

**IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR FLAGLER COUNTY, FLORIDA**

CITY OF PALM COAST, FLORIDA,
a Florida Municipal Corporation,

Plaintiff,

v.

Case No. 2016-CA-000639

**THE GROUP GOLF OF PALM
COAST, LLC,** a Florida Limited
Liability Company,

Defendant.

CITY OF PALM COAST'S MOTION TO STRIKE AFFIRMATIVE DEFENSES

Plaintiff, CITY OF PALM COAST, FLORIDA ("City"), pursuant to Rule 1.140(b) & (f) of the Florida Rules of Civil Procedure, hereby moves to strike affirmative defenses of Defendant, THE GROUP GOLF OF PALM COAST, LLC ("Group Golf" or "Defendant"). Group Golf raised four defenses in its Answer deemed filed by the Court on March 2, 2017. For the reasons set forth below, the City moves for an order striking the specified defenses with prejudice. Group Golf cannot establish that it has a meritorious defense to the City's foreclosure action. This Court lacks jurisdiction to review the underlying code enforcement orders which form the basis of the City's foreclosure action because Defendant failed to appeal them. As grounds therefor, the City states:

1. The City's Complaint for Lien Foreclosure seeks to foreclose a utility lien (Count I) and a code enforcement lien (Count II).

2. On March 2, 2017, the Court deemed Group Golf's proposed answer and defenses as filed. That answer contains the following four defenses:

a. The City's code enforcement lien is unconstitutional as applied;

- b. Incorporate allegations of separate lawsuit; Case No. 2016 CA 000126¹;
- c. Lack of Notice;
- d. City's actions are *ultra vires*.

3. Although asserted as separate defenses, Group Golf collectively challenges the actions of the City's code enforcement board as applied to its property with duplicative claims of unreasonable and undisclosed code enforcement standards, selective enforcement of code violations, and lack of notice to Group Golf as the real property owner. Group Golf seeks to avoid foreclosure of the code lien by alleging that the lien is "invalid, and the method and practices [] used to assess the same did not afford the Defendant either procedural or substantive due process and are unconstitutional as applied." *Answer and Affirmative Defenses* at 7.

4. Florida Statutes, Chapter 162, governs municipal code enforcement matters. Chapter 162 authorizes the enforcement process, addresses the conduct of code enforcement hearings, and authorizes the imposition of fines and liens on real property. All testimony before a code enforcement board is under oath and recorded. *Fla. Stat.* §162.07(3).

5. During the proceedings, a code enforcement board is required to "take testimony from the code inspector and alleged violator." *Id.* "Formal rules of evidence shall not apply, but fundamental due process shall be observed and shall govern the proceedings. *Id.* At the conclusion

¹ In its Second Affirmative Defense, Group Golf incorporates the entirety of its Complaint filed in a separate action, Case No. 2016-CA-000126. That Complaint includes causes of action for violation of due process and equal protection rights, along with requested injunctive relief, involving a host of issues unrelated to the lien sought to be foreclosed. Defendant's incorporation of an entire complaint as an affirmative defense is improper. First, the allegations, to the extent they relate to the lien at issue, are duplicative of the other defenses raised, and therefore are subject to dismissal for failure to exhaust administrative remedies. Secondly, to the extent Group Golf seeks to assert a cause of action against the City, it should file a counterclaim consistent with the Florida Rules of Civil Procedure.

of the hearing, the board is required to issue an order affording the proper relief consistent with its powers. *Fla. Stat.* §162.07(4).

6. Florida Statutes Section 162.11 requires an aggrieved party, including the city, to appeal a final order of the code enforcement to the circuit court within 30 days. The Section specifically states:

An aggrieved party, including the local governing body, may appeal a final administrative order of an enforcement board to the circuit court. Such an appeal shall not be a hearing de novo but shall be limited to the appellate review of the record created before the enforcement board. An appeal shall be filed within 30 days of the execution of the order to be appealed.

On appeal, the circuit court shall consider whether (1) procedural due process was afforded; (2) the essential requirements of law were observed; and (3) the decision was supported by competent substantial evidence. *City of Deerfield Beach v. Valliant*, 419 So.2d 624, 625 (Fla. 1982). *See also, City of Deland v. Benline Process Color Co.*, 493 So.2d 26, 28 (Fla. 5th DCA 1986).

7. The failure to timely appeal an order of the code enforcement board bars circuit court jurisdiction to review the board's order. *Kirby v. City of Archer*, 790 So.2d 1214 (Fla. 1st DCA 2001).

8. Group Golf never appealed any order of the code enforcement board. Per Composite Exhibit "C" attached to the Complaint, the Violation Order was entered August 8, 2015, and the Order Imposing Fine/Lien was entered November 5, 2015. Both orders expressly notified Defendant that it had the right to appeal each order to this Court within thirty (30) days. Defendant does not allege in its answer that it appealed any of the code enforcement board orders.

9. In *Kirby*, the court held that a property owner is **precluded** from challenging a lien foreclosure action based on alleged errors with the code enforcement proceedings. The City of Archer's code enforcement board found Kirby, the property owner, in violation of city codes

prohibiting junk and abandoned vehicles on real property. Kirby did not appeal the final order of the code board and the city subsequently filed a foreclosure action to foreclose the lien. In the foreclosure action, Kirby opposed the city's motion for summary judgment on the grounds that the vehicles were operable and, therefore, did not violate city code and that the city's code had been unconstitutionally applied to him. Kirby maintained that summary judgment was improper because disputed issues of fact existed as to the findings of the code board. The trial court entered summary judgment for the city which was affirmed on appeal.

10. The First District Court of Appeal determined that:

Kirby makes his arguments too late. If he contested the facts raised by the Code Enforcement Board, he was obligated to present his evidence to the Board at that time. If he then disputed the final order of the Board, his remedy was to file an appeal in the circuit court pursuant to section 162.11, Florida Statutes (1997). Having failed to challenge the Board's action, Kirby cannot raise factual disputes with the Board's findings in the foreclosure action. "Matters determined in an order which has become final without appeal are not later subject to appellate review. . . ."

Id. (citing *City of Plantation v. Vermut*, 583 So.2d 393, 394 (Fla. 4th DCA 1991)). *See also*, *City of Fort Lauderdale v. Bamman*, 519 So.2d 37, 38 (Fla. 4th DCA 1987)(the failure to timely appeal the final order of the Code Enforcement Board renders the order final in all respects).

11. The *Kirby* Court further concluded that the property owner's "as applied constitutional challenge [could] not be raised for the first time in the foreclosure action." *Kirby*, 790 So.2d at 1215. Pursuant to Section 162.11, constitutional challenges to a final order of a code enforcement board must be raised on appeal to the circuit court. Failure to do so results in a waiver.

Id. (citing *Holiday Isle Resort & Marina Assoc. v. Monroe Cty*, 582 So.2d 721-722 (Fla. 3^d DCA 1991); *Sanford v. Rubin*, 237 So.2d 134, 137 (Fla. 1970)). *See also*, *Sarnoff v. Florida Dept. of Highway Safety & Motor Vehicles*, 825 So.2d 351, 354 (Fla. 2002).

12. Group Golf's defenses in this case challenge the City's code board actions as applied to their property. The Florida Supreme Court, in *Key Haven Associated Enterprises, Inc. v. Bd of Trustees of Internal Imp. Trust Fund*, 427 So.2d 153, 158 (Fla. 1982) determined that where an as-applied challenge to a rule or ordinance is raised, a party must exhaust administrative remedies:

The final category of constitutional challenge is the claim that an agency has applied a facially constitutional statute or rule in such a way that the aggrieved party's constitutional rights have been violated. This type of challenge would involve the assertion that an agency's implementing action was improper because, for example, the agency denied the party the rights to due process or equal protection. A suit in the circuit court requesting that court to declare an agency's action improper because of such a constitutional deficiency in the administrative process should not be allowed. As well articulated by Judge Smith in the instant case, administrative remedies must be exhausted to assure that the responsible agency "has had a full opportunity to reach a sensitive, mature, and considered decision upon a complete record appropriate to the issue."

(citation omitted).

13. Because Defendant failed to appeal the code enforcement board orders, Defendant waived the right to assert its as applied constitutional defenses. This Court lacks jurisdiction to address the defenses. Therefore, they should be stricken with prejudice since Defendant is barred, as a matter of law, from challenging the code enforcement lien foreclosure based on the defenses asserted for the first time in this case.

WHEREFORE, for the reasons set forth herein, Plaintiff, CITY OF PALM COAST, FLORIDA, respectfully requests that Defendant's March 2, 2017 defenses be stricken, with prejudice, as well as any and all further relief this Court deems just and proper.

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that the original of the foregoing has been filed with the Clerk of the Circuit Court, Flagler County, Florida, through the E-Portal filing system and a copy was served by email on: Michael R. Yokan, Esq., 2720 Park Street, Suite 213, Jacksonville, Florida 32205, mike.yokan@gmail.com, and Christopher W. Wickersham, Jr., Esquire, The Whiteway Building, Suite 205, 2720 Park Street, Jacksonville, Florida 32205, pleadings@chriswickersham.com, this 22st day of March, 2017.

/s/ Vivian P. Cocotas, Esquire
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