

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
OF FLORIDA IN AND FOR LEON COUNTY

STEVEN R. ANDREWS

Plaintiff,

vs.

CASE NO: 2012-CA-859
JUDGE: SHELFER

GOVERNOR RICK SCOTT,
ATTORNEY GENERAL PAM BONDI,
CHIEF FINANCIAL OFFICER, JEFF
ATWATER, AND COMMISSIONER
ADAM PUTNAM, as the BOARD OF
TRUSTEES OF THE INTERNAL
IMPROVEMENT TRUST FUND.

Defendant.

_____/

**BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND'S
MOTION TO DISMISS PLAINTIFF STEVEN ANDREWS', COMPLAINT AND
INCORPORATED MEMORANDUM OF LAW**

Defendant, the Board of Trustees of the Internal Improvement Trust Fund ("Board of Trustees"), moves pursuant to Florida Rule of Civil Procedure 1.140 (b) (1), (6), and (7), to dismiss Plaintiff, Steve Andrews' complaint for declaratory relief for lack of subject matter jurisdiction, failure to state a cause of action, failure to join indispensable parties, and lack of standing. In support of its motion the Board of Trustees states as follows:

FACTUAL ALLEGATIONS

1. Plaintiff invokes Chapter 86, Florida Statutes, for declaratory judgment concerning his relative rights and obligations regarding real property and improvements located at 822 North Monroe Street in Tallahassee, Florida, as described in Plaintiff's Exhibit "A" (hereinafter referred to as "the Property") (Complaint at p. 1)

2. The Property is located adjacent to The Grove Plantation, which was conveyed to the Board of Trustees by former Governor LeRoy Collins and his wife, Mary Call Darby Collins (hereinafter “the Collinses”) in 1985. (Complaint at p. 2, ¶ 7)
3. As part of the consideration of the Agreement for the sale and purchase of The Grove Plantation in 1985, the Collinses granted the Board of Trustees a preemptive right to purchase three parcels, two of which are the subject of this action. (Complaint Exhibit B)
4. The Grant of Right of First Refusal (hereinafter “Right of First Refusal”) states in pertinent part:

The Collinses hereby grant to the Trustees the right of first refusal to purchase each of the three lots more particularly described above. The right of first refusal will remain in effect until final discharge of the personal representative of the estate of the later of LeRoy Collins or Mary Call Collins to die. The right of first refusal consists of the following: **Prior to any proposed sale of any of such lots, or any part thereof, during that period, the owner or owners of each lot shall give the Trustees, through the Division of State Lands, six months written notice and opportunity to purchase the subject lot or lots at a price equal to that of the proposed sale.** If within said six months’ time the Trustees have not purchased for said equal sum, the lot or lots may be sold free of the burden of the aforementioned right of first refusal.

(Complaint Exhibit B) (emphasis added).

5. Former Governor Collins died on March 12, 1991, and the Personal Representative of his estate was discharged by court order. (Complaint at p. 2, ¶ 10).
6. Mrs. Collins died on November 29, 2009, and an Order of Summary Administration was entered on December 13, 2011. (Complaint at p. 2, ¶ 11).
7. Prior to entry of the Order of Summary Administration, Plaintiff and Grove Properties Limited entered into a Deposit Receipt and Contract for Sale and

Purchase dated October 18, 2011 (hereinafter “Contract”), for the purchase of the Property. (Complaint Exhibit D).

8. On December 19, 2011, John K. Aurell, as General Partner of Grove Properties Limited, wrote a letter addressed to the Trustees of the Internal Improvement Trust Fund (the Board of Trustees), advising the Board of Trustees for the first time of the proposed sale of the Property to Steven Andrews, requesting a waiver of the Board of Trustees’ rights under the Right of First Refusal, and recognizing that, although it had previously offered the Property to the Department of State, the Right of First Refusal is “in the name of the Trustees and not the Department of State.” (Complaint Exhibit F)
9. On December 21, 2011, Clay Smallwood, Director of the Division of State Lands, Florida Department of Environmental Protection, received a letter from Kurt S. Browning, Secretary of State, Florida Department of State, notifying him that Grove Properties Limited entered into a contract to sell the Property and that although Grove Properties Limited offered to sell or lease the Property to the Department of State it was not interested in pursuing a purchase or lease of said property. (Complaint Exhibit E)
10. On March 20, 2012, the Board of Trustees was to consider exercising its rights to the Property under the Right of First Refusal and on that same date the Board of Trustees was served with Plaintiff’s complaint for declaratory relief. (Complaint at p. 3, ¶ 23).
11. As proof of the respective interests and rights at issue Plaintiff has attached documents involving Plaintiff, the Board of Trustees, Grove Properties Limited, and

John Aurell, as both general partner of Grove Properties Limited and trustee for the Mary Call Darby Collins Trust. (Complaint Exhibits B, C, D, E, and F).

STANDARD OF REVIEW

12. In evaluating a motion to dismiss, the trial court's consideration is limited to the four corners of the complaint, the allegations of which must be accepted as true and considered in the light most favorable to the nonmoving party. See Locker v. United Pharmaceutical Group, 46 So. 3d 1126, 1127 (Fla. 1st DCA 2010).
13. To survive a motion to dismiss, a complaint must allege a prima facie case. Whether a prima facie case has been pled depends on the plaintiff's ability to allege facts sufficient to state all of the elements of his or her claim, excluding plaintiff's bare conclusions. The factual pleading must be enough to raise the right to relief above the speculative level. See Alvarez v. E & A Produce Corp., 708 So. 2d 997, 999-1000 (Fla. 3d DCA 1998); see e.g. Okeelanta Power Ltd. P'ship v. Fla. Power & Light Co., 766 So. 2d 264, 267 (Fla. 4th DCA 2000); accord Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).
14. The test of sufficiency of a complaint in a declaratory judgment action is not whether the complaint shows that the plaintiff will succeed in getting a declaration of rights in accordance with his theory and contention, but whether he is entitled to a declaration of his rights at all. See Hialeah Race Course, Inc. v. Gulfstream Park Racing Ass'n, 210 So. 2d 750, 752-53 (Fla. 3d DCA 1968).

ARGUMENT

15. Plaintiff's complaint does not give rise to a proceeding under Florida's Declaratory Judgments Act. See §86.011 et seq., Fla Stat. (2012). A review of Plaintiff's

complaint establishes that: a) the court lacks jurisdiction to review Plaintiff's declaratory claim; b) Plaintiff has failed to state a cause of action under Florida's Declaratory Judgments Act; c) Plaintiff has failed to join an indispensable party to this action.; and d) Plaintiff lacks standing to bring a declaratory action.

a. The court lacks subject matter jurisdiction.

16. This Court lacks subject matter jurisdiction to make a Chapter 86 declaration of rights in the case sub judice.

17. In May v. Holley, 59 So. 2d 636, 639 (Fla. 1952), the Florida Supreme Court held that before a court has jurisdiction to entertain a proceeding for declaratory relief

it should be clearly made to appear that there is a bona fide, actual, present practical need for the declaration; that the declaration should deal with present, ascertained or ascertainable state of facts or present controversy as to a state of facts; that some immunity, power, privilege or right of the complaining party is dependent upon the facts or the law applicable to the facts; that there is some person or persons who have or reasonably may have an actual, present, adverse, and antagonistic interest in the subject matter either in fact or law; that the antagonistic and adverse interests are all before the court by proper process or class representation and that the relief sought is not merely the giving of legal advice by the courts or the answer to questions propounded from curiosity.

Id., proposition affirmed in more recent case law, see e.g. Martinez v. Scanlon, 582 So.2d 1167 (Fla. 1991), and 1108 Ariola, LLC v. Jones, 71 So.3d 892 (Fla. 1st DCA 2011).

18. Plaintiff's pleading and attached exhibits demonstrate that Plaintiff does not presently have a contractual right to purchase the Property.

19. The Contract executed on October 18, 2011, and attached to Plaintiff's complaint as Exhibit D, has terminated on its face.

20. The Contract required that the transaction be closed and the deed for the Property be delivered on or before December 31, 2011.

21. Plaintiff has failed to allege that a closing occurred and a deed to the property was delivered on or before December 31, 2011.
22. Pursuant to its terms the Contract expired more than three months ago and the Contract neither provides for, nor does the evidence establish that, the Contract's term has been extended.
23. The Contract expressly recited that time was of the essence and therefore a delay in performance of the express terms of the agreement constitutes a material breach of the contractual terms. See Sublime, Inc. v. Boardman's Inc., 849 So. 2d 470, 471 (Fla. 4th DCA 2003).
24. Plaintiff's failure to timely perform the Contract is a material or total breach and Grove Properties Limited is discharged of its obligations under the Contract. See Atlanta Jet v. Liberty Aircraft Servs., LLC, 866 So. 2d 148, 150 (Fla. 4th DCA 2004).
25. Thus, Plaintiff does not have an enforceable contract for the purchase of the Property.
26. Consequently, Plaintiff cannot demonstrate a "present, ascertained or ascertainable state of facts", regarding any contract to purchase the Property. Martinez, 582 So. 2d at 1170 (citing May, 59 So. 2d at 639). Therefore, the relief that Plaintiff is seeking is "merely the giving of legal advice by the courts ... to questions propounded from curiosity." Id.
27. Since there is no "present ascertained or ascertainable state of facts" under which Plaintiff can establish contractual rights to the Property, this court lacks subject matter jurisdiction under Florida's Declaratory Judgments Act.

**b. Plaintiff has failed to state a cause of action under
Florida's Declaratory Judgments Act.**

28. Plaintiff failed to state a cause of action upon which declaratory relief can be granted.
29. In Florida, a complaint will give rise to a proceeding under the Declaratory Judgment Act only when “the party seeking the declaration shows that he is in doubt or is uncertain as to the existence or non-existence of some right, status, immunity or privilege and has actual, practical and present need for the declaration.” See Hialeah Race Course, Inc., 210 So. 2d at 752-53.
30. In short, Plaintiff must establish that there is “a bona fide controversy, justiciable in the sense that it flows out of some definite and concrete assertion of right” Id.
31. Plaintiff cannot allege a bona fide controversy that can be settled by this Court.
32. Plaintiff's contract has terminated on its face and therefore he does not have an operative contract for the purchase of the Property.
33. As a result, Plaintiff cannot establish rights to the Property, any rights Plaintiff may have are speculative and are not appropriate for declaratory relief.
34. Accordingly, Plaintiff has not stated a cause of action for declaratory relief.

c. Plaintiff has failed to join indispensable parties to this action.

35. Plaintiff's pleading and exhibits establish that he has failed to join indispensable parties to this lawsuit.
36. Before any proceeding for declaratory relief is cognizable all persons who have an “actual, present, adverse, and antagonistic interest in the subject

matter' should be before the court." Fla. Dep't of Education v. Glasser, 622 So. 2d 944, 948 (Fla. 1993) (quoting May, 59 So. 2d at 639).

37. Indispensable parties are "[p]ersons who have not only an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." Phillips v. Choate, 456 So.2d 556, 557 (Fla. 4th DCA 1984)(quoting Shields v. Barrow, 58 U.S. (17 How.) 130, 15 L.Ed. 158, 160 (1854)).
38. At the core of this controversy is the contract between Grove Properties Limited and Steven Andrews.
39. The Right of First Refusal at issue in this proceeding places contractual obligations on the descendants of the Collinses, more specifically John Aurell as Trustee for the Mary Call Darby Collins Trust and as General Partner of Grove Properties Limited.
40. Grove Properties Limited and the Mary Call Darby Collins Trust are the record owners of the parcels of property at issue in this lawsuit.
41. Necessarily, both the Mary Call Darby Collins Trust and Grove Properties Limited are indispensable parties, as each is a party whose interest in the controversy makes it impossible to completely adjudicate the matter without affecting either their interest or the interests of another party in the action. Florida Dept. of Revenue v. Cummings, 930 So.2d 604, 607 (Fla. 2006).

42. Plaintiff's suit directly implicates the ability of the owner of the property, whether it be the Mary Call Darby Collins Trust or Grove Property Limited, to alienate their property.
43. Moreover, Plaintiff's prayer for relief invokes "other relief as the Court deems equitable," which, in this case, would necessarily implicate the two parcels at issue in this lawsuit and owned by parties that are not subject to this Court's jurisdiction at this time.
44. Consequently, it is impossible for this Court to completely adjudicate this matter without the participation of the Mary Call Darby Collins Trust or Grove Property Limited as owners of the property at issue in Plaintiff's declaratory action .

d. Plaintiff lacks standing to bring this action under Florida's Declaratory Judgments Act.

45. Plaintiff's pleading for declaratory relief requests that this Court determine the Board of Trustees' rights under the Right of First Refusal.
46. Specifically, Plaintiff "asks the Court to enter a judgment . . . finding the Board's rights under the Right of First Refusal terminated[,] that the Board has no current rights under the Right of First Refusal; [r]uling that the property may be conveyed and encumbered free from any restrictions arising out of the Right of First Refusal; and [g]ranted such other relief as the Court deems equitable." (Complaint at p. 4).
47. Notably, Plaintiff does not implore the Court to declare his rights under any written instrument.
48. Florida's Declaratory Judgments Act is a statutorily created cause of action, which permits:

Any person claiming to be interested or who may be in doubt about his rights under a deed ... or whose rights, status, or other equitable or legal relations are affected by a ... deed ... may have determined any question or construction or validity arising under such ... deed ... and obtain a declaration of rights, status or other equitable or legal relations thereunder.

§86.021, Fla. Stat. (2012).

49. In City of Pinellas Park v. Matthews, 355 So. 2d 475, 476 (Fla. 2d DCA 1978), the Court, in construing section 86.021, Fla. Stat., determined that before a party can bring suit under the declaratory judgment statute he must claim some right under the instrument he is seeking to have construed.

50. Here, Plaintiff does not allege that he is a party to, or has rights under, the Right of First Refusal.

51. Instead, he asks the Court to construe the Board of Trustees' rights under the Right of First Refusal.

52. Therefore, based on the facts alleged in the Complaint, Plaintiff lacks standing to pursue his claim against the Board of Trustees as his pleading fails to assert any claim of right under the Right of First Refusal that he seeks to have construed.

CONCLUSION

WHEREFORE, the Board of Trustees respectfully requests this Court dismiss Plaintiff's complaint for declaratory judgment.

Submitted this 2nd day of April 2012.

BOARD OF TRUSTEES OF THE
INTERNAL IMPROVEMENT TRUST FUND

PAMELA JO BONDI
Attorney General



Michele R. Forte-Osborne
Sr. Asst. General Counsel
Florida Bar No. 17535
Dept. of Environmental Protection
Marjory Stoneman Douglas Building
3900 Commonwealth Blvd. M.S. 35
Tallahassee, Florida 32399
Telephone: (850) 245-2242
Fax: (850) 245-2296
Michele.ForteOsborne@dep.state.fl.us

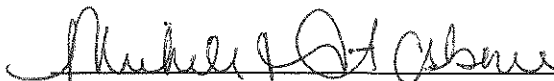


James A. Peters
Fla. Bar No. 230944
Office of the Attorney General
The Capitol, PL-01
Tallahassee, Florida 32399-1050
Telephone: (850) 414-3300
jim.peters@myfloridalegal.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished
via U. S. Mail, this 12th day of April, 2012 to:

Brian O. Finnerty
Fla. Bar No: 0094647
The Law Offices of
STEVEN R. ANDREWS, P.A.
822 North Monroe Street
Tallahassee, FL 32303



Michele R. Forte-Osborne
Sr. Assistant General Counsel