IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

CITRUS MEMORIAL HEALTH FOUNDATION, INC., a Florida not-for-profit corporation,

Appellant,

v.

CITRUS COUNTY HOSPITAL BOARD, an independent Special District of the State of Florida, and the STATE of FLORIDA,

Appellees.

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NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1D12-0858

Opinion filed February 14, 2013.

An appeal from the Circuit Court for Leon County.
Jackie L. Fulford, Judge.

Peter D. Webster, Sylvia H. Walbolt, Gary L. Sasso and Christine Davis Graves of Carlton Fields, P.A., Tallahassee and Tampa, and Clark A. Stillwell of Clark A. Stillwell, P.A., Inverness, for Appellant.

Arthur J. England, Jr. of Arthur J. England, Jr., P.A., Coral Gables, Barry Richard of Greenberg Traurig, P.A., Tallahassee, and William J. Grant of Grant & Dozier, Inverness, for Appellee Citrus County Hospital Board.

Pamela Jo Bondi, Attorney General, and Enoch J. Whitney, Assistant Attorney General, Tallahassee, for Appellee State of Florida.

CLARK, J.

The Citrus Memorial Health Foundation appeals from a final summary judgment entered in favor of the Citrus County Hospital Board, appellee, which determined that chapter 2011-256, Laws of Florida, does not impair vested contract rights or violate Article I, Section 10, of the Florida Constitution. The special law which the legislature enacted at chapter 2011-256 significantly alters the parties' contractual rights and is an unconstitutional impairment of their contracts so as to be prohibited by Article I, Section 10. Accordingly, the order granting summary judgment for Citrus County Hospital Board is reversed.

In 1990, Citrus County Hospital Board, a special taxing district, contracted with Citrus Memorial Health Foundation by entering into a Lease Agreement and an Agreement for Hospital Care which transferred the control and operation of Citrus Memorial Hospital from the Board to the Foundation. Amendments to those contractual agreements provide for the continuation of that arrangement until 2033. In 2011 the Florida Legislature enacted chapter 2011-256, which addressed the Foundation's obligations and altered aspects of the parties' contractual agreements.

Among other provisions, this special law requires that the Foundation's budget be approved by the Board, limits the Foundation's ability to borrow money without Board approval, and restricts the Foundation's ability to undertake capital improvements without Board approval. In addition to those changes to the

agreements, the special law alters the Foundation's Articles of Incorporation by requiring Board approval of amendments to the Articles and the Foundation's bylaws in some instances, and specifying that the Board's trustees be appointed as a majority of the Foundation's directors while giving the Board a right of approval as to all of the Foundation's directors.

The Foundation filed an action for declaratory judgment in circuit court, seeking a ruling on the constitutionality of chapter 2011-256 in light of its impact on the contractual agreements between the Board and the Foundation, and in connection with the Foundation's Articles of Incorporation. The Foundation asserted that chapter 2011-256 impaired vested contractual rights. The court entered summary judgment for the Board, accepting the Board's assertion that the state can exercise regulatory power over the functions the Board had transferred to the Foundation. Consequently, the circuit court ruled that chapter 2011-256 does not violate the Florida Constitution's due process protections or the Article I, Section 10, prohibition against laws impairing the obligation of contracts.

The circuit court's ruling treats the Foundation as a public entity, referring to O'Malley v. Florida Insurance Guaranty Association, 257 So. 2d 9 (Fla. 1971), where a legislatively-created entity was accorded status as a public corporation used to implement legislative objectives within the state's police power. However, unlike the public corporation in O'Malley, the Foundation was not created by the

legislature and was used by the Board for the express purpose of avoiding statutory and constitutional limitations which would pertain to the Board as a public entity. Thus, O'Malley does not apply here and the circuit court's ruling disregards the true nature of the relationship between the Board and the Foundation.

It is undisputed that Citrus County Hospital Board was created for the purpose of operating hospitals and medical facilities in Citrus County. The Board provided that service until it contracted with the Foundation in 1990. That transfer of control and operation of Citrus Memorial Hospital resulted from a decision by the Board's trustees to contract out that function to reduce expenditures by removing employees from the state retirement plan, and to create joint venture opportunities for the hospital. The Board's trustees determined that while those actions would financially benefit the hospital, as a public entity the Board was precluded by section 122.061, Florida Statutes, and Article VII, section 10, of the Florida Constitution, from undertaking such actions. Upon that determination the Board then contracted with the Foundation. The circuit court's characterization of the Foundation as a public entity disregards the purpose of the contractual agreements, which was to transfer the operational control of the hospital from the Board's status as a public entity with such restrictions, to the private Foundation where such restrictions would not apply.

In considering the Foundation a public entity, the court proceeded to find that the changes made by chapter 2011-256 did not diminish the value of any constitutionally protected interest. The court applied the "impairment of contract" test from Pomponio v. The Claridge of Pompano Condominium, Inc., 378 So. 2d 774 (Fla. 1979), without giving any effect to the accompanying test from Dewberry v. Auto-Owners Insurance Co., 363 So. 2d 1077 (Fla. 1978). In both Dewberry and Pomponio, the supreme court addressed the prohibition in Article I, Section 10 of the Florida Constitution with regard to laws impairing the obligation of contracts. In Dewberry the court cautioned that any legislation that detracts from the value of a contract is subject to the constitutional proscription, referring to Yamaha Parts Distributors Inc. v. Ehrman, 316 So. 2d 557 (Fla. 1975), which likewise indicates that virtually no degree of impairment is tolerated under Article I, Section 10. In Pomponio the court again referred to Yamaha Parts Distributors and explained that, although virtually no impairment may be tolerable, some minimal impact in furtherance of the state's police power might be allowed upon a balancing of interests as between the contract rights and the state's interest in a permissible exercise of its police power. The Pomponio court then set out various criteria to be considered in connection with such balancing, emphasizing that in this context the state's police power may only be exercised in the least restrictive means possible. Most significantly, the Pomponio court did not disavow or recede

from Dewberry, which the supreme court has continued to apply in subsequent decisions. See In re Advisory Opinion to the Governor, 509 So. 2d 292 (Fla. 1987); see also Cohn v. Grand Condominium Ass'n, Inc., 62 So. 3d 1120 (Fla. 2011); State Farm Mutual Automobile Ins. Co. v. Gant, 478 So. 2d 25 (Fla. 1985).

The continuing vitality of Dewberry is also recognized in other decisions, such as Lee County v. Brown, 929 So. 2d 1202 (Fla. 2d DCA 2006), where it was suggested that a per se test under Dewberry applies, rather than a balancing test under Pomponio, when there is an immediate diminishment in the value of a contract. Accord, Coral Lakes Community Ass'n, Inc. v. Busey Bank, N.A., 30 So. 3d 579 (Fla. 2d DCA 2010); see also, e.g., State v. Leavins, 599 So. 2d 1326 (Fla. 1st DCA 1992).

In the present case, the circuit court reasoned that there was no impairment to the contracts between the Board and the Foundation because it was not shown that the taxpayers and residents of Citrus County were harmed by the enactment of chapter 2011-256. That reasoning does not recognize the impact on the Foundation's contractual rights under its agreements with the Board or under its Articles of Incorporation. Cases such as Aztec Motel, Inc. v. State ex rel. Faircloth, 251 So. 2d 849 (Fla. 1971), indicate that the corporate charter is a contract with the state, and other decisions such as Cohn v. Grand Condominium Ass'n, Inc., supra, indicate that statutory changes to an entity's contractual rights

of internal governance may run afoul of the Article I, Section 10, prohibition against the impairment of contracts. Even apart from the effect of chapter 2011-256 upon the Foundation's Articles of Incorporation, the alteration of the Foundation's contractual agreements with the Board whereby additional obligations were legislatively imposed in connection with those agreements, violates Article I, Section 10.

Ultimately, the legislative action in chapter 2011-256, as deemed valid by the circuit court, is a rewrite of the parties' contractual agreements and the imposition of further obligations on the Foundation, while permitting the Board's privatization of hospital management functions as described in Indian River County Hospital District v. Indian River Memorial Hospital, Inc., 766 So. 2d 233 (Fla. 4th DCA 2000). Even if some public benefit might ensue from that privatization, by which the Board sought to avoid the restrictions on its undertakings as a public entity, the legislative changes in chapter 2011-256 cannot be countenanced under Article I, Section 10, of the Florida Constitution.

REVERSED.

VAN NORTWICK, J., CONCURS; RAY, J., DISSENTS WITH OPINION.

RAY, J., DISSENTING.

I would affirm the trial court's decision to uphold the constitutionality of chapter 2011-256 (the "Special Law"). "[W]e are obligated to accord legislative acts a presumption of constitutionality and to construe challenged legislation to effect a constitutional outcome whenever possible." Fla. Dep't. of Revenue v. City of Gainesville, 918 So. 2d 250, 256 (Fla. 2005). After thoroughly analyzing the arguments and law presented by the parties on cross-motions for summary judgment, the trial court ruled that the Foundation cannot be heard to complain about the impairment of its contracts in violation of article I, section 10 of the Florida Constitution (the "Contracts Clause"), because it is a public or quasi-public corporation.[1] The trial court ruled that the same analysis applies to the claim that the Special Law violates the Foundation's right to due process by depriving it of vested contractual rights. Guided by the Florida Supreme Court's decision in O'Malley v. Florida Insurance Guaranty Association, 257 So. 2d 9 (Fla. 1971), and informed by the Foundation's history and its own representations about its nature, I agree.

[1] The trial court ruled, in the alternative, that the Special Law would not unconstitutionally impair the Foundation's contracts even if the Foundation were a private corporation. Because I agree with the trial court on the threshold issue concerning the Foundation's nature as a public entity, I express no opinion on the impairment question.

The Hospital Board formed the Foundation as a not-for-profit corporation to carry out the purposes of the special act creating the Hospital Board. At the Foundation's inception, and when the Hospital Board and Foundation executed the Lease Agreement and Agreement for Hospital Care in 1990, the Hospital Board trustees occupied a majority of the positions on the Foundation's Board. Since the beginning of the leasing and hospital-care arrangements, the Foundation has carried out its agreement to operate and manage Citrus Memorial Hospital using public funds provided through ad valorem taxing by the Hospital Board. In 2006, the parties amended the Agreement for Hospital Care to make clear that the Foundation's obligations "are to be considered a transfer of a governmental function from the [Hospital] Board."

The Foundation has made several declarations to the courts and officials of this state indicating that this transfer defines its very nature and purpose. In 2007, in the context of obtaining sovereign immunity, the Foundation represented to a circuit court that "the Foundation serves no purpose other than to fulfill the Hospital Board's public function of operating hospitals in Citrus County." The Foundation advised the same court that it is "an 'instrumentality' or 'agency' of the Hospital Board in the truest sense." Further, seeking to rebase its Medicaid rates in 2008, the Foundation urged the Florida Agency for Health Care Administration to deem it a public entity. The Foundation cited its entitlement to sovereign

immunity, which the Foundation noted "is reserved only for the state and its agencies," as one factor among many militating in favor of such a finding. Other factors included the Foundation's fulfillment of the Hospital Board's public function, the Hospital Board's ownership of the Foundation, the Foundation's compliance with Florida's public records law, and the fact that the Foundation "answers to the Hospital Board regarding key operational, capital[,] and financial decisions."

Despite the control the Foundation had previously conceded the Hospital Board exercises over its operations, the Legislature determined, in 2011, that greater control was necessary to ensure meaningful oversight and appropriate accountability by the Hospital Board over the Hospital Board's public responsibilities. This determination is reflected in the Special Law's "whereas clauses," which also indicate that the Legislature instituted the accountability measures at issue as a mechanism to protect the public interest.

The trial court ruled that the Special Law does not violate the Contracts Clause because the Foundation is a public or quasi-public corporation. The parties to this appeal have not presented any cases defining the terms "public corporation" or "quasi-public corporation" with respect to the Contracts Clause, and it appears that Florida courts have not previously been called upon to analyze the nature of a corporation for the purpose of applying this provision. The best precedent

available on this topic is O'Malley, in which the Florida Supreme Court distinguished between private and public or quasi-public corporations for the purpose of deciding whether a law violated article III, section 11, of the Florida Constitution. Although O'Malley concerned a different constitutional provision, its definitions of private and public corporations are relevant to our determination of the nature of the corporation at issue here.

The O'Malley court explained that "[p]rivate corporations are those which have no official duties or concern with the affairs of government, are voluntarily organized[,] and are not bound to perform any act solely for government benefit, but the primary object of which is the personal emolument of its stockholders." 257 So. 2d at 11. The O'Malley court then defined public corporations by reference to the following considerations:

> Their business ordinarily is stipulated by the Legislature to fill a public need without private profit to any organizers or stockholders. Their function is to promote the public welfare and often they implement governmental regulations within the state's police power. In a word, they are organized for the benefit of the public.

Id.

The Foundation attempts to distinguish O'Malley on the ground that the Legislature directly created the corporation whose status was at issue in that case, through enabling legislation. But whether a corporation is created directly by the State, or by an arm of the State, seems to be a distinction without a difference

when, as here, the sole and exclusive purpose of the corporation is to carry out a public function for the benefit of the public. Furthermore, if the manner of a corporation's creation were dispositive of the public/private inquiry, there would have been no need for the O'Malley court to describe the attributes of public and private corporations for the purpose of determining in which category the corporation in question was to be placed. The court, instead, could have started and ended its analysis by reference to the manner of the corporation's creation. Because the supreme court did not adopt this approach, the trial court properly resolved this case by reference to the O'Malley factors.

Under the O'Malley definition, the Foundation is a public or quasi-public corporation. It was not voluntarily created by private citizens for their own benefit or for the benefit of any private interests whatsoever. As the Foundation has admitted, the Hospital Board created the Foundation for the purpose of fulfilling the Hospital Board's public function of providing hospital services in Citrus County, and it still exists for that sole purpose. The Foundation has no shareholders, and the Hospital Board is its only member. As the Hospital Board has aptly described the relationship, the Hospital Board essentially restructured itself when it executed the Lease Agreement and Agreement for Hospital Care. This situation was not one where a special taxing district competitively bid the outsourcing of a public function and entered into "arm's length" bilateral contract

with a private company. Cf. Mem'l Hosp.-W. Volusia, Inc. v. News-Journal Corp., 729 So. 2d 373, 377-78 (Fla. 1999).

The representations the Foundation has made to the courts and officials of this state are perhaps the best indication of its identity as a public or quasi-public corporation. These statements reveal that the Foundation has no greater interest in self-governance than any other state agency, as it exists only to fulfill the delegated duty to meet Citrus County's public health needs in accordance with the Legislature's mandate for the Hospital Board. Like other state agencies and officials, the Foundation should be required to presume the legislation affecting its duties is constitutional and focus on carrying out those duties. See Crossings At Fleming Island Comty. Dev. Dist. v. Echeverri, 991 So. 2d 793, 799 (Fla. 2008) (quoting Barr v. Watts, 70 So. 2d 347, 351 (Fla. 1953) ("The state's business cannot come to a stand-still while the validity of any particular statute is contested by the very board or agency charged with the responsibility of administering it and to whom the people must look for such administration."); Dep't of Educ. v. Lewis, 416 So. 2d 455, 458 (Fla. 1982) ("State officers and agencies must presume legislation affecting their duties to be valid, and do not have standing to initiate litigation for the purpose of determining otherwise.")). Regardless of the status of other corporations involved in leases under section 155.40, the specific relationship the Foundation has acknowledged it has with the Hospital Board requires a holding

that the Foundation is a public entity that cannot be removed from legislative oversight.

The Foundation contends that its prior representations, made for other purposes, should not determine its status as public or private. Citing Prison Rehabilitative Industries and Diversified Enterprises, Inc. v. Betterson, 648 So. 2d 778 (Fla. 1st DCA 1995), the Foundation notes that an entity may be a state agency for the purpose of claiming sovereign immunity and not for other purposes. See also Keck v. Eminisor, 37 Fla. L. Weekly S697, S700-01 (Fla. Nov. 15, 2012). While the Foundation's entitlement to sovereign immunity might not be dispositive, the Foundation should nevertheless be held to the factual representations it has made in other contexts. See Blumberg v. USAA Cas. Ins. Co., 790 So. 2d 1061, 1066 (Fla. 2001) (quoting Smith v. Avatar Properties, Inc., 714 So. 2d 1103, 1107 (Fla. 5th DCA 1998) (recognizing that, under the doctrine of judicial estoppel, litigants are prohibited from "taking totally inconsistent positions in separate judicial, including quasi-judicial, proceedings")). Those factual representations establish that it has all of the essential elements of a public or quasi-public entity and that the Special Law does not affect any private interest.

In my view, the definition in O'Malley and the Foundation's prior representations resolve this case. Because the Foundation's true nature is that of a public or quasi-public corporation, I find no cognizable claim under the Contracts

Clause. The Foundation's "due process" claim hinges on a deprivation of the same contract rights at issue in its claim under the Contracts Clause. Therefore, this related claim should fail for the same reasons.