

Third District Court of Appeal

State of Florida

Opinion filed September 18, 2019.

Not final until disposition of timely filed motion for rehearing.

Nos. 3D18-1436 & 3D18-1437
Lower Tribunal Nos. 14-7987 & 14-7997

**City of Miami Firefighters' and Police Officers'
Retirement Trust & Plan, et al.,**
Appellants,

vs.

Lieutenant Jorge Castro, et al.,
Appellees.

Appeals from a non-final order from the Circuit Court for Miami-Dade County, Michael A. Hanzman, Judge.

Klausner, Kaufman, Jensen & Levinson, and Robert D. Klausner, Adam P. Levinson and Paul A. Daragjati (Plantation), for appellants.

Sorondo Rosenberg Legal, PA, and R. Edward Rosenberg; The Silverstein Firm, LLC, and Ira B. Silverstein (Philadelphia, PA); James C. Blecke, for appellees.

Before LOGUE,¹ SCALES and LINDSEY, JJ.

¹ Did not participate in oral argument.

SCALES, J.

The Miami-Dade Circuit Court determined, as a matter of law, that the two City of Miami retirement boards and their respective boards of trustees were not protected by sovereign immunity from the breach of contract claims brought by certain City employees. We reverse because the subject pension ordinances, relied upon by the trial court in determining that the defendants owed contractual duties to the plaintiffs, do not impose the express contractual obligations that the plaintiffs alleged were breached. Thus, the retirement boards and their trustees are sovereignly immune from the alleged breach of contract claims.

I. Case History

A. The Parties

This consolidated appeal is from an amended order on a motion to dismiss entered by the trial court on June 22, 2018. The order was entered in two cases below which, for ease of reference, we call the Castro case² and the Rodriguez case.³ The plaintiffs in the Castro case (appellees here) are Lieutenant Jorge Castro and fellow former and current City of Miami Police officers. The three named defendants in the Castro case are: the City of Miami Firefighters' and Police Officers' Retirement Trust and Plan; the Board of Trustees of the City of Miami Firefighters' and Police

² Lower tribunal case number 14-7987-CA-01(22)

³ Lower tribunal case number 14-7997-CA-01(22)

Officers' Retirement Trust; and the City of Miami. The plaintiffs in the Rodriguez case (also appellees here) are Jose Rodriguez and fellow former and current City of Miami civilian employees. The three named defendants in the Rodriguez case are: the City of Miami Civil Employees' and Sanitation Employees' Retirement Trust and Plan; the Board of Trustees of the City of Miami Civil Employees' and Sanitation Employees' Retirement Trust; and the City of Miami. For the purposes of this opinion, the retirement boards and trustee defendants in both cases will be referred to collectively as "the Pension Defendants," and the City of Miami will be referred to as the "City."

B. Relevant Background Procedure and Facts⁴

The plaintiffs in each case were eligible to receive retirement benefits in accordance with the terms and conditions of their retirement plans administered, managed and operated by the Pension Defendants. Both retirement plans were created pursuant to, and are memorialized within, city ordinances.⁵

⁴ The facts recited herein are based on the allegations in the operative amended complaints which, for the purposes of a motion to dismiss directed to those complaints, are to be taken as true. Minor v. Brunetti, 43 So. 3d 178, 179 (Fla. 3d DCA 2010). The operative complaint in the Castro case is the fifth amended complaint. The operative complaint in the Rodriguez case is the fourth amended complaint.

⁵ Section 40-191 *et seq.* of the City's Code of Ordinances establishes and governs the police and firefighters plan; section 40-241 *et seq.* establishes and governs the civil employees and sanitation employees' plan. Collectively, we refer to these as the "Pension Ordinances."

Each retirement plan employed a pension administrator charged with assisting his or her board in the performance of its duties. Each retirement plan also offered participants a Deferred Retirement Option Program (“DROP”). Once an employee becomes eligible, he or she may enter DROP and, in exchange for certain guaranteed lump sum and future payments, the employee: (i) commits to retire within a specified time period; and (ii) agrees that his or her contributions (and the City’s contributions) to the retirement plan will cease and he or she will no longer earn creditable service for pension purposes. So, upon entering DROP (an election binding once made), the employee effectively retires for pension purposes and each employee is obligated to cease work on or before a specified future date.⁶

On July 28, 2010, the City declared “financial urgency” and proposed adopting an ordinance that – as alleged by the plaintiffs – threatened to adversely affect their vested pension benefits. Ordinance No. 10-010-91 (hereinafter the “Financial Urgency Ordinance”) declaring the financial urgency – which was to become effective September 30, 2010 – was passed on first reading on September 14, 2010, and on second reading on September 27, 2010.⁷ In their operative amended

⁶ All monies needed to fund the retirement plan and DROP accounts are contributed by the City and its employees.

⁷ The City’s declaration of “financial urgency” and attempt to modify its “certified bargaining agreement” with the Fraternal Order of Police was met with an unfair labor practice claim that eventually worked its way up to our Supreme Court. See Headley v. City of Miami, 215 So. 3d 1 (Fla. 2017).

complaints, the plaintiffs alleged that, in the months leading up to the Financial Urgency Ordinance's effective date, rumors circulated concerning the ordinance's impact on their future pensions, and it became "common knowledge" that the only way an employee could avoid a substantial diminution of benefits was to retire or enter DROP prior to such effective date.

The plaintiffs also alleged that: (i) the language of the Financial Urgency Ordinance (and of certain disclosure bulletins released by the City) was confusing; (ii) the unions, Pension Defendants and the City all issued differing and confusing interpretations of the Financial Urgency Ordinance; and (iii) a state of "confusion, panic and chaos" set in among the pension participants regarding the effect of the Financial Urgency Ordinances on their benefits.⁸ The plaintiffs alleged that they sought advice from individuals identified by the Pension Defendants who could provide them counsel on the effects of the Financial Urgency Ordinance.

The gravamen of their allegations was that they were provided "incorrect advice, counsel and guidance which led to the plaintiffs prematurely retiring or entering the DROP program." Specifically, they alleged that they received the incorrect advice that they would suffer a reduction in their pension benefits if they

⁸ As a result of this alleged confusion and misinformation, the plaintiffs alleged that during the summer of 2010, "over one hundred civilian employees" and "over one hundred senior or high-ranking police officers and firefighters" retired or entered DROP.

did not retire or enter DROP by October 1, 2010; and further that the Pension Defendants did nothing to clarify the “chaos and confusion” that the impending adoption of the Financial Urgency Ordinance was causing.

Against this backdrop, the plaintiffs alleged three causes of action: (i) rescission based on unilateral mistake; (ii) breach of contract; and (iii) breach of the implied duty of good faith and fair dealing. The trial court dismissed, with prejudice, the counts for rescission based on unilateral mistake and breach of the implied duty of good faith and fair dealing, but it denied the Pension Defendants’ motion to dismiss the breach of contract claims. The trial court’s initial order, denying the Pension Defendants’ motion to dismiss the breach of contract claims, did not specifically and expressly determine as a matter of law that the Pension Defendants were not entitled to sovereign immunity from the respective breach of contract claims; and therefore, we dismissed the Pension Defendants’ initial appeals of the November 28, 2017 order for lack of jurisdiction.⁹

After we dismissed the initial appeals, the trial court entered the June 22, 2018 amended order on the Pension Defendants’ motion to dismiss that *did* determine specifically and expressly that the Pension Defendants were not entitled to sovereign

⁹ Separate panels of this Court dismissed the two cases. See City of Miami Firefighters’ & Police Officers’ Ret. Tr. Plan v. Castro, 250 So. 3d 64 (Fla. 3d DCA 2018); City of Miami Gen. Emps. & Sanitation Emps. Ret. Tr. v. Rodriguez, 246 So. 3d 567 (Fla. 3d DCA 2018).

immunity on the plaintiffs' breach of contract claims. The Pension Defendants timely appealed this amended order and for the reasons stated below, we reverse.¹⁰

II. Analysis.¹¹

A. Introduction

Unless the immunity is waived, governmental entities in Florida generally are sovereignly immune from suit. City of Key West v. Fla. Keys Cmty. Coll., 81 So. 3d 494, 497 (Fla. 3d DCA 2012). Florida courts determine whether a municipality has waived sovereign immunity depending on whether the claim against the municipality sounds in tort or contract. In the torts sphere, assuming the municipality owes a legal duty to the injured party, section 768.28 of the Florida Statutes provides for a limited waiver of municipal sovereign immunity. See Piedra v. City of N. Bay Vill., 193 So. 3d 48, 52 (Fla. 3d DCA 2016). In the contracts sphere, the limited waiver of sovereign immunity is founded in common law and occurs only when the municipality breaches an express written contract. See City of Fort Lauderdale v. Israel, 178 So. 3d 444, 447 (Fla. 4th DCA 2015).

¹⁰ We have jurisdiction. Fla. R. App. Proc. 9.130(a)(3)(C)(xi).

¹¹ Our review of a trial court determination regarding whether a party is entitled to sovereign immunity is *de novo*. Plancher v. UCF Athletics Ass'n, 175 So. 3d 724, 725 n.3 (Fla. 2015).

B. The Trial Court's Determination

The trial court below concluded that the City, by adopting the Pension Ordinances, created an express contract between the plaintiffs and the Pension Defendants, and thereby waived sovereign immunity for the plaintiffs' breach of contract claims. Citing several cases from our sister courts,¹² the trial court first concluded that the Pension Ordinances constitute express contracts among the Pension Defendants, the City, and the participating employees. The trial court then analyzed the general duties imposed by the Pension Ordinances and the alleged breach of those "contracts."

The trial court specifically relied on the section of the Pension Ordinances that impose upon the Pension Defendants, and particularly on the pension boards, a "continuing duty to observe and evaluate the performance of any pension

¹² For the proposition that a contractual relationship occurs between a municipality through its retirement plan and participating employees of that plan, the trial court cited: Bd. of Trs. Of Jacksonville Police & Fire Pension Fund v. Kicklighter, 106 So. 3d 8 (Fla. 1st DCA 2013); City of Hollywood v. Petrosino, 864 So. 2d 1175 (Fla. 4th DCA 2004); City of Riviera Beach v. Bjorklund, 563 So. 2d 1114 (Fla. 4th DCA 1990); Bishop v. State, Div. of Ret., 413 So. 2d 776 (Fla. 1st DCA 1982). These cases are uniformly about retirement benefits. Because we conclude that no breach of an express provision of the Pension Ordinances occurred in this case, we express no opinion on the trial court's general conclusion that the Pension Ordinances constitute contracts.

administrator employed by the Board.” Miami, Fla. Code § 40-194(b)(1)b.¹³ The trial court concluded that this broad oversight language in the Pension Ordinances created a *contractual* obligation on the Pension Defendants to ensure the accuracy of any advice their staff gave to plan participants about the effect of the pending Financial Urgency Ordinance. The trial court then found that the alleged incorrect advice given to the plaintiffs, combined with the Pension Defendants’ declining to allow the plaintiffs who had participated in DROP to rescind their DROP election, constituted a breach of the Pension Ordinances. Consequently, the trial court determined that the Pension Defendants were not entitled to sovereign immunity.

C. Our Analysis

Our analysis focuses on whether the Pension Ordinances impose the express duty that the plaintiffs alleged was breached.

1. The Alleged Breach

As stated earlier, the plaintiffs allege that the Pension Defendants breached a contract between the parties when their staff provided plaintiffs with poor advice regarding the effect on them of the City’s Financial Urgency Ordinance, as well as the Pension Defendants’ declining to offer plaintiffs an opportunity to revoke their

¹³ This ordinance language is pertinent to the Castro case. Similar language, worded slightly differently, pertinent to the Rodriguez case is at Miami, Fla. Code § 40-244(b)(3), to wit: “The Board shall have a continuing duty to observe and evaluate the performance of the pension administrator.”

DROP elections considering the impact of that alleged poor advice. The plaintiffs argue, and the trial court concluded that, while the respective Pension Ordinances do not expressly require the Pension Defendants' employees to provide advice regarding pending City legislation, their voluntary undertaking to do so – resulting in the alleged incorrect advice – constituted a breach of contract.

2. Contrasting the Alleged Breach to the Duty Imposed by the Texts of the Pension Ordinances

An examination of the duty imposed upon the Pension Defendants by the Pension Ordinances is critical to our analysis because sovereign immunity is waived only as to an express governmental contract and its attendant duties. Israel, 178 So. 3d at 447. Did the Pension Ordinances expressly require the Pension Defendants' employees to give accurate advice regarding the Financial Urgency Ordinance to pension beneficiaries? Our review of the text of the Pension Ordinances simply does not reveal such an express duty of the Pension Defendants.

We are loath to adopt a rule of law that transforms general language in a retirement plan ordinance – requiring that the performance of a pension administrator be observed and evaluated – into an express contractual duty guaranteeing the accuracy of advice provided to pension beneficiaries on pending legislation. While the Pension Ordinances might have imposed upon the Pension Defendants an express contractual duty to provide retirement *benefits* to pension

beneficiaries (see footnote 12, *supra*), we do not view the Pension Ordinances as expanding that contractual duty to voluntarily undertaken advice-giving to pension beneficiaries on the effects of pending legislation.

Municipalities commonly include language in their pension ordinances requiring supervision and oversight of the employees charged with handling plan logistics. Indeed, such ordinances, including those of the City, provide that trustees of retirement plans owe a fiduciary duty to the beneficiaries of the retirement system.¹⁴ Again, though, a judicial expansion of such general duties into express contractual obligations – as suggested by the plaintiffs, for which the City and the Pension Defendants must waive sovereign immunity – is a leap we are unprepared to take.

Under the auspices of ordinances requiring general supervision, municipal employees routinely provide advice to their colleagues and the public without meaning to waive sovereign immunity, even when the advice is mistaken. We view the sovereign immunity doctrine as designed to preclude liability for such conduct. See City of Dunedin v. Pirate’s Treasure, Inc., 255 So. 3d 902, 905 (Fla. 2d DCA 2018) (holding in the tort context that municipal sovereign immunity is not waived

¹⁴ See sections 40.193(c) and 40-243(c).

when a city employee allegedly misrepresents information in the city's development code).

III. Conclusion

The alleged poor advice given by the Pension Defendants' employees to the plaintiffs, and the Pension Defendants' declining to allow the plaintiffs to revoke their DROP elections made as a result of such advice, do not constitute a breach of any express contractual duty imposed on the Pension Defendants by the Pension Ordinances. The plaintiffs, therefore, have not stated causes of action for breach of contract for which the Pension Defendants have waived sovereign immunity. We reverse that portion of the trial court's June 22, 2018 order that determined, as a matter of law, that the Pension Defendants are not entitled to sovereign immunity. We remand for proceedings consistent with this opinion.

Reversed and remanded.