest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness. It is denied when its exaction would be inequitable."

Finlayson, 555 So.2d at 1213 (citations omitted). This Court has applied this rule in a number of recent cases, approving the awarding of prejudgment interest in most instances.[3] The prime case wherein we denied prejudgment interest[4] did not involve a contract dispute, as does the present case, but rather posed a "[choice] between innocent victims." *Flack v. Graham,* 461 So.2d 82, 84 (Fla.1984).

Equity, in my opinion, requires payment of interest in the present case—there simply are not two innocent victims here. When the State entered into its formal contractual agreement with the state workers' unions to provide a raise, it assumed the same responsibility to honor its word that any private party would have. When equitable principles are factored in, the State's obligation was clearly as great as that of the union. The State, as opposed to many private parties, is a highly sophisticated bargaining entity with vast practical experience and nearly limitless technical resources at its disposal to facilitate it in the decisionmaking process. When the State knowingly and deliberately broke its word in the present case, it did so based on grounds that this Court has found unacceptable. Additionally, I note that adequate cuts could have been made in alternative areas where the State had not already formally and legally bound itself. Equity, to my mind, unquestionably lies with the innocent victim here—the state workers—who should be made whole for their losses.

I concur in the remainder of the majority opinion.

KOGAN, J., concurs.

All Citations

615 So.2d 671, 143 L.R.R.M. (BNA) 2136, 18 Fla. L. Weekly S143

Footnotes

1 The legislative ratification pertained only to the 1991–92 fiscal year. Therefore, the pay raise ordered by this opinion covers only the six-month period from January 1, 1992 to June 30, 1992.

2 The savings clauses in the instant agreements recognize the legislature's ultimate control over the bargaining process.

3 Ordinarily, an exercise of the appropriation power, i.e., funding a wage increase, is not an abridgment of the right to bargain. *State v. Florida Police Benevolent Ass'n, Inc.,* 613 So.2d 415, 419 n. 6. Moreover, the legislature's failure "to appropriate funds sufficient to fund the collective bargaining agreement shall not constitute, or be evidence of, any unfair labor practice." § 447.309(2), Fla.Stat. (1989).

4 Article VII, section 1(d), Florida Constitution, states: "Provision shall be made by law for raising sufficient revenue to defray the expenses of the state for each fiscal period."

5 After this Court declared subsection 216.221(2), Florida Statutes (1989), unconstitutional in *Chiles v. Children A, B, C, D, E, & F,* 589 So.2d 260 (Fla.1991), the legislature amended section 216.221. Ch. 92–142, § 64, Laws of Fla. The governor's duty regarding a balanced budget is the same now as in the previous version of the statute.

6 Notwithstanding what is said in the majority opinion, it appears to me that its decision has abrogated the separation of powers doctrine. It has clearly substituted its judgment for that of the legislature when it holds that inadequate reasons existed to cancel the pay raises.

1 The cases cited by the unions are readily distinguishable, because they deal with illegal or improper acts against individual employees, *e.g., Flack v. Graham,* 461 So.2d 82 (Fla.1984), or unfair labor practices. *E.g., Town of Pembroke Park v. State ex rel. Healy,* 446 So.2d 198 (Fla. 4th DCA1984). The present case deals with actions taken toward state employees as a whole that impaired a contract but obviously did not constitute an unfair labor practice.

2 § 447.309(2), Fla.Stat. (1991).

3 *See, e.g., Broward County v. Finlayson,* 555 So.2d 1211 (Fla.1990) (prejudgment interest awarded to emergency medical technicians against county for overtime back pay); *Kissimmee Utility Auth. v. Better Plastics, Inc.,* 526 So.2d 46 (Fla.1988) (prejudgment interest awarded to utility customer against public utility for rate overcharge); *Argonaut Ins. Co. v. May Plumbing Co.,* 474 So.2d 212 (Fla.1985) (prejudgment interest awarded to victim's insurance carrier against tortfeasor's carrier on judgment of damages).

4 *Flack v. Graham,* 461 So.2d 82 (Fla.1984) (prejudgment interest denied to county judge against comptroller for back pay).

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