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Florida Second District Court of Appeal Docket

Case Docket

Case Number: 2D13-4574

Final Civil Other Notice from Manatee County

THE BRADENTON TIMES, INC. vs. MANATEE COUNTY

Lower Tribunal Case(s): 2013-CA-2597

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Date Docketed	Description	Date Due	Filed By	Notes
09/23/2013	Notice of Appeal Filed		Ralf G. Brookes, Esq. 778362	
09/25/2013	Case Filing Fee			
09/26/2013	OSC/Better Gov't Ass'n [summary judgment]			Discharged 10/8/2013
10/04/2013	RESPONSE		Ralf G. Brookes, Esq. 778362	to order to show cause and notice of filing final judgment
10/08/2013	ORD-DISCHARGING SHOW CAUSE			
11/06/2013	Received Records			FTP RECORD MORELAND
11/25/2013	Mot. for Extension of time to file Initial Brief		Ralf G. Brookes, Esq. 778362	
11/25/2013	Mot. for Extension of time to file Initial Brief		Ralf G. Brookes, Esq. 778362	
12/02/2013	ORDER GRANTING EOT FOR INITIAL BRIEF	12/20/2013		
12/19/2013	Initial Appellant Brief on Merits		Ralf G. Brookes, Esq. 778362	
01/06/2014	Request for Oral Argument			AE Robert M. Eschenfelder, Esq. 0008435
01/08/2014	Appellee Answer Brief		Robert M. Eschenfelder, Esq. 0008435	
01/28/2014	Appellant Reply Brief		Ralf G. Brookes, Esq. 778362	
04/01/2014	Oral Argument Date Set			
04/11/2014	Affirmed - Per Curiam Affirmed			
05/02/2014	Mandate			
12/29/2014	Returned Records			SFT VIA AUTO RECORD RETURN APPLICATION

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CLERK CIRCUIT COURT
MANATEE CO. FLORIDA

IN THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR MANATEE COUNTY FLORIDA

THE BRADENTON TIMES, INC.

Plaintiff,

v. CASE NO. 412013CA002597AX

MANATEE COUNTY,

Defendant.
_____/

FINAL ORDER JUDGMENT

This cause having been resolved by this Court's Order Granting Summary Judgment rendered on August 22, 2013 it is hereby

ORDERED AND ADJUDGED that:

Final Judgment is hereby entered on all counts in this case in favor of Defendant and against the Plaintiff and nothing further remains to be done.

DONE AND ORDERED in chambers this 3 day of October, 2013

_____
CIRCUIT COURT JUDGE

cc

Robert Eschenfelder Esq., Robert.eschenfelder@mymanatee.org
Ralf Brookes Esq. Ralf@RalfBrookesAttorney.com

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR MANATEE COUNTY, FLORIDA

THE BRADENTON TIMES, INC.,

Plaintiffs,

v.

CASE NO. 2013-CA-002597

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

Defendant,

_____/

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This matter is before the Court on Defendant's Motion for Summary Judgment, filed June 21, 2013; and Plaintiff's Response to Defendant's Motion for Summary Judgment and Cross Motion for Summary Judgment, filed August 8, 2013. Oral arguments on the matter were heard on August 13, 2013. The Court has reviewed the motions, the arguments, and the applicable law and is otherwise duly advised in the premises.

Summary Judgment Standard

Fla. R. Civ. P. 1.510(b) provides that "[a] party against whom a claim . . . is asserted . . . may move for a summary judgment in that party's favor as to all or any part thereof at any time with or without supporting affidavits." However, because summary judgment deprives a party of his or her right to trial, it must be exercised with restraint and any doubts must be resolved in favor of the nonmoving party. *Clay Elec. Co-op., Inc. v. Johnson*, 873 So. 2d 1182 (Fla. 2003). A movant for summary judgment has the initial burden of demonstrating the nonexistence of any genuine issue of material fact, but once the movant tenders competent evidence to support the motion, the opposing party must come forward with counterevidence sufficient to reveal a

genuine issue. *Gomez v. Fradin*, 41 So. 3d 1068 (Fla. 4th DCA 2010). "[I]f the pleadings and summary judgment evidence on file show that there is no genuine issue as to any material fact," summary judgment should be rendered and "the moving party is entitled to a judgment as a matter of law." Fla. R. Civ. P. 1.510(c). Nevertheless, a genuine triable issue may still exist, "even where the evidence is uncontradicted, if such evidence is susceptible of conflicting inferences." *Hobby v. Scott*, 298 So. 2d 436 (Fla. 4th DCA 1974).

Factual Background

In the instant case, the parties agree that the following facts are undisputed and that the issues are ripe for summary judgment. Accordingly, based on the affidavits, transcripts, and representations at the hearing, the Court finds as follows:

1. On May 1, 2010, Manatee County Administrator, Edwin Hunzeker, entered the State of Florida's Deferred Retirement Option Program (DROP), which allowed him to "retire" for the purposes of his Florida Retirement System benefits distribution, but remain employed with the County until the Fall of 2014. In the Fall of 2014, Mr. Hunzeker would be forced to cease his employment with the County; otherwise, he would forfeit his $337,000 lump-sum DROP payment.
2. On January 8, 2013, the Manatee County Board of Commissioners held a regularly scheduled and properly noticed meeting.
3. During the portion of the meeting known as "Commissioner's Comments," the newly elected Chairman of the Board, Larry Bustle, expressed to the Board his concerns about Mr. Hunzeker's impending retirement and asked the Board to "empower [him] as Chairman to negotiate a new contract with the administrator and bring it back to this

board." This request was made into a motion by a fellow Commissioner, seconded, and approved by the Board. This action was not listed on the meeting agenda.

4. On January 9, 2013, Chairman Bustle and the County Attorney met with Mr. Hunzeker and his own attorney to discuss potential contract terms. The meeting was held without public notice and no minutes were taken.

5. On January 22, 2013, the same individuals held a second meeting concerning the terms of Mr. Hunzeker's employment contract with the County. Again, the meeting was held without public notice and no minutes were taken.

6. Following these two meetings, the County Attorney met with each County Commissioner individually to present Mr. Hunzeker's proposed contract and to answer any questions. None of these meetings were publicly noticed and no minutes were taken.

7. On January 29, 2013, the Board held an open, publicly noticed meeting. Discussion and approval of Mr. Hunzeker's contract was listed as Agenda Item #38. When the item came up, Chairman Bustle reviewed the key terms of Mr. Hunzeker's proposed contract and opened the issue up to the public for discussion. After public comments were taken, each commissioner was given the opportunity to discuss the contract. Thereafter, the Board voted to approve the contract by a vote of 5-2.

8. On April 18, 2013, Plaintiff filed its original Complaint for Declaratory and Injunctive Relief, which was later twice amended. The substance of the Complaints alleged that Defendant, Manatee County, failed to give public notice or keep minutes for any of the meetings that were held between January 9, 2013, and January 28, 2013, in violation of Fla. Stat. § 286.011, commonly known as "The Sunshine Law."

Legal Analysis

As an initial matter, the Court addresses Plaintiff's apparent concern that the potential negotiation of a new contract for Mr. Hunzeker was not listed on the agenda for the January 8, 2013, Board meeting. Although courts have recognized that an agenda is an integral part of the actual mechanics of a publicly noticed meeting, they have concluded that The Sunshine Law does not require that every item must be placed on an agenda before it can be discussed. *See Hough v. Stembridge*, 278 So. 2d 288, 290-91 (Fla. 3d DCA 1973); *see also Grapske v. City of Alachua*, 31 So. 3d 193, 199 (Fla. 1st DCA 2010). In fact, courts have noted that "the necessity of items to appear on an agenda before they could be heard at a meeting would foreclose easy access to such meetings to members from the general public who wish to bring specific issues before the governing body." *Hough*, 278 So. 2d at 291. Therefore, any argument that the negotiation of Mr. Hunzeker's contract was not properly raised at the January 8, 2013, meeting, because it was not listed on the agenda, is without merit.

Therefore, the Court now turns to the core of Plaintiff's Complaint that Defendant violated The Sunshine Law when it failed to give public notice or keep minutes for any of the meetings that were held between January 9, 2013, and January 28, 2013. This argument stems from Fla. Stat. § 286.011(1) and (2), which states:

> (1) All meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision, except as otherwise provided in the Constitution, including meetings with or attended by any person elected to such board or commission, but who has not yet taken office, at which official acts are to be taken are declared to be public meetings open to the public at all times, and no resolution, rule, or formal action shall be considered binding except as taken or made at such meeting. The board or commission must provide reasonable notice of all such meetings.

> (2) The minutes of a meeting of any such board or commission of any such state agency or authority shall be promptly recorded, and such records shall be open to public inspection. The circuit courts of this state shall have jurisdiction to issue injunctions to enforce the purposes of this section upon application by any citizen of this state.

However, Defendant contends that these provisions are only applicable to a meeting of a board or commission. In this case, Defendant argues that the meetings in question were not "meetings of a board or commission," because only one Commissioner was in attendance at each meeting. In support of this assertion, Defendant cites a plethora of cases that define a "meeting of a board or commission" as a gathering of two or more members of the same board. *See Times Publishing Co. v. Williams*, 222 So. 2d 470, 473 (Fla. 2d DCA 1969); *Hough v. Stembridge*, 278 So. 2d 288, 289 (Fla. 3d DCA 1973); *Rowe v. Pinellas Sports Authority*, 461 So. 2d 72, 75 (Fla. 1984); *Sarasota Citizens for Responsible Government v. City of Sarasota*, 48 So. 3d 755, 764 (Fla. 2010).

In response, Plaintiff does not contest this two-person rule. Instead, Plaintiff argues that when the Board delegates the authority to an individual to act on its behalf, this creates an exception to that two-person requirement. In support of this proposition, Plaintiff cites *Town of Palm Beach v. Gradison*, 296 So. 2d 473 (Fla. 1974). In *Gradison*, the Town Council created a planning committee comprised of a lay group of citizens who were not regularly employed personnel of the town to participate in the formulation of a zoning plan. *Id.* at 474. Thereafter, the committee met in private, without noticing their meetings or taking minutes. The meetings of the committee resulted in changes in the zoning plan, which was later approved by the Town Council at a public meeting. The zoning plan was later challenged, because the plaintiff contended that the citizen planning committee had violated The Sunshine Law. In finding that the meetings were in violation of the law, the Supreme Court noted that "the Council delegated

to the committee much of their administrative and legislative decisional zoning formulation authority which is ordinarily exercised by a city-governing body itself." *Id.* at 474-75. As such, the Court concluded that "the nature of the committee and its function reached the status of a board or commission that to act legally must comply with the sunshine law." *Id.* at 475.

Likewise, Plaintiff relies on *Wood v. Marston*, 442 So. 2d 934 (Fla. 1983), which reached a similar conclusion. In *Wood*, a university created a faculty committee to seek out and screen applicants for a new position, to which the university president would make the final appointment, and the local news media sought an injunction to prohibit the committee from meeting in private. Concluding that the faculty committee was analogous to that in *Gradison*, the Court noted that both cases "involved delegation of a portion of the decision-making authority to an advisory group." *Id.* at 939. In addition, the Court held that a review of this decision-making process which takes place *in the sunshine*, "cannot serve to replace the public right of first-hand access to that process." *Id.*

These cases are distinguishable from the instant matter. Specifically, in this case, there was no delegation of decision-making authority to a committee or advisory group. To the contrary, the Board of County Commissioners permitted one Commissioner, Chairman Bustle, to meet with the County Administrator and attempt to negotiate a potential new contract for the Board's approval. In carrying out this assignment, the Chairman met with the County Attorney and the County Administrator, who also brought his own attorney. As such, the meetings consisted of a Commissioner, two staff members, and outside counsel.

Such a scenario concerning a meeting of staff members was first addressed in *Occidental Chem. Co. v. Mayo*, 351 So. 2d 336 (Fla. 1977) (receded from on other grounds in *Citizens of State of Fla. v. Beard*, 351 So. 2d 336 (Fla. 1992)). In *Occidental*, a chemical company who

purchased electric power from the Florida Power Corporation challenged a general rate increase that was approved by the Public Service Commission. Prior to the rate increase, the Commission held several public hearings, and then the Commission staff compiled a report of recommendations for the rate increase. Thereafter, the recommendations were recited by the Commission's counsel at a publicly noticed meeting, and the recommendations were adopted without comment. As such, the chemical company argued that because the "conference lasted only 90 minutes and resulted in adoption of the pre-prepared staff proposal, the commissioners either met in private to reach a consensus or delegated their decision-making responsibility to staff." *Id.* at 341.

As an initial matter, the Supreme Court rejected the chemical company's "broad-brush argument that all meetings between the commissioners and their staff must be open to the public. The Commission's staff is not subject to the law." *Id.* In addition, the Court went on to note that there was no evidence that "the commissioners met in secret or used staff members as intermediaries in order to circumvent public meeting requirements." *Id.* Instead, the Court concluded that the Commission "may have utilized some preconceived standard procedure to reduce all issues to writing, in the form of a draft order, in preparation for their joint meeting at the agenda conference," and the Court recognized that "there is no infirmity in their process if they did." The Court went on to state that "nothing in the Sunshine Law requires each commissioner to do his or her thinking and studying in public." Ultimately, the Court concluded that there was "no showing that an official act of the Commission preceded the public meeting or that the commissioners met together to reach a final decision out of the public spotlight." *Id.* at 342.

Following this decision, the Second District Court of Appeal confirmed that "staff is normally not included within the Sunshine Law." *News-Press Pub. Co., Inc. v. Carlson*, 410 So. 2d 546, 548 (Fla. 2d DCA 1982) (*citing Occidental Chem. Co. v. Mayo*, 351 So. 2d 336 (Fla. 1977)). However, the Second District recognized that "when a member of the staff ceases to function in his capacity as a member of the staff and is appointed to a committee which is delegated authority normally within the governing body, he loses his identity as staff while operating on that committee and is accordingly included within the Sunshine Law." *Id.* In reaching this conclusion, the court emphasized that "it would be unrealistic, indeed intolerable, to require that . . . every contact and discussion with anyone from whom [board members] would seek counsel and consultation to assist them in acquiring the necessary information, data, or intelligence needed to advise or guide them in their capacity [on the board], be a public meeting within the description of the Sunshine Law." *Id.* at 548-49. Nevertheless, "when [staff members] put on their committee 'hat' and act as a board governed by the act and discuss, deliberate, decide, and take action . . . , these meetings constitute official acts which are an indispensable requisite to formal action. At that point the committee must give reasonable notice to the public, meet in public, and keep minutes of their meetings." *Id.* at 549.

This distinction outlined by the Second District was subsequently approved of by the Supreme Court in *Wood*, 442 So. 2d at 939. In *Wood*, the Court recognized that the staff of a board or commission is privileged to inform and advise a decision-maker without complying with the requirements of The Sunshine Law; however, a delegation of decision-making authority to a committee of staff members would not likewise be privileged. *Id.* at 940 (Fla. 1983).

With this framework in mind, the Second District then decided *Godheim v. City of Tampa*, 426 So. 2d 1084 (Fla. 2d DCA 1983). In *Godheim*, staff members for the city council

held meetings with two waste disposal companies to negotiate the terms of their potential contracts. These meetings were supervised by the mayor; however the ultimate decisions on the contracts were to be made by the city council. In concluding that these meetings were not governed by The Sunshine Law, the Court approved of the Attorney General's opinion that The Sunshine Law does not apply to meetings of staff committees held for the purpose of evaluating bids and negotiating proposed contracts with winning bidders. *Id.* at 1088 (1981 Op.Att'y Gen.Fla. 081-51 (July 8, 1981)). As such, the Court distinguished *News-Press Publishing Co. v. Carlson,* and held that the negotiation meetings were not the equivalent of a governing board for purposes of The Sunshine Law. *Id.*

Accordingly, the scenario in *Godheim* is most similar to that in this case. Here, just as in *Godheim*, the Board gave authority to the Chairman to engage in negotiations, along with the staff, and to bring a proposed contract back to the Board for approval. As in *Godheim*, the meetings between the Chairman and the staff members were not of a character such that they should be considered the equivalent of a governing board for the purposes of The Sunshine Law.

Likewise, neither of the staff members who participated in the negotiations ceased to function in their capacity as staff members. To the contrary, the negotiations were well within their regular employment duties, and were not pursuant to a delegation of decision-making authority by the Board. *See News-Press*, 410 So. 2d 548-49; *Wood*, 442 So. 2d at 940. As such, the negotiation meetings in question did not constitute a sufficient delegation of decision-making authority to trigger the requirements of The Sunshine Law, where two or more members of the Board were not present at the meeting. *See Times Publishing Co. v. Williams*, 222 So. 2d 470, 473 (Fla. 2d DCA 1969); *Hough v. Stembridge*, 278 So. 2d 288, 289 (Fla. 3d DCA 1973); *Rowe*

v. Pinellas Sports Authority, 461 So. 2d 72, 75 (Fla. 1984); *Sarasota Citizens for Responsible Government v. City of Sarasota*, 48 So. 3d 755, 764 (Fla. 2010).

Likewise, the individual meetings between the County Attorney and each Commissioner were also not required to be held *in the sunshine*. Again, only one member of the Board was present at each meeting, and there is no allegation that the members were using the County Attorney as an intermediary to discuss the contract amongst themselves. *See Occidental*, 351 So. 2d at 341. Accordingly, because the Commissioners are permitted to seek counsel and information from their staff without giving public notice and taking minutes, there was no violation of The Sunshine Law. *News-Press*, 410 So. 2d at 548-49.

Therefore, based on the foregoing, it is hereby,

ORDERED AND ADJUDGED that Defendant's Motion for Summary Judgment is **GRANTED**. It is further,

ORDERED AND ADJUDGED that Plaintiff's Cross Motion for Summary Judgment is **DENIED**.

DONE AND ORDERED in Chambers, at Bradenton, Manatee County, Florida, this 22 day of August 2013.

Diana Moreland, Circuit Judge

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