IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CASE NO: 2020-020643-CA-01
SECTION: CA05
JUDGE: Samantha Ruiz Cohen

Gustavo Tellez
Plaintiff(s)

vs.

Village of Key Biscayne
Defendant(s)
_____/

ORDER GRANTING FINAL SUMMARY JUDGMENT

THIS CAUSE came before the Court on June 22, 2021 and June 28, 2021 on the Motion for Summary Judgment filed by the Village of Key Biscayne ("Village"), and the Court, having reviewed the motion, response, and documents attached and incorporated into the record, and after hearing argument of counsel, and being otherwise fully advised in the premises, **Finds and Orders** as follows:

Background

Plaintiff seeks to invalidate and nullify the Village's November 3, 2020 bond referendum ("Referendum"), which asked voters whether the Village should be authorized to issue $100 million in bonds for the purpose of "financing costs of improvements relating to mitigating the effects of sea level rise and flooding, protecting the Village's beaches and shoreline, and hardening infrastructure to the effects of hurricanes." (*See* Amend. Compl., Exhibit A.)

The Amended Complaint challenges the Referendum based upon three somewhat related claims: In Count I, Plaintiff alleges that, as a result of the Referendum, the Village has

improperly borrowed money without an ordinance. In Count II, Plaintiff alleges that voters were asked if they are "For" or "Against" the bonds—instead of being asked to select "Yes" or "No." And in Count III, Plaintiff alleges that the ballot language is confusing, and the Village Resolution approving the Referendum did not contain the projects articulated on the Village website.

New Summary Judgment Standard

In *Askew v. Firestone*, 421 So. 2d 151, 154 (Fla. 1982), the Florida Supreme Court established that "in order for a court to interfere with the right of the people to vote … the record must show that the proposal is clearly and conclusively defective." Put another way, Plaintiff must show that the voters did not have "fair notice of the decision [they] must make." *Metro. Dade Cty. v. Shiver*, 365 So. 2d 210, 213 (Fla. 3d DCA 1978).

The Florida Supreme Court recently amended Rule 1.510 of the Florida Rules of Civil Procedure and "adopted the federal summary judgment standard." *In re Amends. to Fla. Rule of Civ. Proc. 1.510*, No. SC20-1490, 2021 WL 1684095, at *3 (Fla. Apr. 29, 2021). Under the newly enacted summary judgment standard, the burden is no longer on the moving party "to produce evidence showing the absence of a genuine issue of material fact, even with respect to an issue on which the nonmoving party bears the burden of proof." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). "Instead . . . the burden on the moving party may be discharged by 'showing'—that is, pointing out to the [trial] court—that there is an absence of evidence to support the nonmoving party's case." *Id*. Moreover, in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), the United States Supreme Court aligned its' summary-judgment practice with the standards applicable to motions for directed verdict (now, motions for judgment as a matter of law), rejecting the "scintilla" test. *Id.*; *see also Roger Whitmore's Auto. Services, Inc. v. Lake County, Illinois*, 424 F.3d 659, 669 (7th Cir. 2005) (explaining that the plaintiff must present something by which a jury could connect the dots and not only bare speculation or "scintilla of evidence," as this does not suffice). "Just as the court will enter judgment as a

matter of law against a party who can produce no more than a scintilla of proof at trial, so too will a court grant summary judgment against a party who can produce no more than a scintilla of proof at the summary-judgment stage." *Id.* In *Liberty Lobby*, the Court stated that Rule 56 "[b]y its very terms, [ ] provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Id.* at 247-48. The Court also delineated that substantive law identifies which facts are material and that only disputes over facts that might affect the outcome of the suit under the governing law will preclude the entry of summary judgment. *Id.* at 248. An issue is genuine when the evidence is such that a reasonable jury could return a verdict for the nonmovant. *Id.* at 249-50 (1986).

Under the new federal standard, the "test for the existence of a genuine factual dispute is whether the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *In re Amends. to Fla. Rule of Civ. Proc. 1.510*, 2021 WL 1684095, at *3 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Thus, the movant no longer has the burden of "disproving the nonmovant's case." *Id.*, at *2. To defeat summary judgment, the non-moving party must do more than merely show there is the "slightest doubt" or some "metaphysical" doubt about the facts. *Id.*; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

FINDINGS

1. The Referendum (attached to the Amended Complaint as Exhibit A) was approved by 56% of the electorate on November 3, 2020, and the results were certified on November 17, 2020.
2. Voters were asked whether they were "For Bonds" or "Against Bonds." (Amend. Compl., ¶¶. 10-11).
3. The Referendum sought approval for the Village to issue general obligation bonds not exceeding $100 million for mitigating sea level rise and flooding, protecting Village beaches and shoreline, and hardening infrastructure to the effects of hurricanes. Amend.

Compl., Exhibit A.

4. The resolution approving the Referendum passed by the Village Council on June 30, 2020 ("Resolution") states that, if approved by the voters, the Bonds may be issued as the Village "in its discretion thereafter determine[s] by subsequence ordinance or resolution." Resolution, Section 8.
5. There is no evidence in the record that any Referendum money has been borrowed by the Village without an ordinance.
6. The Village "put online a website at https://www.vkbresilience.org/." Amend. Compl. ¶ 34. The website outlines the projects that would be funded by the bonds, including roadway improvements, renourishment on the beach, undergrounding or elevating utility infrastructure, and hardening of structures that support the electrical components of the grid. Amend. Compl. ¶ 34.
7. In addition to the website, the record reflects extensive public notice and information as to how the money would be used, including comments by the Village Manager at the June 30, 2020 Council meeting, newspaper articles discussing the Referendum and its purpose, and virtual town hall meetings, all prior to the November 3, 2020 vote.

As a result, is it Ordered and Adjudged as follows:

Discovery

Plaintiff argues that summary judgment cannot be entered until all discovery is complete. Plaintiff has recently propounded discovery that seeks information that is not relevant to the issues in the Amended Complaint or the motion for summary judgment—such as who was involved in creating the website and how it was funded. Plaintiff cites to cases that stand for the unremarkable proposition that "generally" summary judgment should not be entered until discovery is complete. *See e.g. Brandauer v. Publix Super Markets, Inc.*, 627 So. 2d 932, 933 (Fla, 2d DCA 1995); *Act Corporation v. Devane*, 672 So. 2d 611, 613 (Fla. 5th DCA 1996).

Under binding Third District Court of Appeal precedent, however, "[s]ummary judgment may be granted, even though discovery has not been completed, when the future discovery will not create a disputed issue of material fact." *Est. of Herrera v. Berlo Indus., Inc.*, 840 So. 2d 272, 273 (Fla. 3d DCA 2003); *Barco Holdings, LLC v. Terminal Inv. Corp.*, 967 So. 2d 281, 288 (Fla. 3d DCA 2007) (noting that summary judgment is appropriate where pending discovery would "not have unearthed any material facts necessary for the resolution of [the] issue"). Moreover, federal courts have held that after a party moves for summary judgment, the non-movant "bears the burden of calling to the district court's attention any outstanding discovery." *See Cowan v. J.C. Penney Co.*, 790 F.2d 1529, 1530 (11th Cir.1986). A district court may grant summary judgment in the early stages of discovery if "further discovery would be pointless" and the movant is "clearly entitled to summary judgment." *See Robak v. Abbott Labs.,* 797 F.Supp. 475, 476 (D.Md.1992) (granting summary judgment in the "early stages" of discovery because "no material fact [could] be genuinely disputed under the allegations of the Complaint"). Thus, the pending discovery, that is not relevant to the issues in the Amended Complaint or the motion for summary judgment, does not prevent this Court from ruling on the motion.

Summary Judgment

Next, Plaintiff argues that summary judgment should not be granted because of purported disputes as to material facts. This Court hereby finds and rules that Plaintiff has presented no genuine dispute as to any material fact and that summary judgment is therefore appropriate. The Court also notes that the Village has pointed to many cases involving challenges to referenda that have been resolved at the summary judgment stage. *See Matheson v. Miami-Dade Cty.*, 187 So. 3d 221 (Fla. 3d DCA 2015); *Andrews v. City of Jacksonville*, 250 So. 3d 172 (Fla. 1st DCA 2018); *Town of Ponce Inlet v. Pacetta, LLC*, 63 So. 3d 840 (Fla. 5th DCA 2011); *O'Connell v. Martin Cty.*, 84 So. 3d 463 (Fla. 4th DCA 2012).

Count I

Plaintiff has not argued that any question of fact precludes entry of summary judgment as to Count I. Instead, Plaintiff argues that the Referendum in effect borrows money without a Village ordinance, as required by section 4.03(b) of the Village Charter.

In fact, the Resolution makes clear that no money has been or can be borrowed without subsequent action by the Village Council. If the Village in the future does attempt to borrow money without the passage of an ordinance, that would be in violation of section 4.03(b) and can be challenged at that time.

However, since there is no evidence presented that any money has been borrowed or can be borrowed without an ordinance, the Court hereby enters final summary judgment in favor of the Village as to Count I of the Amended Complaint.

Count II

Plaintiff argues that the Referendum is defective and should be nullified because the ballot asked voters whether they were "For Bonds" or "Against Bonds." Plaintiff points to section 5.03 of the Village Charter, which states ballot proposals should include the words "Yes" or "No." Plaintiff does not argue that there are any questions of fact that preclude a ruling at this stage of the proceedings.

The Village argues that Charter section 5.03 does not apply. However, the Court need not reach this issue because, even if section 5.03 were to apply, binding case law establishes that such "highly technical" arguments are insufficient to invalidate ballot language. *See Metropolitan Dade County v. Shiver*, 365 So. 2d 210, 213 (Fla. 3d DCA 1978) (finding that "ballot language is in compliance with the" statutory requirements, notwithstanding "slight variation in ballot language"). In fact, when confronted with this issue, the Florida Supreme

Court has held that voters are "afforded an opportunity to express themselves fairly," regardless of whether they are asked to select "Yes" and "No" or "For Bonds" and "Against Bonds." *State v. Special Tax Sch. Dist. No. 1 of Dade Cty.*, 86 So. 2d 419, 419 (Fla. 1956). In this case, it is clear that "the voters were afforded an opportunity to express themselves fairly and did in fact exercise that privilege." *Id.*

Therefore, this Court hereby enters final summary judgment in favor of the Village as to Count II of the Amended Complaint.

Count III

In Count III, Plaintiff claims that the ballot language is "confusing and misleading" and that the Resolution did not contain the "projects articulated on the Village website." Amend. Compl. ¶¶ 31, 35. As a matter of law, the Court finds that the Referendum language is neither confusing nor misleading. In plain and unambiguous language, the Referendum asked voters whether they supported the issuance of bonds to (1) "[m]itigate effects of sea level rise and flooding"; (2) "[p]rotect Village beaches and shoreline"; and (3) "[h]arden infrastructure to the effects of hurricanes." The Court thus finds Plaintiff has failed to carry his burden in establishing that the Referendum is "clearly and conclusively defective." *Shiver*, 365 So. 2d at 213.

Further, the Florida Supreme Court has held that there is "no requirement [as urged by Plaintiff] . . . that the City must expressly include each capital project in its resolution." *Grapeland Heights Civic Association v. City of Miami*, 267 So. 2d 321, 323 (Fla. 1972). And finally, the Court finds that the record reflects substantial public information informing the citizens of the purpose of the Referendum and use of the funds. Therefore, this Court finds that the electorate had fair notice of the Referendum, as required by Florida law. *Winterfield v. Town of Palm Beach*, 455 So. 2d 359, 363 (Fla. 1984) (holding that public was adequately informed of

bond referendum issues based upon "public record[s]" and "leaflets prepared by the town explaining the referendum"); *Shiver*, 365 So. 2d at 213; *Grapeland*, 267 So. 2d at 323.

Therefore, this Court hereby enters final summary judgment as to Count III of the Amended Complaint.

In summary, it is ordered and adjudged as follows:

1. Final Summary Judgment as to Counts I, II, and III of Amended Complaint is entered in favor of the defendant, Village of Key Biscayne, and against the plaintiff, Gustavo Tellez.
2. Plaintiff, Gustavo Tellez, shall take nothing from this action, and defendant, Village of Key Biscayne, shall go hence without day.
3. The Court reserves jurisdiction to grant costs, if any, to the Village of Key Biscayne.

DONE and **ORDERED** in Chambers at Miami-Dade County, Florida on this 29th day of June, 2021.

2020-020643-CA-01 06-29-2021 4:11 PM
Hon. Samantha Ruiz Cohen

CIRCUIT COURT JUDGE
Electronically Signed

No Further Judicial Action Required on **THIS MOTION**

CLERK TO **RECLOSE** CASE IF POST JUDGMENT

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