IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

GLENDALL W. GETTINGS and CALLIOPE D. GETTINGS,

Appellants,

v.

CASE NO.: CVA1 09-42
Lower Court Case No.: 2009-DF-123962

ORANGE COUNTY, FLORIDA,

Appellee.
_____/

Appeal from Special Magistrate,
for Orange County,
Yvette Rodriguez Brown.

William G. Osborne, Esquire,
for Appellant.

Edward M. Chew, Esquire,
for Appellee.

Before LEBLANC, KOMANSKI, and PERRY, J.J.

PER CURIAM.

FINAL ORDER AND OPINION AFFIRMING SPECIAL MAGISTRATE

Appellants Glendall W. and Calliope D. Gettings (the "Gettingses") timely appeal the Special Magistrate's "Findings of Fact, Conclusion of Law, and Order," entered on August 13, 2009, in favor of the Appellee, Orange County, Florida. This Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(c)(1)(A).

Facts and Procedural History

The Gettingses own the residential property located at 17607 Deer Isle Circle, Winter

Garden, Florida 34787 in unincorporated Orange County. In a "Notice of Violation" letter, dated February 22, 2008, the Orange County Environmental Protection Division ("OCEPD") notified the Gettingses that, during a site inspection on a neighboring property, its staff observed a seawall that had been constructed on the Gettingses property and that no permits from the OCEPD had been found for the structure. Therefore, the OCEPD asserted in the letter that the Gettingses were in violation of Orange County Code Chapter 15, Article VI, Section 15-218.

In addition to the "Notice of Violation" letter, the OCEPD sent a "Consent Agreement" to the Gettingses, also dated February 22, 2008, in which the OCEPD offered to waive its right to seek judicial remedies if the Gettingses would agree to complete the following corrective measures to bring their property into compliance: (1) remit payment of $4,000.00 to the Board of County Commissioners as a penalty for unauthorized dredge and fill and (2) complete one of the following two options; (A) attempt to permit the seawall structure after-the-fact, with the understanding that if the application is denied, they would be required to restore the shoreline, or (B) remove the existing seawall and restore the shoreline. In response, the Gettingses elected not to sign the "Consent Agreement," and instead, Mr. Gettings sent a letter to the OCEPD, dated April 15, 2008, in which he asserted that he had paid someone for the construction and permit for the wall and that he had obtained approval from his homeowners' association and Orange County before construction had begun. In a "No Further Action" letter, dated July 3, 2008, the OCEPD notified the Gettingses that the enforcement case against them had been closed.

However, in a second "Notice of Violation" letter, dated February 13, 2009, the OCEPD notified the Gettingses that, based on further information gathered by the OCEPD, there was evidence that the seawall and fill extended into waters of the county and, again, there were no permits on file for the described work. Therefore, the OCEPD again asserted in the letter that the

Gettingses were in violation of Orange County Code Chapter 15, Article VI, Section 15-218. This time, however, after the Gettingses elected not to sign the second "Consent Agreement" presented by the OCEPD, dated March 9, 2009, and containing the same terms as the first "Consent Agreement," the OCEPD served a "Statement of Violation" and "Notice of Hearing" upon the Gettingses, in which it referred the case to a Special Magistrate, alleged that the Gettingses were in violation of Orange County Code Chapter 15, Article VI, Section 15-218 for "Unauthorized Shoreline Alteration/Dredge and Filling of surface waters," and sought the same relief it requested in the "Consent Agreements."

At the hearing, various photographs and documents were received into evidence, and a few documents were excluded. One particular document that was excluded consisted of one page of handwritten notes, which the Gettingses claimed to have obtained from the OCEPD file regarding the instant matter. The Gettingses sought to have this document, which is simply titled "Notes," entered into evidence, but the Special Magistrate excluded the document because she believed that it could not be authenticated, she did not know whether it was relevant, and it did not contain any signature identifying the author. Nonetheless, the hearing continued, and the Special Magistrate heard the testimony of Mr. Gettings and of Christina Curtiss, the primary OCEPD official that worked on the instant matter.

The Gettingses raised three defenses before the Special Magistrate. First, the Gettingses argued that the OCEPD is operating under an erroneously established Normal High Water Elevation. Second, the Gettingses raised the defense of equitable estoppel, in which they argued that they had relied on a representation of an Orange County employee ensuring them that they did not need a Flood Plain Permit, and therefore they believed that they did not need any further permits to build the wall. The Gettingses then invested time and significant financial resources to

build the wall, and they argued that Orange County should be estopped from now claiming that the work was unauthorized without a permit. Finally, the Gettingses raised the defense of waiver, in which they argued that, when the OCEPD closed the initial enforcement case in 2008, it waived its right to raise it again in the future and it should be estopped from now doing so.

After the hearing, the Special Magistrate entered her "Findings of Fact, Conclusion of Law, and Order," in which she found that the conditions described in the "Statement of Violation" do exist as a matter of fact, and she concluded that the Gettingses were in violation of Code requirements. Therefore, she ordered the Gettingses to correct the Code violation as requested by the OCEPD in the "Consent Agreements" and the "Statement of Violation." This appeal followed.

Discussion of Law

Appeals regarding a final administrative order from a code enforcement board or special magistrate shall not be de novo hearings, but rather, they shall be limited to appellate review of the record created before the enforcement board or special magistrate. § 162.11, Fla. Stat. (2011). Therefore, the Court's review of such a final order shall be governed by a three-part standard of review: (1) whether procedural due process was accorded; (2) whether the essential requirements of the law were observed; and (3) whether the decision was supported by competent substantial evidence. Broward County v. G.B.V. Int'l, Ltd., 787 So. 2d 838, 843 (Fla. 2001) (citing City of Deerfield Beach v. Vaillant, 419 So. 2d 624, 626 (Fla. 1982)). "It is neither the function nor the prerogative of a circuit judge to reweigh evidence and make findings [of fact] when [undertaking] a review of a decision of an administrative forum." Dep't of Highway Safety & Motor Vehicles v. Allen, 539 So. 2d 20, 21 (Fla. 5th DCA 1989) (citing Vaillant, 419 So. 2d 624).

The Gettingses raise three arguments on appeal. First, they argue that the Special Magistrate failed to observe the essential requirements of the law by not applying the doctrine of equitable estoppel. Second, the Gettingses argue that the Special Magistrate failed to observe the essential requirements of the law by not applying the doctrine of waiver and estoppel. Finally, they assert that the Special Magistrate abused her discretion by excluding the handwritten "Notes" from evidence.

In response, Orange County argues that the Gettingses have failed to prove that Orange County should be estopped from enforcing the Pumping and Dredging Ordinance, which requires a permit to construct a wall below the "Normal High Water Elevation." In addition, Orange County asserts that the Gettingses have failed to prove that Orange County waived the enforcement of the Pumping and Dredging Ordinance by opening and then closing a related investigation. Finally, Orange County argues that the exclusion from evidence of the handwritten "Notes" was not an abuse of discretion.

Equitable Estoppel

The Gettingses argue that the facts of this case, as argued before the Special Magistrate, satisfy the elements of equitable estoppel, and they assert that they were entitled to relief under that defense. Specifically, Mr. Gettings testified that, to his knowledge, the wall at issue was approved by Orange County at the time that it was built, and when he hired someone to build it, that included the permit. Furthermore, the Gettingses produced documentary evidence of a "Flood Zone Determination" from the Orange County Public Works Division, dated April 22, 1996, stating that a Flood Plain Permit was not required to fill in the swale. Finally, Mr. Gettings testified that, during the time that the wall was being constructed, he observed an "inspection box" on his property, and he now argues on appeal that the inspection box was further evidence

to him that the retaining wall was being built pursuant to applicable code and regulations.

However, merely because the Gettingses presented evidence and argued their version of the facts before the Special Magistrate, does not mean that those "facts" have been found to be true. See Boucicaut v. Fla. Unemployment Appeals, 929 So. 2d 619, 620 (Fla. 3d DCA 2006) (citing Glover v. Sanford Child Care, Inc., 429 So. 2d 91 (Fla. 5th DCA 1983)) (holding that the credibility of a witness and the weight to be given to evidence is within the sound discretion of the fact finder). Nonetheless, even assuming, arguendo, that the allegations contained in the preceding paragraph are true, the Gettingses would still not be entitled to relief in this case based on the defense of equitable estoppel.

For a property owner to invoke the doctrine of equitable estoppel against a governmental body, the property owner must establish the following three elements: (1) he has relied in good faith; (2) upon some act or omission of the government; and (3) he has made "such a substantial change in position or incurred such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the rights that the owner has acquired." Citrus County v. Halls River Dev., Inc., 8 So. 3d 413, 421-22 (Fla. 5th DCA 2009) (citing Verizon Wireless Pers. Commc'ns, L.P. v. Sanctuary at Wulfert Point Cmty. Ass'n, 916 So. 2d 850, 856 (Fla. 2d DCA 2002)). "However, estoppel should be invoked against the government only in exceptional circumstances." Id. (citing Watson Clinic, LLP v. Verzosa, 816 So. 2d 832, 834 (Fla. 2d DCA 2002)).

The first factual allegation upon which the Gettingses rely to establish their entitlement to relief by equitable estoppel contains no act, omission, or any type of representation on behalf of Orange County, and therefore, it fails to satisfy the second required element. Mr. Gettings testified that, *to his knowledge*, the wall was approved by Orange County and when he paid the

builder to build the wall, the permit was to be included. Nowhere in those allegations is found any representation on behalf of Orange County. Mr. Gettings's subjective belief that Orange County had approved the wall does not amount to an actual representation from Orange County that it had done so. Furthermore, a representation from the builder that he would obtain the necessary permits does not amount to a representation from Orange County that all necessary permits have been obtained. Therefore, the first factual allegation fails to support implementation of equitable estoppel.

On the other hand, while the Gettingses' second factual allegation successfully establishes a basis for finding that Orange County made a representation to them upon which they relied in good faith, it still fails to provide a basis for relief under the facts of this case. The Gettingses produced documentary evidence establishing that Orange County had represented to them that a Flood Plain Permit was not required for filling in the swale on their property. Therefore, if the Gettingses relied on that representation in good faith, then Orange County would be estopped from changing its position and now claiming that the Gettingses did need a Flood Plain Permit. However, in the instant matter, Orange County is not claiming that the Gettingses failed to obtain a necessary Flood Plain Permit. Rather, Orange County is claiming that the Gettingses failed to obtain the necessary Shoreline Alteration/Dredge and Fill Permit.

The Orange County Public Works Division handles applications for Flood Plain Permits. In fact, it was the Public Works Division that represented to the Gettingses that they did not need a Flood Plain Permit to fill in the swale. However, it is the OCEPD that handles applications for Shoreline Alteration/Dredge and Fill Permits. Nowhere in the Flood Zone Determination document relied upon by the Gettingses does Orange County represent that no other permits are required or that the Gettingses have satisfied all requirements under the Orange County Code to

proceed with construction of the wall. Therefore, even if the Court were to find that Orange County is estopped from claiming that the Gettingses needed a Flood Plain Permit to build the wall, it would not be estopped from claiming that the Gettingses needed a Shoreline Alteration/Dredge and Fill Permit.

Finally, the Gettingses' allegation that an inspection box was present on their property during the construction of the wall, and that its presence further evinced to Mr. Gettings that the wall was being built pursuant to applicable code, fails to establish their entitlement to relief via equitable estoppel. As demonstrated, supra, the subjective belief of Mr. Gettings that the wall was being built pursuant to applicable code does not amount to a representation by Orange County that the same is true. Furthermore, there is no evidence in the record establishing that any employee or other agent of Orange County used the inspection box for any purpose. Nonetheless, even if the Court were to assume and accept that the presence of the inspection box constituted a representation by Orange County, which we do not, there is no evidence in the record establishing what the inspection box was used for, what it contained, or any secondary representations made via the inspection box. Therefore, in effect, the only potential representation by Orange County supported in the record would be that an inspection box was present on the property during the construction of the wall. Thus, if the Gettingses relied on this hypothetical representation in good faith, then Orange County could be estopped from denying that an inspection box was present on the property. Of course, the presence of an inspection box does not establish that all necessary permits were obtained and all applicable code requirements were satisfied. Therefore, even if the Court were to construe the facts in the light most favorable to the Gettingses, a privilege to which they are *not* entitled, they would still not be entitled to relief under the theory of equitable estoppel in this case.

Waiver

The Gettingses argue that, by instituting and then subsequently closing an enforcement action against them regarding the wall, Orange County should be barred by the doctrine of waiver from instituting a second enforcement action based upon the same facts when no new facts have been discovered. The Gettingses argue that, when Orange County instituted the first enforcement action, it had actual knowledge of its right to prosecute the Gettingses for the alleged violation. Therefore, they assert that Orange County intentionally relinquished its right to prosecute them for the violation as described in the first notice. Finally, the Gettingses argue that Orange County now attempts to prosecute them in this second enforcement action based upon the same facts and without newly discovered evidence, and therefore the Gettingses argue that Orange County should be barred by the doctrine of waiver.

"Waiver is the intentional or voluntary relinquishment of a known right, or conduct which implies the relinquishment of a known right." Bishop v. Bishop, 858 So. 2d 1234, 1237 (Fla. 5th DCA 2003) (citing State Farm Mut. Auto. Ins. Co. v. Yenke, 804 So. 2d 429, 432 (Fla. 5th DCA 2001)). A party seeking relief under the doctrine of waiver must establish the following three elements: "(1) the existence at the time of the waiver of a right, privilege, advantage, or benefit which may be waived; (2) the actual or constructive knowledge of the right; and (3) the intention to relinquish the right." Id. "Furthermore, the waiving party must possess all of the material facts for its representations to constitute a waiver." L.R. v. Dep't of Children & Families, 822 So. 2d 527, 530 (Fla. 4th DCA 2002) (citing Zurstrassen v. Stonier, 786 So. 2d 65 (Fla. 4th DCA 2001)).

The waiver analysis in this case hinges upon whether Orange County possessed all of the material facts, and thus had actual or constructive knowledge of the right to prosecute, at the time

that it closed the first enforcement action. The Gettingses argue that the second enforcement action is based upon the same facts as the first action and that no new facts have been discovered. In support of this argument, the Gettingses assert that the second "Notice of Violation" letter is based upon the same information that the OCEPD possessed when it wrote the first "Notice of Violation" letter, there is no difference between the first letter and the second letter, and, the Gettingses add, when asked the difference between the two letters, OCEPD official Christina Curtiss was unable to articulate any distinction. However, we find the Gettingses' attempts to characterize the content of the two letters as indistinguishable to be unpersuasive, and we find the assertion regarding Ms. Curtiss's inability to articulate a distinction between the two letters to be simply and manifestly untrue.

First, the "Remarks" section on the first "Notice of Violation" letter states: "During a site inspection on a neighboring property, staff observed a seawall constructed on site. . . ." The "Remarks" section on the second "Notice of Violation" letter states: "*Based on further information gathered by EPD*, there is evidence that the seawall and fill *extend into waters of the County*. . . ." (Emphases added). We find the distinction between the two letters to be very clear and that no further analysis is necessary to demonstrate the difference between the two.

Furthermore, when asked to differentiate between first and second letters, and when counsel for the Gettingses suggested that they both address the same issue, Ms. Curtiss responded: "No. The issue [in the first letter] was for the . . . seawall. The issue [in the second letter] is for the fill *within the lake*."[1] When counsel for the Gettingses confused the issue, understandably, by focusing on the terms "fill" and "seawall" and assuming that the difference hinged on filling in dirt versus building a retaining wall, Ms. Curtiss clarified that the issue does not revolve around whether one is filling in dirt or building a wall, but rather, the issue is *where*

[1] See Trial Transcript at page 30, lines 8-13 (emphasis added).

the dirt is being filled in and the wall is being built and whether they extend into county waters. She specifically stated, in pertinent part: "[The second letter stated that] the seawall and fill *extended into the waters* . . . . [A] seawall is considered fill."[2] Finally, when asked why the first enforcement action was dropped and the second one brought, and what information the OCEPD had before bringing the second action that it did not have when it closed the first action, Ms. Curtiss answered: "We did not have the information we have today showing that the land was extended into John's Lake. . . . We did not have a survey of the property showing there was an extension of lands."[3]

Nevertheless, in determining whether the Special Magistrate observed the essential requirements of the law, the analysis does not focus on what the parties assert the facts to be, or even what this Court might assess the facts to be, but rather, it depends upon what the Special Magistrate found the facts to be because finding the facts was within her sound discretion, and it is not the prerogative of this Court to reweigh the evidence. However, the Special Magistrate's order is void of any specific findings of fact regarding the waiver issue, and it is void of any explicit legal ruling regarding the Gettingses' entitlement to relief under the doctrine of waiver. Nonetheless, in Data Lease Fin. Corp. v. Barad, 291 So. 2d 608, 611 (Fla. 1974), the Florida Supreme Court held, in pertinent part:

> Where numerous defenses are raised, it is not necessary, although it is certainly preferable, for the trial judge to rule expressly upon each defense asserted. In the absence of such express ruling, it is presumed that the matter was resolved in a manner consistent with the judgment rendered, in accordance with the general presumption of correctness of judgments. A presumption exists that the lower court did all things necessary to impart binding force to its judgment.

(Citations omitted). Therefore, we must presume that the Special Magistrate ruled against the Gettingses on the waiver issue and that her findings of fact support her ruling. As demonstrated,

[2] See Trial Transcript at page 30, line 21, through page 31, line 2 (emphasis added).
[3] See Trial Transcript at page 31, lines 10-12, and page 34, lines 9-13.

supra, there was competent substantial evidence to support the finding that Orange County did not possess all of the material facts at the time of the purported waiver, and thus it did not have actual or constructive knowledge of its right to prosecute the claim. Therefore, the Special Magistrate observed the essential requirements of the law, and the Gettingses are not entitled to relief under the doctrine of waiver.

Exclusion of "Notes"[4] from Evidence

"The standard of review of a trial court's exclusion of evidence is abuse of discretion." O'Brien v. O'Brien, 899 So. 2d 1133, 1138 (Fla. 5th DCA 2005) (quoting Shearon v. Sullivan, 821 So. 2d 1222, 1225 (Fla. 1st DCA 2002)). When reviewing discretionary acts, appellate courts must recognize the superior vantage point of the trial judge and should apply the "reasonableness" test. Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980). That is, if reasonable men could differ as to the propriety of the action taken by the trial judge, then there can be no finding of an abuse of discretion. Id. The test requires a determination of whether there is a logical justification for the result. See Id.

However, even if the Court were to find that the Special Magistrate abused her discretion and improperly excluded the "Notes" from evidence, her error would not be reversible unless it resulted in a miscarriage of justice. See § 59.041, Fla. Stat. (2011). This standard has come to be known as the "harmless error" rule. See Herbello v. Perez, 754 So. 2d 840, 840 (Fla. 3d DCA 2000) (citing § 59.041, Fla. Stat. (1999)). "[I]n civil cases, the harmless error test is 'whether, but for such error, a different result may have been reached.'" Gencor Indus., Inc. v. Fireman's Fund Ins. Co., 988 So. 2d 1206, 1209 (Fla. 5th DCA 2008) (quoting Katos v. Cushing, 601 So. 2d 612, 613 (Fla. 3d DCA 1992)).

The Gettingses argue that the Special Magistrate's exclusion of the "Notes" from

[4] The "Notes" can be found on page 136 of the Record on Appeal.

evidence was not harmless and constituted reversible error because the "Notes" are directly relevant to the third element of waiver—that is, whether the OCEPD intended to relinquish its right to enforce the Gettingses' code violation. The Gettingses assert that the "Notes" contain evidence regarding the reason why Orange County closed the first enforcement action and, therefore, are directly relevant to Orange County's intent to waive its right.

However, this argument fails for two reasons. First, insofar as the "Notes" consist of evidence that Orange County intended to relinquish its right to enforce the Gettingses' code violation pursuant to the first "Notice of Violation" letter, the "Notes" are merely cumulative evidence. Orange County does not deny that it intentionally closed the first enforcement action. Ms. Curtiss testified that Orange County intentionally closed the first enforcement action, and most significantly, the "No Further Action" letter, which effectively closed the first enforcement action, was received into evidence.

Second, the Gettingses' waiver argument in this case did not hinge upon the third element of waiver—that is, intentional relinquishment. Rather, the waiver argument in the instant matter hinged upon whether Orange County possessed all of the material facts at the time that it closed the first enforcement action, which is relevant to the second element of waiver—that is, whether Orange County had *knowledge* of its right. On this issue, admission of the "Notes" into evidence would most likely have only hurt the Gettingses, rather than help them. In agreement with Ms. Curtiss's testimony, the "Notes"—assuming, arguendo, that they are authentic records of the OCEPD—indicate that the OCEPD did not have evidence that the wall extended into county waters and assumed that that the wall was at a minimum of one foot above the Normal High Water Elevation. Specifically, the "Notes" contain the following handwritten phrases: "Can't obtain access to site therefore: *no evidence of fill below NHWE [and] *unable to determine

where wall place [sic] in relation to NHWE[.] . . . *Closed assuming the 'retaining' wall is @ minimum 1ft above NHWE . . . ." In the second "Notice of Violation" letter, the OCEPD stated that, based on further information gathered, it had determined that the wall extended into county waters—a fact that it did not possess at the time it closed the first enforcement action and upon which it based the second enforcement action.

We do not find that the exclusion of the "Notes" from evidence harmed or prejudiced the Gettingses in any way, nor do we find that, but for the exclusion of the "Notes" from evidence, a different result may have been reached. Therefore, even if the exclusion of the "Notes" from evidence were erroneous and constituted an abuse of discretion, we find that it would be harmless error and that it did not result in a miscarriage of justice. Therefore, we find it unnecessary to further analyze whether the Special Magistrate abused her discretion.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that the Special Magistrate's "Findings of Fact, Conclusion of Law, and Order," entered on August 13, 2009, is **AFFIRMED**.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida on this the 16th day of April, 2012.

/S/
BOB LEBLANC
Circuit Judge

/S/
WALTER KOMANSKI
Circuit Judge

/S/
BELVIN PERRY, JR.
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished via U.S. mail to: **William G. Osborne, Esq., William G. Osborne, P.A.**, 538 East Washington Street, Orlando, Florida 32801 and **Edward M. Chew, Esq., Orange County Attorney's Office – Litigation Section**, 435 North Orange Avenue, Suite 300, Orlando, Florida 32801 on the ____16th_____ day of ___April_____, 2012.

_/S/_____
Judicial Assistant