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IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
DEC 1 1989
CLERK, SUPREME COURT
By ________
Deputy Clerk

THE STATE OF FLORIDA, and the Taxpayers, Property Owners and Citizens of Collier County, including non-residents owning property or subject to taxation therein, et. al.,

Appellant,

v.

SCHOOL BOARD OF COLLIER COUNTY, FLORIDA, acting as the Governin Body of the School District of Collier County, Florida,

Appellee,

CASE NO. 75,009

INITIAL BRIEF OF APPELLANT

JOSEPH P. D'ALESSANDRO
STATE ATTORNEY
TWENTIETH JUDICIAL CIRCUIT

BY: MICHAEL J. PROVOST
ASSISTANT STATE ATTORNEY
P. O. DRAWER 2007
NAPLES, FLORIDA 33939

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PREFACE

Appellant State of Florida will be referred to as "Appellant." Appellee Collier County School Board will be referred to as the "School Board." Citations to Appellant's Appendix will be stated as "App ___."

JURISDICTIONAL STATEMENT

This is an appeal pursuant to Rule 9.030(a)(1)(B)(i) of the Florida Rules of Appellate Procedure from a final order validating bonds or certificates of indebtedness.

STATEMENT OF THE CASE

This is an appeal from a final judgement of the Circuit Court of the Twentieth Judicial Circuit in and for Collier County, Florida, validating certain obligations of the Collier County School Board pursuant to Chapter 75, Florida Statutes.

The School Board filed a complaint for validation pursuant to Chapter 75, Florida Statutes on August 18, 1989, seeking validation of the Certificates of Participation. The complaint was heard before the Honorable Charles T. Carlton, Judge of the Twentieth Judicial Circuit in and for Collier County, Florida on October 12, 1989. A final judgment validating the Certificates of Participation was rendered on October 13, 1989. The Appellant filed a timely Notice of Appeal on November 9, 1989.

STATEMENT OF THE FACTS

Pursuant to a resoulution adopted August 17, 1989, (App. 1) the School Board approved a Lease-Purchase Agreement between the School Board and the Collier County School Board Foundation (the "Foundation") for the acquisition, construction and equipping of certain capital projects.

To facilitate the Lease-Purchase Agreement, the School Board leased property which it owns to the Foundation upon which the projects are to be built. The Foundation assigned all its interest in the Ground Lease and Lease-Purchase Agreement to a trustee, (App. 18) who is to sell Certificates of Participation which evidence a fractionalized interest in the lease payments owed by the School Board under the Lease-Purchase Agreement. The trustee is to disburse the funds raised by the Certificates of Participation at the direction of the School Board to finance the construction of the projects.

The term of the Lease-Purchase Agreement will expire at the end of each fiscal year, but may be automatically renewed upon the School Board making a sufficient annual appropriation from the School Board's legally appropriated funds (App. 7). The maximum term of the agreement is 30 years.

Failure of the School Board to appropriate sufficient funds for the payments of rents due under the Lease-Purchase Agreement will terminate the agreement. The School Board will not incur any additional penalties or liabilities under the Lease-Purchase Agreement. The trustee cannot compel the School Board to appropriate funds pursuant to the Lease-Purchase Agreement.

In the event of a non-appropriation, the trustee may sell the projects, or may rent them, at fair market value, for a period of up to 30 years in order to generate sufficient funds to pay the certificate holders. While the School Board will retain its fee title to the lands, it loses any possessory rights it may have in the property for the term of the reletting up to 30 years (App. 11-12, 36-37).

The School Board retains the option, in the event of a non-appropriation, of purchasing the projects by paying off the outstanding Certificates of Participation (App. 13).

SUMMARY OF ARGUMENT

Chapter 75, Florida Statute, authorizes the Circuit Courts to determine the validation of bonds and certificates of indebtedness. There are certain conditions which must exist, however, before the Circuit Court may exercise its jurisdiction. In this case, none of the pre-conditions necessary for the court to exercise jurisdiction exists. The School Board is not the issuing authority of any indebtedness, it has merely entered into the lease, and it does not, under the terms of the lease, become indebted to the certificate holders.

If the court finds that an indebtedness of the School Board does exist, then the question becomes whether the School Board has lawfully incurred that debt. The School Board derives its authority to enter into the arrangement from Florida Statutes, Section 230.23(9)(b)(5) and 235.056. In fact, Section 230.23(9)(b)(5) refers directly to Section 235.056. Section 230.23 requires that a referendum be held if rents are payable from ad valorem taxes under a Lease-Purchase Agreement and the agreement is greater than 12 months. Section 235.056 was amended effective October 1, 1989, the day the Lease-Purchase Agreement took effect, to provide that leases like the lease in this case constitute a multiple-year lease, thus triggering the referendum requirement.

The 1989 amendment implicitly recognizes that Section 235.056 would be in violation of the spirit and intent of Article VII, Section 12 of the Florida Constitution by allowing the School Board to avoid the approval by the taxpayers of the expenditure of vast sums of money by simply making a long term capital inprovement project divisible into yearly segments. This would be the ultimate triumph of form over substance and allow the School Board to do indirectly that which it cannot do directly.

ARGUMENT

POINT I

THE CIRCUIT COURT DID NOT HAVE JURISDICTION TO VALIDATE THE CERTIFICATES OF PARTICIPATION UNDER CHAPTER 75 AS THE SCHOOL BOARD HAS INCURRED NO INDEBTEDNESS TO THE HOLDERS OF THE CERTIFICATES AND IS NOT THE ISSUING AUTHORITY OF THE CERTIFICATES.

Section 75.01, Florida Statutes, provides that the Circuit Court shal have jurisdiction to determine the validation of bonds and certificates of indebtedness. Section 75.02, Florida Statutes, defines those plaintiffs who may invoke the jurisdiction of the court in a validation proceeding. Section 75.02 provides that any political subdivision of the State may determine its authority to issue certificates of debt.

The purpose of a validation proceeding is to determine whether the issuing body had the authority to act under the Constitution and Laws of the State of Florida. McCoy Restaurants, Inc., v. City of Orlando, 392 So.2d 252 (Fla. 1980). In this case, however, the School Board is issuing nothing, and is quick to point out that it is incurring no debt (App. p.26). It has merely entered into a Lease-Purchase Agreement which it is free to terminate at any time, with no risk. What the School Board desires is for the court to validate the Lease Purchase Agreement (App. 26-28). This purpose, however, is not within the scope of a validation proceeding. In McCoy Restaurants, Inc., v. City of Orlando, 392 So.2d 252 (Fla. 1980), this court held that the validity of certain leases, which were entered into to help pay off the bonded debt, was a collateral issue to a bond validation proceeding.

The School Board claims that this issue had already been decided in State v. Brevard County, 539 So.2d 461 (Fla. 1989). Appellant disagrees. The jurisdictional question raised by Justice Shaw is exactly the same issue before the court. The court's discussion of the issue, and its disposition in a footnote deserves a closer look however. In Brevard County, the court cited to State v. City of Daytona Beach, 431 So.2d 981 (Fla. 1983) as vesting the court with jurisdiction. The court based its conclusion in Brevard County on the fact that the State in both Brevard County and City of Daytona Beach raised a similar defense. The real point, however, is that the issuing authority in Brevard County was a non-profit corporation, and the issuing authority in City of Daytona Beach was the municipality of Daytona Beach and the County of Volusia.

In State v. City of Daytona Beach, 431 So.2d 981 (Fla. 1983), the issues before the court were:

1. Did the interlocal aqreement between Volusia County and the City of Daytona Beach constitute indebtedness under Chapter 75.
2. If it did, did it violate the holding of County of Volusia v. State, 417 So.2d 968 (Fla. 1982).

The court held that the agreement was a debt under Chapter 75, and that it did not violate the dictates of County of Volusia. The major compelling difference between this case, (and in Brevard County), is that in City of Daytona Beach, the issuing authorities of the interlocal agreement were one of the enumerated authorities in Section 75.02, not a private corporation, as in Brevard County, and the case before this court.

The mere fact the State raised the same defense in both cases does not confer jurisdiction upon the court. Under Chapter 75, it is the parties which invoke jurisdiction, not the issues. In determining who are the proper

parties in a bond validation proceeding, this court has held that the only parties absolutely necessary to a bond validation are the issuing entiti-and, if the condition necessitating a defense are met, the State. Broward County v. State, 515 So.2d 1273, 1274 (Fla. 1987). (Emphasis added).

If, as in this case, the ssuing authority is not one of the enumerated authorities in Section 75.02, or, as in this case, the enumerated authority is not issuing any debt, then the Circuit Court does not have jurisdiction under Chapter 75 to validate the Certificates of Participation.

POINT II

THE SCHOOL BOARD DID NOT HOLD AN APPROVING REFERENDUM WHEN ENTERING INTO THE LEASE-AGREEMENT AS REQUIRED BY FLORIDA STATUTE SECTION 230.23(9)(b)(5).

Florida Statute Section 230.23 provides for the powers and duties of a school board. Section 230.23(9)(b)(5) provides that school boards may:

> Enter into leases or lease-purchase arrangements, in accordance with the requirements and conditions provided in s. 235.056(3), with private individuals or corporations for the rental of necessary grounds and educational facilities for school purposes or of educational facilities to be erected for school purposes. Current or other funds authorized by law may be used to make payments under a lease-purchase agreement, Notwithstanding any other statutes, **if** the rental **is to** be paid from funds received from ad valorem taxation and the agreement **is** for **a** period greater that **12** months, an approving referendum must **be held.**

While the School Board did advertise the Lease-Purchase Agreement and make **it** available for public inspection at the public-hearing when the resolution was passed, no approving referendum of the Lease-Purchase Agreement was held.

The School Board's position that the lease and Lease-Purchase Agreements are not for a term greater than 12 months is simply an exercise of form over substance and is factually distinguishable from the situation in State v. Brevard County, 539 So.2d 461 (Fla. 1989). The major factual differences is that in this case, the School Board is dealing with the construction of educational facilities, not the mere rental of office equipment (App. 22-24, 30, 38-39). As expressed in the Lease-Purchase Agreement, the School Board has an immediate need for and expects to make immediate use of the projects, and

does not expect the need for the projects to diminish (App. 9). The School Board also intends to appropriate suffic ent funds each year to avoid an event of non-appropriation (App. 9).

In addition, since the Schoo Board has an immediate need for the projects, it is unlikely that it wou d risk the loss of the use of its lands for up to a period of thirty years by failing to appropriate.

In a bond validation proceeding, the court should look to see that the issuing body excercised its authority in accordance with the spirit and intent of the law. McCoy Restaurants, Inc., v. City of Orlando, 392 So.2d 252, 253 (Fla. 1980).

The spirit and intent of Section 230.23(9)(b)(5) becomes clearer when the court looks at Section 235.056(3)(a), Florida Statute (1989). The Florida Legislature amended Section 235.056 effective October, 1989 to provide that:

> A LEASE CONTRACT FOR 1 YEAR OR LESS, WHEN EXTENDED OR RENEWED BEYOND A YEAR, BECOMES A MULTIPLE-YEAR LEASE, AND MUST BE APPROVED BY THE OFFICE. (Emphasis added)

When reading Section 235.056(3)(a) in pari materia with Section 230.23(9)(b)(5), as the court should do since Section 230.23(9)(b)(5) directly refers to Section 235.056(3), the Lease-Purchase Agreement in this case becomes a multiple-year lease upon renewal, i.e., appropriation. By any meaning of the word, a multiple-year lease is one for a "period greater than 12 months" and therefore, an approving referendum is required.

Even assuming that the School Board does not make an appropriation for the full thirty years, if it makes only one appropriation, that renews the agreement and makes the Lease-Purchase Agreement a multiple-year lease, i.e., greater than 12 months.

POINT III

ARTICLE VII, SECTION 12 OF THE FLORIDA CONSTITUTION REQUIRES AN APPROVING REFERENDUM.

Article VII, Section 12 of the Florida Constitution requires that the issuance of bonds or certificates of indebtedness which are payable from ad valorem taxation and mature more the twelve months after issuance be approved by the vote of the electors. It is undisputed that part of the funds being used to pay the lease payments derive from ad valorem taxes (App. 32-33). It is also clear that the Lease-Purchase Agreement as well as all the other documents approved by the resolution of the School Board have been tailored to avoid the referendum requirement. Fortunately, this court has prevented governmental authorities from doing indirectly that which could not be done directly. County of Volusia v. State, 417 So.2d 968 (Fla. 1982).

In reviewing to see that the School Board has followed the spirit and intent of the law, it is obvious that the requirement to re-appropriate is necessitated out of the need to avoid an agreement greater than 12 months. If the court looks at any other aspect of the agreement, it sees a long term commitment to finance needed capital improvements (App. 24). State v. Brevard County, 539 So.2d 461 (Fla. 1989) is greatly different than the factual situation at hand. The two biggest differences are the items being leased, equipment versus educational facilities, and the fact that the School Board is using ad valorem taxes whereas Brevard County pledged non-ad valorem revenues. When the court then factors in the amendment to Section 235.056(3)(a), the only difference between these Certificates of Participation, and a simple ad valorem bond issue, maturation greater than 12 months, disappears. The amendment to Section 235.056(3)(a) amounts to a legislative

recognition that these Certificates of Participation violate the dictates of Article VII, Section 12 of the Florida Constitution.

Even if the School Board chooses to fund the lease-payments by some source other than ad valorem revenues, the outcome is the same. By pledging all legally appropriated funds, together with a promise to maintain the appropriation, an approving referendum is still required under Article VII, Section 12, and this court's decision in County of Volusia v. State, 417 So.2d 968 (Fla. 1982). The promise to maintain the appropriation, dispite the avowed right to non-appropriation, is the fact that the School Board has made clear its intent to appropriate each year (App. 9), has covenanted that each annual proposed budget contain an appropriation (App. 9), has an expectation that it has the funds for an appropriation for the full term of the lease (App. 9), has a need for the schools which the board does not believe will lessen (App. 9), and with that need in mind, cannot reasonably be expected to forgo making use of its lands and the buildings thereon for a period of thirty years. Therefore, the right of non-appropriation is illusory and the only reason for the one-year renewal is the avoidance of the referendum requirement. This is particularly ironic considering that the legislature in Section 230.23(9)(b)(5) requires taxpayer approval so that the people who would be required to shoulder the burden have some say in the outcome.

CONCLUSION

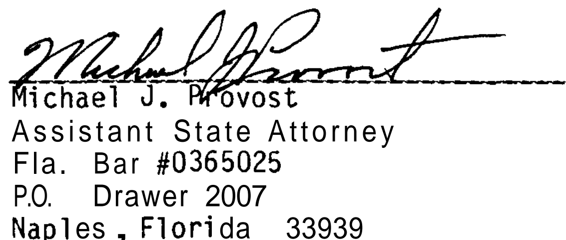
The Circuit Court should not have heard the School Board's request **to** validate its Lease-Purchase Agreement as the School Board in this instance has not met the requirements of Chapter 75 to invoke the court's jurisdiction.

If the court can hear the complaint, **it** will find that the School Board has failed to hold the required approving referendum necessary under **both** Section 230.23(9)(b)(5) and Article VII, Section 12 of the Flor da Constitution.

Neither the jurisdictional question nor the outcome of the case is controlled by the court's decision in Brevard County. Unlike B evard coun:y, this case involves the pledge of ad valorem revenues and the construction of long term capital improvement projects.

The State of Florida is requesting that this court reverse the final judgment of the Circuit court and either hold the Circuit Court is without jurisdiction to validate the Certificates of Participation, or set aside the validation until the taxpayers have had their say in a referendum.

Resectfully submitted,



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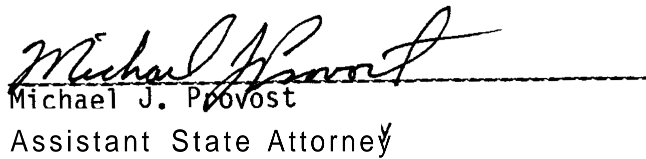
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished to James H. Siesky, 791 Tenth Street South, Naples, Florida, Daniel U. Livermore, Jr., 1750 Gulf Life Tower, Jacksonville, Florida 32207, Joseph L. Shields, 203 South Monroe Street, Tallahassee, Florida 32301, and Sid J. White, Clerk of Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927 by United States Mail / ~~Hand Delivery~~ this 29th day of ~~November,~~ 1989.



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