Third District Court of Appeal

State of Florida

Opinion filed July 17, 2019.
Not final until disposition of timely filed motion for rehearing.

____

No. 3D18-812
Lower Tribunal No. 17-13687

____

Francine Liebman, et al.,
Appellants,

vs.

The City of Miami, et al.,
Appellees.

An Appeal from the Circuit Court for Miami-Dade County, William Thomas, Judge.

Dubbin & Kravetz, LLP, and Samuel J. Dubbin, P.A.; Carlton Fields Jorden Burt, P.A., and Richard J. Ovelmen, Justin S. Wales and Dorothy C. Kafka, for appellants.

Victoria Méndez, City Attorney, and Christopher A. Green, Senior Assistant City Attorney, and John A. Greco, Deputy City Attorney; Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A., and Eugene E. Stearns, Maria A. Fehretdinov, Jason S. Koslowe, and David T. Coulter, for appellees.

Before EMAS, C.J., and LINDSEY and MILLER, JJ.

EMAS, C.J.

INTRODUCTION

Appellants Francine Liebman ("Liebman"), Jorge Mursuli ("Mursuli"), Daniel Suarez ("Suarez"), and Willy Bermello ("Bermello") (collectively, "appellants") filed suit seeking declaratory and injunctive relief against the City of Miami ("the City"). Appellants challenged Flagstone Island Gardens, LLC's ("Flagstone") mixed-use development on City-owned property, on the basis that the underlying lease agreements violated provisions of the City of Miami Charter. Flagstone later intervened in the action, and the City and Flagstone moved to dismiss for lack of standing. In the instant appeal, appellants seek review of the trial court's order dismissing the second amended complaint for lack of standing. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY[1]

In February 2001, the City issued a request for proposals for a mixed-use development of City-owned property on Watson Island. Flagstone was the successful bidder on the project. Voters later approved Flagstone's proposal, as required by the City Charter, and the City and Flagstone then executed an Agreement to Enter Ground Lease, to be effective January 1, 2003.

[1] The summarized facts are taken from the second amended complaint. On review of a motion to dismiss, we accept as true the well-pleaded factual allegations in the operative complaint. See The Florida Bar v. Greene, 926 So. 2d 1195 (Fla. 2006); Cortez v. Palace Resorts, Inc., 123 So. 3d 1085, 1088 (Fla. 2013).

Thereafter, however, Flagstone was unable to secure financing or commence the project. As a result, the City passed Resolution 10-0402, authorizing execution of an Amended and Restated Amended Agreement to Enter Ground Lease ("Amended Lease"). The Amended Lease allowed Flagstone to develop the site in phases rather than as an integrated development project.

From 2011 to 2014, the City passed a series of resolutions purporting to reaffirm and ratify the changes adopted in Resolution 10-0402 and to provide new deadlines, modifications, and consents to the development project. The City did not obtain new appraisals or adjust the minimum annual guaranteed base rent to conform to fair market value in 2010 or thereafter.

On May 30, 2014, the City and Flagstone entered into an Amended and Restated Ground Lease for the Marina Component of the Project ("Marina Lease") and nearly two years later, in August 2016, the parties entered into an Amended and Restated Ground Lease for the Retail/Parking Component ("Retail/Parking Lease"). However, Flagstone failed to commence construction of the Retail/Parking component by the agreed-upon deadline.[2]

---

[2] Because Flagstone failed to start construction by the deadline, the City sent a letter to Flagstone terminating the agreements and instructing Flagstone to vacate the property and relinquish all rights and interests in the property. The termination is the subject of a separate lawsuit between the City and Flagstone. Flagstone Island Gardens, LLC v. the City of Miami, Case No. 17-13829.

On June 8, 2017, City residents Liebman, Mursuli, and Suarez sued the City, alleging that the City violated sections 3(f)(iii)(b), 29-A, 29-B, and 29-C of the City Charter when it amended and re-enacted amendments to the Flagstone project and entered into the Marina Lease and Retail/Parking Lease. The second amended complaint ("Complaint") added Bermello (who is not a City resident) as a plaintiff. Bermello was a principal and the president of an entity that was an equity participant in Watson Island Partners, LLC, one of the groups that bid unsuccessfully on the City's 2001 request for proposals.

After the trial court permitted Flagstone to intervene, the City and Flagstone moved to dismiss the Complaint, contending that none of the four plaintiffs had standing to sue. City residents Liebman, Mursuli, and Suarez argued they had standing pursuant to the November 2016 amendment to section 52(C) of the City's Citizen's Bill of Rights, which provides in part:

> Remedies for violations. Residents of the City shall have standing to bring legal actions to enforce the City Charter, the Citizen's Bill of Rights, and the Miami-Dade County Citizens' Bill of Rights as applied to the City.[3]

---

[3] In contrast, the pre-November 2016 version of section 52(C) provided in part:

> In any suit by a citizen alleging <u>a violation of this Bill of Rights</u> filed in Dade County Circuit Court pursuant to its general equity jurisdiction, the plaintiff, if successful, shall be entitled to recover costs as fixed by the court.

(Emphasis added.)

Bermello, a non-City resident, asserted standing based on "special injury": the assertion in the Complaint that "[i]f the City issues a new request for proposals for the Watson Island site, Bermello would consider submitting a bid." After a hearing, the trial court dismissed the Complaint, finding that Liebman, Mursuli, and Suarez lacked standing because section 52(C) of the Citizen's Bill of Rights was amended in November of 2016 and did not apply retroactively to alleged violations predating the amendment. The trial court also found Bermello lacked standing because his allegation of a special injury was conclusory and speculative. This appeal followed.

STANDARD OF REVIEW

We generally review de novo an order granting a motion to dismiss, as well as questions of statutory interpretation and a trial court's determination whether a party has standing to sue. Matheson v. Miami-Dade Cty., 258 So. 3d 516, 519 (Fla. 3d DCA 2018) (citations omitted).

ANALYSIS AND DISCUSSION

The issue on appeal is whether appellants had standing to sue for alleged violations of the City Charter. We first consider whether Liebman, Mursuli, and Suarez have standing pursuant to the November 2016 amendment to section 52(C) of the City Charter, and separately consider whether Bermello has standing based on his claim of special injury.

1. **Does the November 2016 amendment to section 52(C) of the City Charter confer standing on Liebman, Mursuli, and Suarez?**

In asserting their standing to sue, Liebman, Mursuli and Suarez rely upon the November 2016 amendment to section 52(C) of the City Charter. However, because the amendatory language of section 52(C) does not apply retroactively to actions which predated the amendment (and which formed the basis for the lawsuit), appellants lacked standing to sue.

The Florida Supreme Court has explained that "[i]n the analysis of a change in statutory law, a key determination is whether the statute constitutes a procedural/remedial change or a substantive change in the law." Smiley v. State, 966 So. 2d 330, 334 (Fla. 2007). If it is a substantive change in the law, a presumption *against* retroactive application follows, but if it is procedural/remedial, that presumption does not follow. See Smiley, 966 So. 2d at 334 (Fla. 2007) (citing City of Lakeland v. Catinella, 129 So. 2d 133, 136 (Fla.1961)); see also Kenz v. Miami-Dade Cty., 116 So. 3d 461, 463 (Fla. 3d DCA 2013) (noting "the analysis of whether a change in statutory law should receive retroactive application requires a determination whether the statute sought to be applied retroactively is substantive in nature, or procedural/remedial in nature").

Determining whether a change in law is substantive or remedial/procedural hinges on whether the law prescribes duties and rights or solely concerns the means to enforce existing duties and rights. See Kenz, 116 So. 3d at 464 (Fla. 3d DCA

2013) (citing Weingrad v. Miles, 29 So. 3d 406, 409 (Fla. 3d DCA 2010)). Importantly for our purposes, "a statute that achieves a 'remedial purpose by creating substantive new rights or imposing new legal burdens' is treated as a substantive change in the law." Smiley, 966 So. 2d at 334 (Fla. 2007) (quoting Arrow Air, Inc. v. Walsh, 645 So. 2d 422, 424 (Fla.1994)). The abrogation or elimination of an affirmative defense, for example, constitutes a substantive change in the law because it alters those affirmative defenses available to a defendant. Id. at 336.

Despite being titled "Remedies for violations," the November 2016 amendment operates as a substantive change to the City Charter,[4] because it eliminated standing as an affirmative defense to lawsuits filed by residents against the City. As a substantive change to the law, the amendment carries with it a presumption against retroactivity. To determine whether appellants can overcome this presumption, we apply a two-prong test:

> First, the Court must ascertain whether the Legislature intended for the statute to apply retroactively. Second, if such an intent is clearly expressed, the Court must determine whether retroactive application would violate any constitutional principles.

Fla. Ins. Guar. Ass'n, Inc. v. Devon Neighborhood Ass'n, Inc., 67 So. 3d. 187, 195 (Fla. 2011) (quotations omitted).

[4] "The rules of statutory construction are applicable to the interpretation of municipal charters." Martinez v. Hernandez, 227 So. 3d 1257, 1259 (Fla. 3d DCA 2017).

The amendment contains no language of retroactivity, nor any indication that it was intended to be applied retroactively. Thus, this amendment is to be applied prospectively only, and we need not address the second prong of the above-described test.[5] Accordingly, we hold that the trial court properly concluded that appellants Liebman, Mursuli, and Suarez lacked standing to sue.

2. **Did Bermello adequately allege a "special injury" sufficient to establish standing?**

We further hold that Bermello failed to adequately allege a special injury, and therefore lacked standing to sue the City.

Generally, "[a] plaintiff must demonstrate the existence of an actual controversy between the plaintiff and the defendant in which plaintiff has a sufficient stake or cognizable interest which would be affected by the outcome of the litigation in order to satisfy the requirements of standing." Matheson, 258 So. 3d 516, 519 (Fla. 3d DCA 2018) (citing Warren Tech., Inc. v. Carrier Corp., 937 So. 2d 1141, 1142 (Fla. 3d DCA 2006)).

[5] We therefore need not reach the various constitutional questions raised on appeal. See In re Holder, 945 So. 2d 1130, 1133 (Fla. 2006) (observing that Florida courts "have long subscribed to a principle of judicial restraint by which we avoid considering a constitutional question when the case can be decided on nonconstitutional grounds"); Singletary v. State, 322 So. 2d 551, 552 (Fla. 1975) (applying the "settled principle of constitutional law that courts should not pass upon the constitutionality of statutes if the case in which the question arises may be effectively disposed of on other grounds").

However, when challenging governmental action, "the Florida Supreme Court has repeatedly held that citizens and taxpayers lack standing to challenge a governmental action unless they demonstrate either a special injury, different from the injuries to other citizens and taxpayers, or unless the claim is based on the violation of a provision of the Constitution that governs the taxing and spending powers." Herbits v. City of Miami, 207 So. 3d 274, 281 (Fla. 3d DCA 2016) (quotations omitted).

Bermello alleged that he would *consider* submitting a bid if the City issues a new request for proposals for the Watson Island site. Such an allegation fails to provide anything more than a mere possibility, and is insufficient to meet the special injury requirement for standing purposes.[6] Compare Fla. Home Builders Ass'n, Inc. v. City of Tallahassee, 15 So. 3d 612, 613 (Fla. 1st DCA 2009) (noting: "Florida Home Builders and Tallahassee Builders Association assert that their memberships include the great majority of the builders and developers who are qualified and would be reasonably likely to build or develop projects that could be subject to the ordinance. But such speculative possibilities, based on factual assumptions

[6] It is important to note that Bermello filed suit in his individual capacity. However, he did not submit a proposal in response to the City's original request for proposals, nor was he a principal of an entity that did. As alleged in the Complaint, Bermello "was a principal and the President of BAP Development, Inc. ('BAP'), which was an equity participant in Watson Island Partners, LLC, one of the groups that unsuccessfully bid in response to the City's 2001 Watson Island RFP, when Flagstone was selected."

pertaining to events that only might occur at some uncertain time in the future, do not create the necessary standing for declaratory or injunctive relief"); with Accela, Inc. v. Sarasota Cty., 901 So. 2d 237, 238 (Fla. 2d DCA 2005) (finding standing where "[t]he plaintiffs complained they stood ready, willing, and able to submit a competitive bid or proposal had the County invited such bids or proposals"); and Matheson, 258 So. 3d at 520 (noting: "Matheson, too, has alleged that he was a potential competitor for the 2.79 acres sold to Miami Properties, and had a right to seek a determination whether competitive bidding was required. This allegation gives Matheson a sufficient stake or cognizable interest to satisfy the requirements for standing").

The trial court properly concluded that Bermello lacked standing to bring this action against the City.

CONCLUSION

The trial court properly dismissed appellants' second amended complaint for lack of standing. Section 52(C) of the City Charter, as amended in November 2016, did not apply retroactively and thus could not confer standing upon appellants Liebman, Mursuli and Suarez. Further, Bermello's allegation that he would consider submitting a bid if the City issues a new request for proposal is insufficient to meet the special injury requirement for standing purposes.

Affirmed.