IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR POLK COUNTY, FLORIDA
CIVIL DIVISION

POINCIANA COMMUNITY DEVELOPMENT DISTRICT, and POINCIANA WEST COMMUNITY DEVELOPMENT DISTRICT,

Plaintiffs, Case No. 2017-CA-003547

v.

STATE OF FLORIDA, et al.

Defendants.
_____/

MEMORANDUM OF LAW ON THE JUDGMENT THAT DENIED THE DISTRICTS' FIRST VALIDATION ATTEMPT

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STATEMENT OF THE CASE AND FACTS

This proceeding is the second attempt by Poinciana Community Development District and Poinciana West Community Development District (the "Districts") to validate more than $100 million of proposed special assessment bonds to purchase the community's common-area amenities from the developer, AV Homes, Inc. and its subsidiary, Avatar Properties Inc., doing business as AV Homes (collectively "AV").

AV establishes the Districts and the Solivita Association

In developing the community Solivita, AV established and initially controlled the Districts, then transitioned control to residents as required by section 190.006(3)(a), Florida Statutes. But the Districts' boards still include supervisors originally chosen by AV. And when AV first proposed the amenities purchase at issue in this case, AV's then vice president of development, Tony Iorio, chaired Poinciana West's board.

When AV first began developing the community in 1999, it recorded two declarations of covenants to apply to all homes: the Solivita Master Declaration and the Solivita Club Plan. The Master Declaration incorporated the Club Plan and stated that the Master Declaration was "subordinate in all respects" to the Club Plan. AV also formed the non-profit Solivita Community Association, Inc. (the "Solivita Association"), to ostensibly represent the interests of the association of homeowners subject to the Master Declaration. AV has always controlled the Solivita Association, with AV executives serving as the Solivita Association's officers and board members.

AV avails itself of the provisions of the Homeowners' Association Act

The creation of a homeowners' association and declarations was necessary for AV to gain the rights and benefits of the Homeowners' Association Act in chapter 720, Florida Statutes. The Act's stated purposes are to "give statutory recognition" to "not for profit" entities to operate residential communities; to provide operation procedures for homeowners' associations, and to "protect the rights of association members." § 720.302, Fla. Stat.

The Act contemplates communities having "common areas" dedicated for a community's homeowners to use and maintain through the homeowners' association. § 720.301(2), Fla. Stat. A developer initially may control the homeowners' association and retain title to the common areas. § 720.307, Fla. Stat. But once 90% of the lots are sold, the developer must transition control of the association to community members and deliver all deeds to common property, regardless of how the properties are titled prior to turnover. § 720.307(1)(a), (4)(a), Fla. Stat.; *see* § 720.301(2), Fla. Stat. (defining "common area" to include property dedicated for use or maintenance by association members, "regardless of whether title has been conveyed to the association").

The Act authorizes the developer to then impose deed restrictions and covenants on the properties sold, and for the developer—and later the association—to levy mandatory assessments on the homes to pay the costs of owning and maintaining the common areas. § 720.308, Fla. Stat. The Act prohibits developers and associations from imposing assessments that exceed common expenses, as all assessments "must be in the member's proportional share of expenses." § 720.308(1)(a), Fla. Stat.

AV attempts to withhold amenities from Solivita Association and creates illegal profit stream from collecting Club Membership Fees

AV's plan for developing Solivita included recreational amenities facilities dedicated for use and maintenance by Solivita's homeowners, including a park, swimming pools, sports courts, workout facilities, and activity centers. But rather than follow Chapter 720, AV crafted a scheme intended to permit it to own the amenities facilities perpetually and assess homeowners in excessive amounts.

Rather than designate the Solivita amenities as common areas, AV sought to maintain perpetual, private ownership of them. Its master declaration excluded "any portion of the Club" from its definition of "Community Property." In turn, the Club Plan declaration defined AV as the "Club Owner" and "Club Property" as "any real property designated by" AV. The Club Plan repeatedly stated that AV retained, subject to its "sole and absolute discretion," all control over the Club, its properties, and their use.

At the same time, AV's declarations purported to impose covenants that would permit it to collect mandatory, perpetual assessments in amounts far exceeding the costs of operating and maintaining the Club Property. The Club Plan declaration states that its terms "shall be covenants running with Solivita in perpetuity." Under the plan, each homeowner is "deemed to have . . . agreed to pay all Club Dues," including both "Club Expenses" and a "Club Membership Fee," which if not paid are enforceable by lien that AV can compel the Solivita Association to enforce.

"Club Expenses" cover "all expenses associated with the Club so that Club Owner shall receive the Club Membership Fees without deduction of expenses or charges in

respect of the Club." Thus, "Club Expenses" are similar to the assessments permitted for common areas under the Act. *See* § 720.308(1)(a), Fla. Stat. "Club Membership Fees are in addition to the Club Expenses" and increase yearly by $1 per month. Club Membership Fees also vary so that different homeowners pay five different levels of different monthly fees, with the highest (and most common) monthly fee being perpetually $20 per month higher than the lowest. The Club Plan also provides that all Club Dues "shall be a charge and continuing first lien" on "each Home and all personal property located thereon."

AV anticipated legal problems with this structure. The Club Plan states that each prospective homeowner "HAS AN OBLIGATION TO RETAIN AN ATTORNEY IN ORDER TO CONFIRM THE VALIDITY OF THIS CLUB PLAN" before accepting a deed in Solivita.

For more than 15 years, AV assessed homeowners for Club Expenses, defined broadly to include not only operating and maintenance expenses but also "Club Owner's debt service and depreciation." By including both "debt service" and "depreciation" in the Club Expenses, AV was able to not only (1) pass to residents costs of the amenities' land and construction, but also (2) charge residents for the depreciation of the amenities, a double recovery. AV also collected a $150 "Capital Contribution" on the original sale of each lot.

In 2013, AV collected more than $3.3 million in Club Membership Fees. By 2016, AV projected it would collect $3.9 million in 2016 Club Membership Fees ranging from $65 to $85 per home.

AV creates exit strategy to cash out profit from Club Fee Scheme

By 2016, AV had sold close to 4,200 homes, approximately 75% of the 5,595 units planned. As sales neared the 90% threshold that would trigger the requirement to turn over control and the deeds to the common areas to the homeowners' association, AV devised a plan to sell the common-area amenities to the Districts through a bond issuance.

AV's plan was to use the Districts' bonding capacity to cash out AV's expected future profit stream from collecting 30 additional years of Club Membership Fees. AV set out to accomplish this by funding the Districts' hiring of a valuation consultant to calculate the present value of this profit stream. Through a series of presentations at public meetings and one-on-one meetings with board supervisors, AV's then vice president of development, Tony Iorio, persuaded the Districts' boards to agree to purchase the amenities for the consultant's calculation of the present value of the profit stream—more than $70 million.

Residents obtain appraisal of amenities fair value

The only licensed property appraiser who has given an opinion on the fair value of the amenities facilities concluded that the fair value is $19.25 million. The Districts take the position that they are not required to pay fair value for the amenities facilities, but instead have discretion to issue bonds for any amount that the Districts' boards decide that they want to pay AV for the amenities facilities.

The Districts are not only proposing to overpay by more than $50 million, but they have also not determined whether the facilities are common property of the community that AV will be required to turn over to the association of homeowners that have been using and maintaining the facilities for the past 15 years.

Districts base assessments on Club Fee Scheme

The Districts also accepted AV's proposal to preserve the Club Fee Scheme's rate structure of five different monthly fee levels so that homeowners currently paying lower Club Membership Fees would pay lower special assessments. AV paid for and persuaded the Districts to adopt an assessment methodology that used the Club Fee Scheme as the basis for apportioning the special assessments.

Preserving the Club Fee Scheme's rate structure in which some homeowners pay more than others was central to the public relations campaign launched by AV to build community support for the bond issuance and amenities purchase. AV and the Districts' boards claimed the $70-million purchase price was a good deal for residents because monthly fees owed by homeowners in the community would not go up. The special assessments that the Districts would impose to repay the bonds would replace the Club Membership Fees currently assessed by AV.

As with the valuation consultant's calculation of the purchase price, AV was successful in persuading the Districts' boards to adopt the assessment methodology that preserved the Club Fee Scheme's rate structure in which some homeowners pay more

than others. Both the valuation consultant and the methodology consultant were paid by AV.

AV also paid for the Districts' legal fees and other costs of attempting to validate more than $100 million of special assessment bonds to fund the purchase of the amenities, as well as the construction costs for renovations and new facilities. The renovation and new construction have also been a central part of AV's public relations campaign.

Districts unsuccessfully attempt to validate proposed bond issuance

On November 22, 2016, the Districts filed their first complaint seeking validation. *See* Case No. 53-2016-CA-004023 (Fla. 10th Cir. Ct.). Following a show cause hearing on June 14, 2017, and a trial to the court on July 18 through 21, 2017, the court entered a final judgment denying validation. *See* Final Judgment Not Validating and Not Confirming Bond Issuance Herein Described for Failing to Properly Apportion the Special Assessments Among the Real Properties Specially Benefitted (Sept. 1, 2017).

In the final judgment denying validation, the court found that the "Plaintiffs **failed** to properly, fairly, and reasonably apportion the subject special assessments levied among the Homeowners," Final J. at 20 (emphasis in original), and that "Plaintiffs' apportionment of the subject special assessments was arbitrary and capricious." *Id.*

The court explained that homeowners in the Districts "are to be **actually** assessed at different rates to effectuate the Districts' Boards' intent to retain the Club Fee Scheme at fixed 2016 Club Fee amounts." *Id.* (emphasis in original). In discussing the law

applicable to special assessment apportionment, the court explained that "Local governing bodies are bound by Florida law to demonstrate apportionment of special assessments amongst specially benefited real properties is not arbitrary and capricious but is proper, fair, and reasonable." *Id.* at 21.

The Court explained that, to justify apportioning special assessments in a manner that results in some homeowners paying more than others, the homeowners that pay higher special assessments must receive a proportionately greater benefit from the bond issuance. *Id.* at 21–22. Finding no justification for the Districts to assess homeowners at different rates, the court concluded that the proposed apportionment of special assessments was unfair, arbitrary, and capricious. *Id.* at 23.

The Court explained: "The **only** basis for the Club Fee Scheme, the sole basis upon which the Districts' Boards approved to specially assess the Homeowners at different rates, is the Developer's original **subjective** decision to implement the Club Fee Scheme." *Id.* at 23 (emphasis in original). "Consequently, the Court finds no reasonable, fair, and proportional relationship between the final different special assessment amounts to be actually levied against the Homeowners . . . . [T]he Homeowners are actually to be specially assessed at different rates **solely** to retain a **subjective** Club Fee Scheme." *Id.* (emphasis in original).

The Districts did not appeal the Court's findings and conclusions with respect to their proposed apportionment of special assessments.

Florida Supreme Court rules Mann and Taylor's appeal is moot

In an abundance of caution and anticipating that AV would fund the Districts' second validation attempt, Mann and Taylor appealed the Final Judgment's findings and conclusions with respect to the public purpose of proposed bond issuance and the Districts' failure to comply with other requirements of law. On these issues, the court's final judgment explained why it would have ruled in favor of the Districts if the special assessments had been fairly and properly apportioned.

The Florida Supreme Court ordered the parties to file briefs on why the appeal was not moot. Mann and Taylor explained in their brief the conflicting case law from Florida's First and Third District Courts of Appeal on whether an appeal of the decision would be required to avoid collateral estoppel on the findings and conclusions of the Final Judgment that were not essential to the Court's denial of validation but were nevertheless included in the Final Judgment. If collateral estoppel would apply, Taylor and Mann argued, then the appeal was not moot and the court should review and reverse the Final Judgment's findings and conclusions with respect to the public purpose of the proposed bond issuance and the Districts' failure to comply with other requirements of law.

The Florida Supreme Court decided that the appeal was moot and clarified that collateral estoppel would not apply to the findings appealed by Mann and Taylor:

> This Court, having reviewed the parties' briefs and responses to this Court's order to show cause, determines that this appeal, brought by Appellants who oppose Appellees' requested bond validation, from the trial court's judgment denying the bond validation is dismissed without prejudice to raising all issues brought in this appeal in any subsequent

> appeal from a subsequent judgment validating the bonds at issue. Specifically, in any future appeal to this Court, there shall be no issue preclusion, *res judicata* effect, collateral estoppel, or similar defense as to the issue of the legal validity of the bonds.

Order in Case No. SC17-1806 (Fla. Mar. 5, 2018).

Districts proceed with second attempt to validate proposed bonds

After the denial of bond validation, the Districts, on October 18, 2017, rescinded their prior amenity debt assessment resolutions and nullified and canceled their prior amenity debt assessments. They also authorized the filing of this civil action. Then, on December 13, 2017, the Districts adopted new resolutions finding special benefits purportedly derived by the parcels to be subject to the special assessments and levying special assessments.

Then, after the Florida Supreme Court dismissed the appeal as moot, the Districts set a case management conference to schedule a show cause hearing, and this Court ordered the parties to file briefs on issue preclusion.

William Mann continues to own property and reside in Poinciana West Community Development District. Brenda Taylor continues to own property and reside in Poinciana Community Development District. Mann and Taylor, through undersigned counsel, intend to show cause and prove at trial that the Court should deny the Districts' second validation attempt. As does William Wynn, who owns property and resides in Poinciana but did not participate in the trial on the Districts' first validation attempt.

MEMORANDUM OF LAW

Under the doctrines of collateral estoppel and res judicata, prior judgments have a preclusive effect only as to matters that were actually adjudicated. Here, the unfair and improper apportionment of assessments was the only matter actually adjudicated by the judgment denying the Districts' first validation attempt. The final judgment's findings about the Districts' public purpose and its compliance with legal requirements were not necessary to the denial of validation and thus were not actually adjudicated. If those matters had actually been adjudicated, then the Florida Supreme Court would have reviewed them on appeal. Instead, it dismissed the appeal as moot. Thus, only the Districts are bound by the findings and conclusions in the final judgment denying their first validation attempt. Mann, Taylor, and Wynn (the "Residents") are not barred from challenging any aspect of the Districts' second validation attempt.

I. The Districts are bound by the prior judgment's finding that the proposed special assessments were not fairly and properly apportioned.

Issue preclusion may be used defensively against a plaintiff that has had the opportunity to fully litigate a matter that has been conclusively determined in a contest which results in a final decision. *Dadeland Depot, Inc. v. St. Paul Fire & Marine Ins. Co.*, 945 So. 2d 1216, 1235 (Fla. 2006); *cf. Zeidwig v. Ward*, 548 So. 2d 209, 214 (Fla. 1989). Here, it has already been conclusively determined that there is no justification for the Districts to assess homeowners at different rates to retain the Club Fee Scheme's rate structure, which was based solely on a subjective decision by AV. *See* Final J. at 20–24. The Districts, having decided not to appeal the final judgment, are precluded from re-

litigating the final judgment's findings and conclusions on the unfair and improper apportionment of special assessments.

II. The Residents are not bound by any of the other findings in the judgment denying the Districts' first validation attempt.

There is no statutory or common law basis upon which to preclude Defendants from challenging any aspect of the Districts' second validation attempt.

A. Only a judgment validating bonds is conclusive as to all of the matters adjudicated in the proceeding; a judgment denying validation does not have the same conclusive effect.

Section 75.09, Florida Statutes, states that a judgment that validates bonds and is affirmed or not appealed "is forever conclusive as to all matters adjudicated against plaintiff and all parties affected thereby[.]" Section 75.09 does not apply to a judgment that does not validate bonds:

> ***If the judgment validates such bonds,*** certificates or other obligations, which may include the validation of the county, municipality, taxing district, political district, subdivision, agency, instrumentality or other public body itself and any taxes, assessments or revenues affected, ***and no appeal is taken within the time prescribed, or if taken and the judgment is affirmed, such judgment is forever conclusive as to all matters adjudicated against plaintiff and all parties affected thereby,*** including all property owners, taxpayers and citizens of the plaintiff, and all others having or claiming any right, title or interest in property to be affected by the issuance of said bonds, certificates or other obligations, or to be affected in any way thereby, and the validity of said bonds, certificates or other obligations or of any taxes, assessments or revenues pledged for the payment thereof, or of the proceedings authorizing the issuance thereof, including any remedies provided for their collection, shall never be called in question in any court by any person or party.

§ 75.09, Fla. Stat.

Thus, there is no statutory basis for issue preclusion based on the findings with respect to public purpose and compliance with legal requirements in the prior judgment denying the Districts' first validation attempt.

B. Under the common law in Florida, res judicata only results from the determinations that were critical and necessary to a prior judgment; additional findings that were not necessary to the decision do not have any preclusive effect.

The term "res judicata" is translated from Latin as "a thing adjudicated" and encompasses claim preclusion and issue preclusion. *Brown v. R.J. Reynolds Tobacco Co.*, 611 F.3d 1324, 1331 (11th Cir. 2010) (applying Florida law) (citing *Black's Law Dictionary* 1336 (8th ed. 2004)). Issue preclusion, known also as collateral estoppel or estoppel by judgment, "prevents the parties in a second suit from litigating those points in question which were ***actually adjudicated*** in the first suit." *Rohan v. Trakker Maps, Inc.*, 633 So. 2d 1176, 1177 (Fla. 3d DCA 1994) (emphasis added); *see also Liberty Mut. Ins. Co. v. Jozwick*, 204 So. 2d 216, 218 (Fla. 3d DCA 1967) ("Estoppel by judgment prevents parties from litigating in a second suit common issues which were ***actually adjudicated*** in a prior action." (emphasis added)).

The requirement of an actual adjudication ensures that there is only preclusion as to issues that were a "critical and necessary part of the prior determination." *Cook v. State*, 921 So. 2d 631, 634–36 (Fla. 2d DCA 2005); *see also Holt v. Brown's Repair Serv., Inc.*, 780 So. 2d 180, 182 (Fla. 2d DCA 2001) (explaining that "the issue must have been a critical and necessary part of the prior determination"). Issue preclusion does not result from "the court's additional findings . . . [that] were not necessary to the decision."

Dempsey v. Law Firm of Cauthen & Odham, P.A., 752 So. 2d 107, 110 (Fla. 5th DCA 2000) (citing Am. Jur. 2d). *See generally* Am. Jur. 2d *Judgments* § 623 ("[T]he party asserting collateral estoppel has the burden to plead and prove that the particular issue on which he or she claims the estoppel ***was actually or necessarily in issue and decided*** in the prior action ***or was necessarily involved and decided in determining*** the real issue in the prior action." (emphasis added)).

C. The only findings that were critical and necessary to the final judgment denying the Districts' first validation attempt were the findings about the Districts' unfair and improper apportionment of assessments. The additional findings were unnecessary and have no preclusive effect.

The judgment denying the Districts' first validation attempt included a number of findings that were unnecessary to the denial of validation. The findings concerned other grounds for denying validation that Mann and Taylor raised. The court did not find that these were additional grounds for denying validation. So Mann and Taylor appealed the findings in an abundance of caution and in anticipation that AV would fund a second attempt at validation. The Florida Supreme Court denied the appeal as moot.

For the same reason that the Florida Supreme Court denied Mann and Taylor's appeal as moot, the findings which were the subject of that appeal should have no preclusive effect. *Gen. Dev. Utils., Inc. v. Florida Public Serv. Comm'n*, 385 So. 2d 1050 (Fla. 1st DCA 1980). In *General Development*, the appellants challenged rules proposed by the PSC. *Id.* at 1050. They prevailed on one of the issues they raised but lost on others. *Id.* The First District held that because the appellants had prevailed in their rule

challenge, they were not "aggrieved" by the order on review and could not appeal the result. *Id.*

The First District noted that the appellants had expressed concern that the PSC could remedy the one problem the hearing officer identified, propose the same rules in a new proceeding, and argue that res judicata or collateral estoppel barred them from making the arguments that had been resolved against them. *Id.* But the First District concluded that concern was "unwarranted." *Id.* It held that the hearing officer's pronouncements on the other issues were "immaterial to the decision and [] dicta upon which no claim of res judicata or collateral estoppel could lie." *Id.*; *see also Allen v. Martinez*, 573 So. 2d 987, 989 (Fla. 1st DCA 1991) (holding that issues raised in appeal of order declining to approve rule were moot, but that appellant was "free to address all of the issues" not addressed on appeal in subsequent rule proceeding).

D. The judgment denying the Districts' first validation attempt did not create any binding precedent.

"Trial courts do not create precedent." *State v. Bamber*, 592 So. 2d 1129, 1132 (Fla. 2d DCA 1991), *approved*, 630 So. 2d 1048 (Fla. 1994); *see also Nard v. DeVito Contracting & Supply, Inc.*, 769 So. 2d 1138, 1140 (Fla. 2d DCA 2000) ("In closing, we take this opportunity to remind trial courts again that they 'do not create precedent.'"); *Wood v. Fraser*, 677 So. 2d 15, 19 (Fla. 2d DCA 1996) (same quote). Thus, the final judgment in the Districts' first validation attempt did not create any rules of law or other standards that this Court must apply. *See id.*

Furthermore, the Districts' actions subsequent to the judgment denying the first validation were not considered in making the additional findings that were not necessary to the final judgment denying the Districts' first validation attempt. The Residents have the right to present evidence of those subsequent actions and all prior actions in support of their challenge to the Districts' second validation attempt.

CONCLUSION

The Districts remain bound by the judgment that resulted from their first validation attempt. It has been conclusively determined that it is unfair and improper to assess homeowners different amounts based on the Club Fee Scheme's rate structure, which was subjectively implemented by AV. The Districts are precluded from re-litigating that issue.

No other issue preclusion results from the prior judgment denying the Districts' first validation attempt. There is no issue preclusion from the prior judgment's additional findings that were unnecessary to denial of validation. Thus, the Residents are not precluded from challenging any aspect of the Districts' second validation attempt.

Dated: June 1, 2018

Respectfully submitted,

/s/J. Carter Andersen

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