

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

CAPTAIN'S BAIT, TACKLE & BBQ, LLC,  
a Florida limited liability company,

Case No. 2019-CA-000381

Plaintiff / Counter-Defendant,

v.

FLAGLER COUNTY, a political subdivision  
of the State of Florida,

Defendant / Counter-Plaintiff.

\_\_\_\_\_ /

**DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

Defendant Flagler County ("County"), pursuant to Florida Rule of Civil Procedure 1.510, respectfully moves for summary judgment as to all claims plaintiff Captain's Bait, Tackle & BBQ, LLC's ("Captain's BBQ") asserts against the County.

**1. Introduction**

Captain's BBQ claims the County has breached an "Amended and Restated Captain's Bait, Tackle & BBQ Lease at Bings Landing" ("Amended/Restated Lease") between it and the County, executed on November 19, 2018. In its Complaint, Captain's BBQ asserts breach of contract, breach of implied covenant of good faith and fair dealing, and specific performance claims (Counts I, II, and IV), and seeks a declaratory judgment finding the Amended/Restated Lease remains valid

and enforceable (Count III). As discussed below, summary judgment is due for the County as to all claims.

## **2. Facts**

This matter relates to property located at 5862 North Oceanshore Boulevard in unincorporated Flagler County, just north of Palm Coast, known as Bing's Landing. In 1989, the County purchased the 7.45-acre property using environmentally sensitive lands program funds. Ex. 1, Warranty Deed, 10/4/89.<sup>1</sup> At the time, the property was a run-down fish camp with a bait shop/shack and trailer park, originally constructed in the 1950s. The property is located on State Road A1A, along the Mantanzas River. In 2001, the Florida Department of Transportation declared this area a "Scenic Highway." Ex. 2, Ord. 2001-26, Flagler Cty., 12/17/01. At issue in this action is the old fish camp's main building, which Captain's BBQ has leased from the County since 2011 to operate a barbeque restaurant. The Mala Compra Plantation Archeological Site is located on the property, about 200 feet north of the building.<sup>2</sup> In 2004, the site was added to the National Register of Historic Places.

---

<sup>1</sup> References to exhibits refer to the summary judgment evidence filed with the County's Notice of Filing, dated August 13, 2020.

<sup>2</sup> See <https://www.visitflorida.com/en-us/things-to-do/arts-history/mala-compra-archeological-site-in-palm-coast-fl.html> (last visited Aug. 13, 2020); [https://en.wikipedia.org/wiki/Mala\\_Compra\\_Plantation\\_Archeological\\_Site](https://en.wikipedia.org/wiki/Mala_Compra_Plantation_Archeological_Site) (last visited Aug. 13, 2020).

On August 15, 2011, the Board of County Commissioners (“Board”) approved a “Lease Agreement Between Flagler County, Florida and Captain’s Bait, Tackle & BBQ, LLC.” Ex. 3, Lease Agreement. In 2015 and 2016, the County and Captain’s BBQ executed amendments to the lease. Ex. 4, 2015 amendment; Ex. 5, 2016 amendment. Through the original lease and the amendments (collectively, the “2011 Lease”), the County leases the building at Bing’s Landing to Captain’s BBQ. The 2011 Lease expires in 2021, and Captain’s BBQ has an option to extend the lease by five years. Ex. 4, p. 1-2.

On November 19, 2018, former County Administrator Craig Coffey presented the Amended/Restated Lease to the Board for consideration. Ex. 6, Bd. mtg. agenda (revised), 11/19/18, p. 3, item 7-k; Ex. 7, Bd. mtg. minutes, 11/19/18; Ex. 8, Amended/Restated Lease.<sup>3</sup> He placed this item on the agenda as a “consent” item. Ex. 6, p. 3, item 7-k. The Amended/Restated Lease would, eventually, replace the 2011 Lease. Ex. 8, p. 19, § 31. Among other changes, the Amended/Restated Lease: allows the construction of a new building, i.e., “the New Location” as referred to in the Amended/Restated Lease, with a larger footprint than the original and current building and which would be located closer to the Mala Compra site; extends the lease term; and allows increased seating capacity in the New Location with

---

<sup>3</sup> Coffey resigned in early January 2019.

additional parking. After Board discussion and considerable public comment, the Board voted 3-to-2 to approve the Amended/Restated Lease. Ex. 7, p. 27-31.<sup>4</sup> The November 19, 2018 meeting was the only meeting during which the Board considered the Amended/Restated Lease before its approval.

As discussed below, the County did not engage in the “highest and best bidder” process required under section 125.35, Fla. Stat. (“County authorized to sell real and personal property and to lease real property”) before considering and approving the Amended/Restated Lease. Ex. 9, Durrance aff.

Under the Amended/Restated Lease’s terms, the 2011 Lease remains in effect until Captain’s BBQ constructs and occupies the New Location:

Lessee presently leases the Original Location from Lessor as described in the Lease Agreement. Lessor shall continue to lease the Original Location to Lessee until the design, permitting and construction of the New Location is completed. The Lessor agrees to lease the New Location, as depicted in Exhibit “A”, to the Lessee after the New Location is designed, permitted and constructed. Lessee shall be permitted to use the Original Location for all uses allowed in the Lease Agreement until the New Location is ready for occupancy and occupied by the Lessee.

Ex. 8, p. 2-3, § 2 (“Property”).

This Amended Lease Agreement supersedes all prior agreements, if any, between the parties regarding the leasing of the Leased Premises

---

<sup>4</sup> Commissioner McLaughlin voted to approve the Amended/Restated Lease. Joe Mullins defeated McLaughlin in the August 28, 2018 primary election, and won the November 6, 2018 general election. The November 19, 2018 meeting was McLaughlin’s last as a commissioner. Mullins was sworn in on November 20, 2018.

and, as of the date of this Lease, those prior agreements shall be of no force or effect. Notwithstanding the foregoing, the terms of the Lease Agreement shall remain valid and binding on the parties with regard to the Original Location for as long as the Lessee occupies the Original Location. Upon the date that the Lessee occupies and commences its business operations from the New Location the Lease Agreement will terminate and be of no further force and effect and the terms of the Amended Lease Agreement shall control all of the rights and obligations of the Lessor and the Lessee with regard to the New Location and the Lessee's operations thereon. In the event there is a conflict between the Lease Agreement and this Amended Lease Agreement with regard to the Lessee's use of the Original Location then the Lease Agreement shall control until the Lessee relocates its business operations to the New Location and the Lease Agreement terminates, as provided for above.

Ex. 8, p. 19, § 31 (“Effect on Prior Agreements”).

The Amended/Restated Lease provides that Captain's BBQ must obtain all permits for, and commence construction of, the New Location by November 19, 2019, and complete construction by November 19, 2020. *Id.*, p. 4, § 4.b. The onus is on Captain's BBQ to seek and acquire any necessary permits, and the Amended/Restated Lease does not waive any permitting requirements, nor guarantee the issuance of any permits from the County. *Id.*, p. 2-4.<sup>5</sup> If Captain's BBQ fails to meet the above deadlines, the Amended/Restated Lease is deemed to be in default, and the County may terminate it and pursue specified default remedies. *Id.*, p. 15, §

---

<sup>5</sup> Captain's BBQ does not allege that since November 19, 2018, it has sought any approvals or permits as may be required to develop the New Location, whether from the County, or any other local, state (e.g., Florida Division of Historical Resources), or federal authority.

24.B; p. 16-17, § 25. Before the New Location is constructed, the County has no affirmative performance requirements or obligations under the Amended/Restated Lease. But, once the New Location is constructed, the County must undertake various “Improvement Requirements/Obligations.” *Id.*, p. 5-7, § 5.

### **3. Summary of argument**

Captain’s BBQ claims the Amended/Restated Lease is valid and enforceable and the County has unilaterally rescinded it. At most, during meetings and workshops after the Amended/Restated Lease was executed, the Board engaged in reconsideration of issues and concerns as to the Amended/Restated Lease. But, there has been no vote whereby the Board has purported to rescind the Amended/Restated Lease, and the County has not communicated any supposed rescission to Captain’s BBQ. Captain’s BBQ does not offer any specific allegations in its Complaint to the contrary.<sup>6</sup>

Regardless, the Amended/Restated Lease, as proposed by the former County Administrator and approved by the Board as constituted before November 20, 2018,

---

<sup>6</sup> Captain’s BBQ’s inaccurate allegations as to the County “rescinding” the Amended/Restated Lease, may be the result of a statement in the December 3, 2018 Board meeting minutes which indicates the Board voted to “rescind” the Amended/Restated Lease. As is apparent from the meeting video, the Board actually voted to “reconsider” the Amended/Restated Lease. *See* video of 12/3/18 mtg., <https://www.youtube.com/watch?v=LzUdkjzyGXE>, at 01:25:20, 01:37:56 (last visited Aug. 13, 2020). The Court may take judicial notice of the video of the

is in fact an illegal and void contract, as it was not considered and approved through the “highest and best bidder” process under section 125.35, Fla. Stat. As the Amended/Restated Lease was illegal and void from its inception, the County cannot be deemed to have rescinded or breached it.

Even if one assumes the Amended/Restated Lease is valid and enforceable, the County has not breached it, namely as the time for the County’s performance under the Amended/Restated Lease has not occurred. Captain’s BBQ presents hypothetical claims which are premature and not ripe for judicial consideration.

#### **4. Summary judgment standard**

“Summary judgment is designed to bring the case to final resolution in an expedient fashion, if appropriate.” *State Farm Mut. Auto. Ins. Co. v. Figler Family Chiropractic, P.A.*, 189 So. 3d 970, 974 (Fla. 4th DCA 2016). The party seeking summary judgment must demonstrate “there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fla. R. Civ. P. 1.510(c). Summary judgment may be granted where “the facts are so clear, crystallized, and undisputed that only questions of law remain.” *Feagle v. Purvis*,

---

December 3, 2018 meeting. *See* § 90.202, Fla. Stat.; *Miami-Dade Cty. Bd. of Cty. Comm’rs v. An Accountable Miami-Dade*, 208 So. 3d 724, 728 n. 4 (Fla. 3d DCA 2016) (“This Court takes judicial notice of the video of the May 17, 2016 Board meeting”). The County’s subsequent activities which examined further the Amended/Restated Lease, were taken pursuant to the authority the Board granted through this vote to “reconsider” the Amended/Restated Lease.

891 So. 2d 1096, 1098 (Fla. 5th DCA 2004) (citation omitted). “Once the moving party meets its burden, then the party opposing entry of a summary judgment must prove the existence of genuine triable issues.” *First N. Am. Nat. Bank v. Hummel*, 825 So. 2d 502, 503 (Fla. 2d DCA 2002) (citation omitted).

**5. The Amended/Restated Lease is not a valid, enforceable contract, and thus Captain’s BBQ’s claims fail**

“The elements of a breach of contract action are: (1) a valid contract; (2) a material breach; and (3) damages.” *Abbott Labs., Inc. v. Gen. Elec. Capital*, 765 So. 2d 737, 740 (Fla. 5th DCA 2000) (citations omitted).<sup>7</sup> Each of Captain’s BBQ’s claims is based on a fundamental claim that the County has rescinded or breached the Amended/Restated Lease. However, the County cannot be deemed to have rescinded or breached the Amended/Restated Lease, as it was and is not a valid, enforceable contract.

---

<sup>7</sup> A claim for breach of the implied covenant of good faith and fair dealing likewise requires an underlying valid contract and a breach. *See JF & LN, LLC v. Royal Oldsmobile-GMC Trucks Co.*, 292 So. 3d 500, 508 (Fla. 2d DCA 2020) (“...the implied covenant cannot be utilized to create a breach where there has been no breach of an express term of the contract... The duty... does not exist until a plaintiff can establish a term of the contract the other party was obligated to perform and did not.”) (citation, internal quotation marks, and brackets omitted). Specific performance claims also require a valid contract and non-performance, i.e., a breach. *See Free v. Free*, 936 So. 2d 699, 702 (Fla. 5th DCA 2006) (“The relief requested in a suit for specific performance may be granted if it is first established that the contract is valid and enforceable.”) (citation omitted).



Section 125.35, Fla. Stat., requires that a county follow a “highest and best bidder” process when leasing property:

- (a) The board of county commissioners is expressly authorized to sell and convey any real or personal property, and to lease real property, belonging to the county, whenever the board determines that it is to the best interest of the county to do so, to the highest and best bidder for the particular use the board deems to be the highest and best, for such length of term and such conditions as the governing body may in its discretion determine.
- (b) Notwithstanding paragraph (a), under terms and conditions negotiated by the board, the board of county commissioners may:
  - 1. Negotiate the lease of an airport or seaport facility;
  - 2. Modify or extend an existing lease of real property for an additional term not to exceed 25 years, where the improved value of the lease has an appraised value in excess of \$20 million; or
  - 3. Lease a professional sports franchise facility...
- (c) No sale of any real property shall be made unless notice thereof is published...

§ 125.35(1), Fla. Stat.

“The statute has been construed to mean that a county commission is not authorized to approve a lease that was not made pursuant to competitive bidding procedures.” *Outdoor Media of Pensacola, Inc. v. Santa Rosa Cty.*, 554 So. 2d 613, 615 (Fla. 1st DCA 1989) (citations omitted); *Matheson v. Miami-Dade Cty.*, 258 So. 3d 516, 525 (Fla. 3d DCA 2018) (“Subsection (1)(a) authorizes a county to sell its

land through the competitive bidding process. Subsection (1)(b) carves out some narrow exceptions for sales that do not have to be competitively bid. And subsection (1)(c) sets out the process a county must use to competitively bid its real property...”); Op. Att’y Gen. Fla. 88-34 (1988) (“As concluded above, s. 125.35, F.S., has been determined to require competitive bidding for the sale or lease of real property.”).

The 2011 Lease expires in 2021 (absent an extension at Captain’s BBQ’s option). Any modification or extension of that lease, or any “new” lease that might follow it, must be considered and approved in compliance with section 125.35(1).

If the Amended/Restated Lease is viewed as modifying or extending the 2011 Lease, then such modification or extension could be implemented, without going through a bidding process, only if “the improved value of the lease has an appraised value in excess of \$20 million.” *See* § 125.35(1)(b)2. The Amended/Restated Lease calls for \$1,000 monthly rent payments, with modest increases over time. Ex. 8, p. 8, § 8 (“Rent”). The Amended/Restated Lease’s total value, over its life, does not approach \$20 million.<sup>8</sup>

---

<sup>8</sup> Even if the value was over \$20 million, section 125.35(1)(b)2. still would not apply as the Amended/Restated Lease contemplates a term which exceeds 25 years. Ex. 8, p. 7-8, § 7 (“Term”).

If the Amended/Restated Lease is viewed as a “new” lease, then the County was required to comply with section 125.35(1)(a). The County did not engage in any bidding process before the Amended/Restated Lease was executed. Ex. 9, Durrance aff., ¶ 6. Thus, the Amended/Restated Lease violates section 125.35. *See Rolling Oaks Homeowner’s Ass’n, Inc. v. Dade Cty.*, 492 So. 2d 686, 689 (Fla. 3d DCA 1986) (finding a complaint which alleged a county commission illegally authorized a lease of property that was not necessarily made to the highest and best bidder pursuant to section 125.35, stated a valid cause of action).

It is well established that a “contract which violates a provision of the constitution or a statute is void and illegal and, will not be enforced in our courts.” *De Lage Landen Fin. Servs., Inc. v. Cricket’s Termite Control Inc.*, 942 So. 2d 1001, 1003 (Fla. 5th DCA 2006) (quoting *Harris v. Gonzalez*, 789 So. 2d 405, 409 (Fla. 4th DCA 2001)); *Local No. 234 v. Henley & Beckwith*, 66 So. 2d 818, 821 (Fla. 1953) (“an agreement that is violative of a provision of... a valid statute... is illegal and void”); *Wechsler v. Novak*, 26 So. 2d 884, 887 (Fla. 1946) (“The general right to contract is subject to the limitation that the agreement must not violate the Federal or State Constitutions or state statutes...”); *Gables Ins. Recovery, Inc. v. Citizens Prop. Ins. Corp.*, 261 So. 3d 613, 624 (Fla. 3d DCA 2018) (“We have consistently applied this rule to invalidate contracts that violate the law.”). The Amended/Restated Lease is void and illegal, and unenforceable, as its approval

violated section 125.35(1), and it would allow County property to be leased without compliance with the statutorily-required competitive bidding process. As there was and is no valid contract on which any of the claims may be based, summary judgment is due for the County as to all of Captain's BBQ's claims. *See Abbott Labs.*, 765 So. 2d at 740 (requiring a showing of "a valid contract" to support breach of contract claims).

**6. Even if the Amended/Restated Lease is valid and enforceable, the County has not breached it, as the time for the County's performance has yet to occur**

A breach of contract claim requires a showing of a "material breach" of the contract at issue. *Abbott Labs.*, 765 So. 2d at 740. Captain's BBQ claims the County has "failed or refused to meet its obligations" under the Amended/Restated Lease, which Captain's BBQ claims is "valid and enforceable." Comp., ¶ 36, 48. However, as a matter of law, the County cannot be deemed to have breached the Amended/Restated Lease, as the County's time for performance has yet to occur. *See Langford v. Paravant, Inc.*, 912 So. 2d 359, 360 (Fla. 5th DCA 2005) ("Contract interpretation is generally a question of law for the court, rather than a question of fact.") (citation omitted). The County does not have any affirmative obligations under the Amended/Restated Lease which apply before Captain's BBQ constructs the New Location. That is, the County's obligations concern actions to be taken only after the New Location is constructed. Ex. 8, p. 5-7, § 5. For example, the

County is obligated to “expand visitor parking... within 24 months of Lessee occupying the New Location,” “upgrade or replace the existing septic system to accommodate the New Location,” and “plant and maintain any trees provided by Lessee both inside and outside the New Location.” *Id.*, p. 6, § 5. Captain’s BBQ does not allege it has constructed the New Location. As such, the County cannot be deemed to have presently “failed or refused to meet its obligations”—it has no present obligations which it could have failed or refused to meet.

Moreover, until Captain’s BBQ commences operations from the New Location, the Amended/Restated Lease does not become an active and enforceable contract. Ex. 8, p. 2-3, § 2 (“The Lessor agrees to lease the New Location... to the Lessee after the New Location is designed, permitted and constructed. Lessee shall be permitted to use the Original Location for all uses allowed in the Lease Agreement until the New Location is ready for occupancy and occupied by the Lessee.); p. 19, § 31 (“Upon the date that the Lessee occupies and commences its business operations from the New Location the Lease Agreement will terminate and be of no further force and effect and the terms of the Amended Lease Agreement shall control all of the rights and obligations of the Lessor and the Lessee with regard to the New Location and the Lessee’s operations thereon.”). As the Amended/Restated Lease’s terms do not apply until after Captain’s BBQ occupies and commences operations from the New Location, the County cannot presently be

found to have committed a “material breach” of the Amended/Restated Lease. *See Abbott Labs.*, 765 So. 2d at 740. For this additional reason, Captain’s BBQ presents unripe, premature claims on which summary judgment is due for the County.

**7. Conclusion**

As the Amended/Restated Lease is void and illegal, and unenforceable, the County cannot be deemed to have breached it. Even if the Amended/Restated Lease were a valid, enforceable agreement, the County has not breached it. On either basis, summary judgment is due for the County as to all claims.

Respectfully submitted this 13th day of August, 2020.

BELL & ROPER, P.A.

By: Dale A. Scott  
Michael J. Roper, Esq.  
Fla. Bar No. 473227  
Dale A. Scott, Esq.  
Fla. Bar No. 568821  
dscott@bellroperlaw.com  
ehemphill@bellroperlaw.com  
2707 E. Jefferson St.  
Orlando, FL 32803  
Tel: 407-897-5150  
Fax: 407-897-3332  
Counsel for Flagler County

CERTIFICATE OF SERVICE

I certify that a copy of this document has been furnished via the F-Filing Portal on this 13th day of August, 2020, to:

Gregory D. Snell, Esq.  
gsnell@snell-legal.law  
Snell Legal PLLC  
1651 N. Clyde Morris Blvd., Ste. 1  
Daytona Beach, FL 32117  
Co-counsel for Captain's Bait, Tackle & BBQ, LLC

John L. Morrow, Esq.  
Sarah May Swartz, Esq.  
eserviceorl@conroysimberg.com  
jmorrow@conroysimberg.com  
Conroy Simberg  
2 S. Orange Ave., Ste. 300  
Orlando, FL 32801  
Co-counsel for Captain's Bait, Tackle & BBQ, LLC

By: Dale A. Scott  
Dale A. Scott, Esq.