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

CASE NO. 2D19-3833
Lower Tribunal Case No.: 2017 CA 001181 NC

SIESTA KEY ASSOCIATION OF SARASOTA, INC.,
and DAVID N. PATTON,

Appellants,

vs.

CITY OF SARASOTA and
LIDO KEY RESIDENTS ASSOCIATION, INC.,

Appellees.

Appeal from a Final Order

REPLY BRIEF OF APPELLANTS

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INTRODUCTION

Appellants, the Siesta Key Association of Sarasota and David Patton (collectively referred to as "SKA"), file this Reply Brief in response to the Answer Brief of the City of Sarasota and Lido Key Residents Association, Inc. (collectively referred to as "Appellees"). Appellees' Answer Brief misconstrues the allegations in the Second Amended Complaint ("Complaint"), Florida Statutes, and the applicable pleading requirements and in doing so only confirms that the circuit court's order dismissing Count I of the Complaint should be reversed and the case remanded for judgment on the merits.

ARGUMENT

I. SECTION 403.412(2)(E), FLORIDA STATUTES, DOES NOT BAR SKA'S CAUSE OF ACTION

Appellees admit that the Lido Key JCP contains the following requirement: "Authorization from the Department does not relieve you from the responsibility of obtaining other permits (Federal, State or local) that may be required for the project." R. at 794. They further acknowledge that General Condition 3 of the Lido Key JCP warns the Permittees: "This permit does not eliminate the necessity to obtain any other applicable licenses or permits that may be required by federal, state, local or special district laws and regulations." R. at 795. Appellees argue–erroneously– that there are no other "local" permits or authorizations required for this Project. The Project, however, does require a permit from the Sarasota County Water and

Navigational Control Authority pursuant to section 54-653 of the Sarasota County Code (hereinafter "WNCA Permit").

a. The Lido Key JCP Does Not Bar SKA's Cause of Action

1. The Circuit Court's Interpretation of the Plain Language of Section 403.412(2)(e), Florida Statutes is in Error

The circuit court concluded: "relief under § 403.412, Fla. Stat. is barred because the City obtained a valid permit [Lido Key JCP] from the appropriate issuing agency [Department]." R. at 1172. In construing section 403.412(2)(e), Fla. Stat. the circuit court ignored the fact that multiple permits (state and local) may be required. Section 403.412(2)(e), Fla. Stat. only serves to exempt a governmental agency from suit under if that governmental agency is:

> acting or conducting operations pursuant to currently valid permit or certificate covering such operations, *issued by the appropriate governmental authorities or agencies*, and is complying with the requirements of said *permits or certificates*.

§ 403.412(2)(e), Fla. Stat. (emphasis added). SKA's cause of action is premised the City's failure to obtain a WNCA Permit from Sarasota County. Thus, the critical issue is whether a WNCA Permit is required for the Project. If it is, then section 403.412(2)(e), Fla. Stat. does not bar SKA's claim. Sarasota County is the "appropriate issuing authority" of a WNCA Permit and it is undisputed no WNCA

Permit has been applied for or issued to the City.[1] Accordingly, SKA's Complaint should not have been dismissed with prejudice.

2. The Project Requires a WNCA Permit

Appellees erroneously argue that the Project does not require a WNCA Permit, nor could it, because the County is without authority to regulate the Project. The plain language of the Sarasota County Code requires a permit:

> No work shall be performed having the effect of Altering any Jurisdictional Areas without first obtaining a [WNCA] permit from the Authority or Administrator, unless specifically exempted under the provisions of Section 54-653(4)(g).

§ 54-653(4)(a), Sarasota County Code. "Altering" is defined to include dredging. § 54-652. "Dredging" is defined to include "excavating, by any means, in Jurisdictional Areas." *Id.* And, "Jurisdictional Areas" are "all water bodies, watercourses, and waterways in the coastal areas of Sarasota County . . . ." *Id.* As explained in Appellants Initial Brief, the Project proposes to dredge portions of Big Sarasota Pass, which necessarily involves "altering" a "jurisdictional area" as those terms are defined. Int. Bf. at 2-4.

[1] SKA acknowledges that the Department's issuance of the Lido Key JCP precludes a section 403.412, Fla. Stat., cause of action for any alleged violation of Chapters 161, 253, or 373, Fla. Stat. But as noted throughout, SKA is not alleging City is or will be violating Chapters 161, 253, or 373, Fla. Stat., rather SKA is asserting the City has violated a local law/rule/regulation for the protection of the air, water, and other natural resources (i.e., section 54-653 of the Sarasota County Code).

Appellees' argument that even if section 54-653(4)(a), Sarasota County Code, applied, the City would qualify for an exemption under subsection (4)(g), is brazenly misleading. Section 54-653(4)(g), provides in relevant part:

> *Exemptions.* Any design change or alternate use of construction material **on the structures to be maintained** may cause the project to be nonexempt. The following **maintenance work** is hereby exempted from permitting requirements of this article, provided that the **structures to be maintained** were **constructed in accordance with a permit issued by the Authority**, or **were constructed before January 1, 1985**:
>
> . . .
>
> 9. Projects by municipal, state and federal government agencies performed as part of their normal official duties for the general public. . . .

(emphasis added).

In their Answer Brief, Appellees only quote subsubsection (9) and omit the prefatory language. When one reads the entire section relating to exemptions, it is clear the exemptions apply to maintenance of *structures* that were built pursuant to a County WNCA permit or built before January 1, 1985 without a permit. The proposed dredging project is not a *structure*, and it has not been previously constructed under a WNCA permit or before January 1, 1985. Moreover, dredging a channel that has never been dredged before cannot be considered "maintenance."

Finally, Appellees erroneously argue that the WNCA could never apply to the Project because it takes place entirely on sovereign submerged lands and is therefore within the sole jurisdiction of the Department. Appellees' argument is one of

preemption. They argue only a JCP Permit is required and once that permit is issued, they need no other local permits or authorizations.

This argument has been expressly rejected in *GLA & Associates v. City of Boca Raton*, 855 So. 2d 278, 282-83 (Fla. 4th DCA 2003), wherein it was held that Chapter 161, Fla. Stat., does not preempt local ordinances. Even the Department filed an amicus brief in that case affirmatively arguing that the City's ordinances are not preempted by Chapter 161, Fla. Stat. *Id.* at 283.

There is no indication in the statutes or rules that the Legislature intended to preempt the authority of local governments to regulate lands within their jurisdiction. *See Phantom of Clearwater, Inc. v. Pinellas Cty.*, 894 So. 2d 1011 (Fla. 2d DCA 2005), approved in *Phantom of Brevard, Inc. v. Brevard Cty.*, 3 So. 3d 309 (Fla. 2008) (explaining that counties in Florida are given broad authority to enact ordinances and preemption of local laws either requires an express statement from the Legislature or clear conflict with a statute).[2]

[2] To that end, the WNCA's authority to regulate submerged lands within the County is undisputed. *See* Chapter 57-1853, Special Acts 1957, Laws of Florida (creating the Sarasota County Water and Navigation Control Authority and granting it the authority to regulate state sovereign submerged lands within Sarasota County, outside of the City of Sarasota); *see also County of Sarasota v. Neville*, 158 So. 2d 533 (Fla. 2d DCA 1963) (acknowledging the authority of the Sarasota County Water and Navigation Control Authority to enforce the provisions of Chapter 253, Fla. Stat. relating to the alteration or extension of lands into navigable waters).

Recall that the Lido Key JCP expressly recognizes local permits may be required as General Condition 3 states: "This permit does not eliminate the necessity to obtain any other applicable licenses or permits that may be required by federal, state, local or special district laws and regulations." R. at 795. Like General Condition 3 in the Lido Key JCP, GLA's Department permit provided that it did not relieve GLA from any requirement to "obtain any applicable license or permits which may be required by federal, state, county, or *municipal law*." *GLA & Assc.*, 855 So. 2d at 283 (emphasis in original).

For these reasons, Appellees argument should be rejected.

b. The WNCA is a Law, Rule, or Regulation for the Protection of the Air, Water, and Other Natural Resources Pursuant to Section 403.412(2)(a), Florida Statutes

Appellees further argue that the Complaint should be dismissed for failure to allege that the WNCA is an "environmental" law, rule, or regulation under section 403.412(2)(a), Fla. Stat. for two reasons: 1) there is no allegation in the Complaint that the purpose of the WNCA is to protect the "environment"; and 2) Section 403.412, Fla. Stat. does not apply to local government or local government regulations. Appellees are wrong on both fronts.

First, Appellees mispresent section 403.412, Fla. Stat. That statue does not speak to "environmental" laws, rules or regulations, rather it states it applies to "laws, rules, and regulations for the protection of the air, water, and other natural

resources of the state." There can be no doubt Chapter 54 of the Sarasota County Code is designed to protect the air, water, and natural resources as the Chapter is entitled "Environmental and Natural Resources."

The Complaint raises a cause of action pursuant to section 403.412, Fla. Stat., and alleges the City's failure to obtain a WNCA permit as the basis for that cause of action. Clearly then, it can be inferred that SKA has alleged that the WNCA is a law, rule or regulation for the protection of the air, water, and other natural resources of the state as contemplated by section 403.412, Fla. Stat.[3]

Second, Appellees' arguments that section 403.412, Fla. Stat., only applies to state laws, rules, or regulations are baseless and an attempt to read language into the statute that does not exist. Appellees reliance on *Evans Rowing Club, LLC v. City of Jacksonville*, No. 1D19-1851 (Fla. 1st DCA June 18, 2020), is misplaced. The decision is a *per curiam* denial of a petition for Writ of Certiorari. The opinion cited is a concurring opinion written by one judge, and accordingly, has no precedential value. *See, e.g., Dep't of Legal Affairs v. Dist. Court of Appeal*, 434 So. 2d 310, 311 (Fla. 1983).

[3] "It is unnecessary to plead presumptions of law, inferences, or facts necessarily implied from other facts stated. A pleading that avers facts from which the law presumes another fact sufficiently pleads that other fact. Moreover, it is unnecessary to plead inferences of facts, necessarily implied from other facts stated, as to matters peculiarly within the knowledge of an adversary." 40 FLA JUR PLEADINGS § 24; *see Ferrell Jewelers of Tampa, Inc. v. S. Mill Creek Prod. Co.*, 205 So. 2d 657, 658 (Fla. 1967).

Additionally, the phrase relied on in *Evans*, from Article V, section 21, Fla. Const. is: "a *state* statute or rule." *Id.* at *2 (emphasis added). SKA agrees with Appellees that section 54-653(4)(a), Sarasota County Code is not a *state* statute or rule. Section 403.412, Fla. Stat., however, does not limit its application to only *state* statutes or rules. *See* § 403.412(a), Fla. Stat. ("[a]ny person, natural or corporate, or governmental agency or authority to enjoin such persons, agencies, or authorities from violating ***any*** laws, rules, or regulations for the protection of the air, water, and other natural resources of the state." (emphasis added)). For example, in *Save Our Bay, Inc. v. Hillsborough Cty. Pollution Control Com.*, 285 So. 2d 447, 448 (Fla. 2d DCA 1973), this Court reversed an order granting a motion to dismiss a complaint filed against the Hillsborough County Pollution Control Commission to enforce a pollution violation citation issued by the Commission for violation of County and state laws. *Id.* at 448; *see also Orange Cty. Audubon Soc. v. Hold*, 276 So. 2d 542 (Fla. 4th DCA 1973) (finding an environmental organization had standing to bring suit pursuant to section 403.412, Fla. Stat. against the Orange County Board of County Commissioners).

Similarly, Appellees' argument that the phrase "governmental agency or authority" within section 403.412(2)(a), Fla. Stat. excludes municipal governments is unconvincing. Not only does it defy logic to argue that a municipality is somehow not a "governmental agency or authority," section 403.412 has been applied to local

governments. *See Save Our Bay, Inc.*, 285 So. 2d at 447 (reversing an order granting a motion to dismiss a complaint filed against the Hillsborough County Pollution Control Commission to enforce a pollution violation citation issued by the Commission for violation of state and county laws).

II. DISMISSAL OF THE COMPLAINT WITH PREJUDICE IS OTHERWISE IMPROPER

a. The Tipsy Coachman Doctrine is Inapplicable to this Case

Appellees raise several arguments urging this Court to otherwise affirm the circuit court's dismissal of the Complaint, even if it was for the wrong reason—a tipsy coachman argument. *See, e.g.*, *Wagner v. Strickland*, 908 So. 2d 549, 551 n.1 (Fla. 1st DCA 2005) (explaining that the tipsy coachman rule "requires an appellate court to affirm the trial court's ruling 'if there is any basis which would support the judgment in the record.'" (quoting *Dade Cty. Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638, 644 (Fla. 1999))).

SKA notes that while these arguments were raised below, the circuit court based its dismissal of SKA's section 403.412, Fla. Stat. cause of action entirely on the issuance of the Lido Key JCP and did not address the other arguments. Therefore, this Court should not address these issues for the first time on appeal. *See Crowley Museum & Nature Ctr., Inc. v. Sw. Fla. Water Mgmt. Dist.*, 993 So. 2d 605 (Fla. 2d DCA 2008).

In *Crowley*, for example, this Court declined to address a statute of limitations argument raised in the appellee's motion to dismiss and argued before the circuit court, but not ruled upon below. *Id.* at 610 ("For this reason, we do not find it appropriate to reach this issue at this time"); *see also E.P. v. Hogreve*, 259 So. 3d 1007, 1012 n.3 (Fla. 5th DCA 2018) ("Inasmuch as the trial court declined to dismiss on these grounds, we decline to do so as well"); *One Call Prop. Servs. v. Sec. First Ins. Co.*, 165 So. 3d 749, 755-56 (Fla. 4th DCA 2015) ("The trial court should address these issues in the first instance"). For the same reason, this Court should decline to address the numerous additional arguments raised by Appellees in their Answer Brief. To the extent this Court is inclined to address the arguments, they are discussed in turn below.

b. Appellees' Alternate Arguments for Dismissal Are Unpersuasive

1. SKA Properly Pled a Cause of Action Pursuant to Section 403.412, Fla. Stat.

Appellees assert that the Complaint should be dismissed because SKA: 1) failed to meet the conditions precedent for bringing a cause of action under section 403.412(2)(c), Fla. Stat., because it did not file presuit notice with the County; and, 2) failed to allege section 54-653 of the Sarasota County Code is a law, rule, or regulation pertaining to the protection of the air or water was at issue.

First, as to Appellees' claims regarding conditions precedent, even if Appellees were correct, dismissal of the Complaint with prejudice would be

improper. Instead, the case should be abated by the circuit court to allow SKA to serve the Complaint on the appropriate party. *See Thomas v. Suwannee County*, 734 So. 2d 492, 498 (Fla. 1st DCA 1999) (concluding under a similar statutory provision that "failing to wait thirty days before filing in circuit court warrants abatement . . it does not justify dismissal with prejudice"). For this reason, the argument should be rejected. *See, e.g.*, *Reverse Mortg. Sols., Inc. v. Unknown Heirs*, 207 So. 3d 917, 922 (Fla. 1st DCA 2016) (declining to affirm on tipsy coachman argument where pleading deficiency could easily be corrected with amendment and was not a justification for dismissal with prejudice).

Even if it were proper to address this argument, Appellees' argument ignores a well-established pleading rule. "In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred." Fla. R. Civ. P. 1.120(c). In the Complaint, SKA went beyond this basic requirement, pleading the specific conditions precedent of section 403.412(2)(c), Fla. Stat. had been met. A denial of a condition precedent should be raised in the pleadings, not in a motion to dismiss where a denial of such a factual argument would be futile.

Second, to the extent Appellees contend that SKA failed to properly allege that section 54-653 of the Sarasota County Code is a law rule, or regulation, for the protection of the air, water, and other natural resources pursuant to section

403.412(2)(e), Fla. Stat., SKA refers this Court to Section I.b. above. SKA properly pled a cause of action pursuant to section 403.412, Fla. Stat. As such, Appellees' arguments should be rejected.

2. SKA Joined All Necessary Parties

Next, Appellees argue the Complaint should be dismissed with prejudice for failure to join indispensable parties. Again, however, even if SKA had failed to do so, dismissal with prejudice would be improper. Rather, the plain language of section 403.412, Fla. Stat. allows the court to "add as party defendant any governmental agency or authority charged with the duty of enforcing the applicable laws, rules, and regulations for the protection of the air, water, and other natural resources of the state." For this reason, the tipsy coachman doctrine cannot apply to this claim. *See, e.g., Reverse Mortg. Sols., Inc.*, 207 So. 3d at 922.

Even so, the Department, the U.S. Army Corps of Engineers ("Corps") and the County are not indispensable parties. "An indispensable party is one whose interest in the controversy makes it impossible to completely adjudicate the matter without affecting either that party's interest or the interest of another party in the action." *Fla. Dep't of Revenue v. Cummings*, 930 So. 2d 604, 607 (Fla. 2006). Appellees argue the Corps – a federal agency – is an indispensable party to the case simply because it is a co-applicant for the Lido Key JCP. However, at the same time, Appellees argue that the Corps, by way of federal supremacy, is not required

to get a Sarasota County permit in this case. Where, as here, a federal agency refuses to recognize a state court's jurisdiction, and thus protect its rights, that federal agency cannot be an indispensable party. *See State v. Manderville*, 512 So. 2d 326, 326 (Fla. 3d DCA 1987) (holding that federal secretary of labor was not an indispensable party where he removed contract dispute to federal court, successfully sought dismissal, and case was remanded to state court where indispensable party issue arose).

Appellees also claim that the Department is an indispensable party because it issued the Lido Key JCP. However, the Department expressly disclaimed all responsibility or interest in other required permits or approvals. *See* JCP General Condition 3, R. at 795. The applicant is responsible for obtaining all other approvals, such as approval by the WNCA pursuant to the Sarasota County Code. *Id.* The Department has no interest in this claim, and accordingly, the issues can be fully adjudicated without the Department's participation.

Appellees also claim that the County is an indispensable party to this action. The claim under 403.412, Fla. Stat., is being brought to enjoin the City from violating a provision of the Sarasota County Code. The County need not be a party for the circuit court to order the City to seek approval from the County. The injunctive relief requested can be granted without the County's involvement in the case, and therefore it is not an indispensable party.

3. *Federal Supremacy Does Not Require Dismissal*

Appellees next contend that the Complaint must be dismissed because the Project is a Corps Project and therefore local regulations are inapplicable. This argument fails because the Complaint does not allege that the Corps is required to get a permit. Rather, it alleges the City is required to get a permit and has failed to do so. What effect any hypothetical permit denial by the County may have on the Corps' ability to continue work on the Project is irrelevant.

4. This Controversy is Otherwise Ripe for Determination

Finally, Appellees claim the Complaint should be dismissed with prejudice because work has yet to begin on the Project.[4] This argument is improper. Appellees state that "the co-applicants have yet to begin any activity for the Project." However, it is impossible to verify the truth of this assertion without relying on facts outside of the four corners of the Complaint. For this reason, it is inappropriate to apply the tipsy coachman doctrine in this instance. *See Rivera v. Torfino Enters.*, 914 So. 2d 1087 (Fla. 4th DCA 2005) (declining to apply tipsy coachman doctrine at motion to dismiss stage where "argument requires going outside the four corners of the complaint.").

[4] SKA notes that U.S. Army Corps of Engineers has represented to the federal district court that it intended to begin work on this project on July 6, 2020. *See SOSS2, Inc. v. United States Army Corps of Engineers*, Case No. 8:19-cv-462 (M.D. Fla. July 6, 2020).

CONCLUSION

This Court should reverse the circuit court's Order dismissing Count I of the Second Amended Complaint for failure to state a claim pursuant to section 403.412, Fla. Stat., and remand the case for further proceedings.

Respectfully submitted this 21st day of July 2020, by:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief is presented in 14-point Times New Roman and complies with the font requirements of rule 9.210, Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent to the following counsel of record by electronic mail on this 21st day of July, 2020:

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