IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT
STATE OF FLORIDA

CASE NO. 2D16-3361

CITY OF ST. PETERSBURG,
Appellant/Defendant,

vs.

BRUCE WRIGHT,
Appellee/Cross-Appellant/Plaintiff.

ON APPEAL FROM THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT IN AND FOR PINELLAS COUNTY, FLORIDA,
L.T. No. 522013CA010801
The Honorable Circuit Judge Kathleen T. Hessinger

APPELLANT'S INITIAL BRIEF

OFFICE OF THE CITY ATTORNEY
FOR THE CITY OF ST. PETERSBURG

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PRELIMINARY STATEMENT

This Initial Brief is submitted on behalf of THE CITY OF ST. PETERSBURG, who is referred to herein as "City" or "Defendant." BRUCE WRIGHT is referred to as "Wright" or "Plaintiff." They are referred to jointly as the "Parties." The Record is cited as "R.____."

STATEMENT OF THE CASE AND FACTS

In May 2009, six homeless defendants brought an underlying action against the City in the U.S. District Court for the Middle District of Florida which challenged, *inter alia,* the constitutionality of St. Petersburg City Code § 20-30 (authorization to issue trespass warnings for public property). R. 11-24. Bruce Wright was not a Plaintiff in the 2009 lawsuit. On September 28, 2011, on appeal from a final judgment in favor of the City, the Eleventh Circuit ruled that plaintiffs had stated a claim for relief that § 20-30 was unconstitutional on its face and as applied in violation of the due process clause of the Fourteenth Amendment of the U.S. Constitution and in violation of the right to intrastate travel guaranteed by the Florida Constitution. *Catron v. City of St. Petersburg, 658 F.3d 1260 (11th Cir. 2011)* R. 99-120. .

On October 18, 2011, the City filed a Petition for Rehearing En Banc with the Eleventh Circuit, which was denied on November 29, 2011. R. 99-120. The

mandate issued on December 13, 2011, remanding the case to the U.S. District Court for further proceedings. R. 99-120.

On December 16, 2011, the City filed a Motion to Dismiss the Plaintiff's claims as they were moot due to the City amending § 20-30 of the City Code while the Petition for Rehearing En Banc was pending. In the Motion to Dismiss, it was made clear to the Federal Court that the amendments to § 20-30 were passed into law after approval by the City Council at two public hearings and mayoral approval. The Federal case was subsequently dismissed. R. 99-120.

The Complaint brought by Plaintiff in the current matter alleges violations of the state Sunshine Law under the Attorney-Client session of Fla. Stat. § 286.011(8) when the City Council met to approve the amendment to City Code § 20-30. R.11-24.

The St. Petersburg City Council first met on October 13, 2011 in an Attorney-Client session to discuss the status of the Federal case and a litigation strategy. R.99-120. The Agenda for the meeting listed Agenda Item E, "An Attorney-Client Session, pursuant to Florida Statutes § 286.011(8), in the case of *Anthony Catron et al v. City of St. Petersburg, Case No. 8:09CV923-T-17EAJ*." R. 27-31. The session was announced on the October 6, 2011 agenda and at the City Council meeting on October 6th. R. 99-120. It was specifically stated the

discussion at the attorney-client session would center on the meaning of the opinion from the Eleventh Circuit Court of Appeals. R. 99-120.

During the Attorney-Client session at the City Council meeting of October 13, 2011, the subject matter discussed included the status of the *Catron* litigation. R. 99-120. Among the discussions was Assistant City Attorney Joseph Patner explaining that if City Code § 20-30 was amended to include appeal provisions, it would render the District Court case moot. R. 99-120. If this were the case, the Plaintiff's attorneys would not be the prevailing attorneys and therefore not entitled to attorney's fees. R. 99-120. It was explained by City Attorney John Wolfe that session was thereby limited to "litigation expenses" as opposed to "settlement." R. 99-120. Discussions were had by the City Council during the closed session regarding this issue. R. 99-120.

Once out of the Attorney-Client session, the Council approved the amended ordinance. R. 99-120.

Newspaper notice was published in the St. Petersburg Times on October 23, 2011, 10 days prior to the second meeting, as is required by state law. R. 197.

A second City Council meeting took place on November 3, 2011. The meeting had been noticed via the Agenda. R. 99-120. It was listed as Item No. F (Public Hearings): "Ordinance 2-H creating a new Section 20-30(i); providing for appeals to the issuance of trespass warnings in certain situations; providing for

hearing masters and procedures for appeals; clarifying and formalizing the process for an appeal of a trespass warning; and amending Section 20-30(e) to provide that trespass warnings shall identify the right to an appeal of a trespass warning." R. 99-120.

At the November 13, 2011 meeting, Assistant City Attorney Mark Winn explained the idea behind the amendment to the ordinance. R. 99-120. There was one person at the meeting who wished to make a public comment. R. 99-120. After the comment related to cost of implementation, the Council the unanimously approved the amendment. R. 99-120.

On November 26, 2013, Plaintiff filed a lawsuit against the City alleging a violation of Florida's Government in the Sunshine Law § 286.011 Fla. Stat. (2012), and Art. I, § 24(b), Florida Constitution. R. 11-24. Plaintiff also alleged a violation of procedures for adoption of City ordinances, § 166.041, Fla. Stat. (2012). R. 11-24.

A summary judgment hearing was held on June 8, 2016 in front of County Court Judge Kathleen T. Hessinger. Judge Hessinger ruled the City Attorneys and City Council stayed within the parameters of § 286.011(8), Fla. Stat. when discussing the strategy of dealing with litigation expenditures. R. 160-165.

However, the Judge ruled in the Plaintiff's favor regarding the allegation that the City Council should not have voted on the amendment when it moved out

of the private attorney-client session and into the public meeting. R. 160-165. The Court stated it was incorrect to have approved the amendment and violated § 286.011(1) and § 166.041(3)(a), Fla. Stat. R. 160-165.

The City moved for a rehearing on the Court's decision. R. 187-189. A hearing was held on July 25, 2016. Due to the Motion for Rehearing being filed more than 15 days after the entry of the Final Summary Judgment, the Court was unable to address the merits of the argument. R. 160-165. However, Judge Hessinger had reviewed the Motion for Rehearing and having heard argument stated, "So I may, in fact, have erred on it, and that is why I set it for hearing today……..So it may have to be corrected on appeal." R. 160-165.

SUMMARY OF THE ARGUMENT

The trial court incorrectly ruled the St. Petersburg City Council violated § 286.011(1) and § 166.041(3)(a), Fla. Stat. when it voted on the amendment to § 20-30 of the City Code for not having properly noticed the reading of the amendment. In fact, Judge Hessinger realized she had ruled incorrectly at the Rehearing on the Summary Judgment when she stated, "So I may, in fact, have erred on it, and that is why I set it for hearing today……..So it may have to be corrected on appeal."

STANDARD OF REVIEW

A circuit court may grant summary judgment if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The movant bears the initial responsibility from demonstrating the absence of a material issue. After this burden is met, it shifts to the non-moving party to show evidence to support its claim. *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 538 (1986).

ARGUMENT

As part of Judge Hessinger's ruling, the Court found the St. Petersburg City Council violated Florida's Government in Sunshine Law by violating the notice provisions of § 286.011(1), Fla. Stat. (2011) and § 166.041(3)(a), Fla. Stat. (2011).

Florida Statute § 166.041(3)(a) states "….a proposed ordinance may be read by title, or in full, on at least 2 separate days and shall at least 10 days prior to adoption be noticed once in a newspaper of general circulation in the municipality. The notice of the proposed enactment shall state the date, time and place of the meeting; the title or titles of proposed ordinances; and the place or places within the municipality where such proposed ordinances may be inspected by the public.

The notice shall advise that interested parties may appear at the meeting and be heard with respect to the proposed ordinance."

In the current case, there was no requirement that the first reading on October 13, 2011 be noticed in advance. Fla. Stat. § 286.011(1) states "…..no resolution, rule, or formal action shall be considered binding except as taken or made at such meeting. The board or commission must provide reasonable notice of all such meetings." The October 13, 2011 Council meeting had the ordinance read aloud once the meeting went from the attorney-client session into the public meeting. This is sufficient to meet the requirement of one of the two readings. The reading of the amendment to local ordinance §§ 20-30 was not binding on October 13, 2011. It was simply the first reading. In order for the Council's decision to become binding, there is the need for the newspaper publication of a public reading, which is then followed by the actual meeting where the public reading occurs. The requirement of the newspaper refers to the "date, time, and place of the meeting." This refers to one meeting, not meetings. The newspaper notice in this matter referred to the second of the two meetings, on November 3, 2011. The newspaper notice was published in the St. Petersburg Times on October 23, 2011, 10 days prior to the second meeting, as is required by state law. There is no requirement under the law for notices in the newspaper for two different

meetings. The notice in the St. Petersburg Times on October 23, 2011 was sufficient to meet the requirements of the law.

The November 3, 2011 City Council meeting was properly noticed to the public. It was at this second meeting where the ordinance was read for a second time. Public comment was allowed, and in fact a member of the public did comment on the proposed ordinance.

It appears the Trial Court misapplied the circumstances of the first council meeting on October 13, 2011. The law requires two readings of the ordinance and one publication. Publication occurred before the properly noticed second meeting. It was only at the second meeting on November 3, 2011 that the amendment to the ordinance became binding.

The actions of the St. Petersburg City Council with respect to the amendment of Ordinance §§ 20-30 were in full compliance with all Florida law, including § 286.011(1), Fla. Stat. (2011) and § 166.041(3)(a), Fla. Stat. (2011).

The Trial Court was aware the City's argument was correct when the Judge stated, "So I may, in fact, have erred on it, and that is why I set it for hearing today……..So it may have to be corrected on appeal."

CONCLUSION

The trial court erred when it granted summary judgment as it related to the notice provisions under § 286.011(1), Fla. Stat. (2011) and § 166.041(3)(a), Fla. Stat. (2011).

The first City Council meeting of October 13, 2011, was properly noticed as an attorney-client session, and the amendment was then read as the meeting went to open session.

The second meeting of November 3, 2011 was also properly noticed via the agenda and also through publication in the St. Petersburg Times.

The trial court was aware of the error when it stated, "so I may in fact, have erred on it, and that is why I set it for hearing today ….. So it may have to be corrected on appeal."

Justice and Florida law require that the summary judgment granted by the trial court be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via e-Filing/E-Portal (www.myflcourtaccess.com) to attorneys of record; Jodi Siegel, Southern Legal Counsel, Inc., 1229 NW 12th Avenue, Gainesville, FL 32601; and Alice K. Nelson, Nelson Law Group, 442 W. Kennedy Boulevard, Suite 208, Tampa, FL 33601, this 23rd day of November, 2016.

/s/ Kenneth W. MacCollom
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY, pursuant to Rule 9.210(a)(2), Fla. R. App. P., that this Initial Brief of Appellant is prepared and filed using Times New Roman 14-point font as required.

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